

Appendix 1 – NPPF Extracts

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.

186. Local planning authorities should approach decision-taking in a positive way to foster the delivery of sustainable development. The relationship between 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 area.

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 26 September 2013

**IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN AND
COUNTRY PLANNING ACT 1990**

Before:

**HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT**

BETWEEN:

FORDENT HOLDINGS LIMITED

Claimant

-and-

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

-and-

(2) CHESHIRE WEST AND CHESTER COUNCIL

Interested Party

Mr. Jonathan Easton (instructed by **LL Barrowcliff Solicitors**) for the **Claimant**
Mr. Cain Ormondroyd (instructed by **the Treasury Solicitor**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 13 September 2013

Judgment

HH Judge Pelling QC:

Introduction

1. This is the hearing of an application by the Claimant ("FHL") under s.288 of the Town and Country Planning Act 1990 ("TCPA") for an order quashing a decision of a planning inspector ("the Inspector") appointed by the Defendant ("SoS") by which the Inspector dismissed an appeal under s.78 TCPA against a refusal of the Interested Party ("the Council") to grant outline planning permission for a change of use for a 9 Hectare site located wholly within the Designated Green Belt known as Rose Manor

Farm, Warrington Road, Mickle Trafford, Chester (“the Site”) 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 of 303 sq. metres and three separate amenity blocks of 170, 141 and 136 sq. metres respectively (“the Scheme”). The Site comprises several agricultural fields and is located between the A 56 and the Chester to Manchester rail line. Part of Route 5 of the National Cycle Network runs along the southern border of the Site.

2. The hearing took place in Manchester on 13th September 2013. At the end of the hearing, I agreed to determine all post judgment issues in writing providing all parties signified their consent to this course and submitted written submissions or an agreed form of order in accordance with directions that I said I would include in the draft judgment. Those directions appeared in the final paragraph of the draft of this judgment although I have omitted them from the judgment as has been handed down.

Background

3. There is no dispute as to the material background facts. The application for planning permission was refused by the Council by a decision dated 26 March 2012 because:

“The Site lies within the designated green belt. The proposal represents inappropriate development as defined by Planning Policy Guidance Note 2, that would cause harm to the Green Belt by reason of inappropriateness, harm to the purposes of including land within the Green Belt by reason of encroachment of development into the countryside, harm to its openness, and harm to its visual amenities. Inadequate information has been submitted to demonstrate that very special circumstances exist to outweigh the harm caused by these impacts. As such the proposals would be contrary to the provisions of PPG2 and policies ENV24, ENV63 and EC18 of the Chester District Local Plan.

4. The decision refusing planning permission was issued on the day before the publication of the National Planning Policy Framework (“NPPF”). It is common ground however that the NPPF applied to the appeal that followed the refusal because the policies contained in the NPPF applied from the date of its publication – see Annex 1, Paragraph 208 - and that PPG2 ceased to apply by reason of it having been replaced by the NPPF – see NPPF, Annex 3, Paragraph 3.
5. The appeal decision was preceded by a public inquiry that was held on the 7, 8 and 13 March 2013, and a site visit that took place on 13 March 2013. The decision to dismiss the appeal was taken on, and is contained in, a decision letter (“DL”) dated 21 May 2013. In summary the Inspector concluded that the proposed change of use and operational development in connection with the proposed change of use constituted inappropriate development, that therefore very special circumstances were required to be demonstrated before the proposed development could be permitted and that such circumstances did not exist because the harm to the green belt that would be caused by the development was not clearly outweighed by the material considerations in favour of the Scheme.

Policy Framework

6. The key purpose of the NPPF is identified in Paragraph 6 as being “... *to contribute to the achievement of sustainable development.*” This concept is further defined in Paragraph 7 in these terms:

“There are three dimensions to sustainable development: economic, social and environmental. These dimensions give rise to the need for the planning system to perform a number of roles:

- **an economic role** – contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;
- **a social role** – supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community’s needs and support its health, social and cultural well-being; and
- **an environmental role** – contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and adapt to climate change including moving to a low carbon economy.”

The need to focus on all of these requirements rather than one at the expense of another is emphasised by Paragraph 8 and at Paragraph 10 the need to take local circumstances into account is emphasised. The presumption in favour of sustainable development is described as a “*golden thread*” which at Paragraph 14 is said to mean:

“For decision-taking this means:^{FN10}

...

where the development plan is absent, silent or relevant policies are out of date, granting permission unless:

any adverse impacts 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.^{FN9}”

Footnotes 9 and 10 state:

“9. For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.

[Emphasis supplied]

10. Unless material considerations indicate otherwise.”

In relation to economic growth, Paragraphs 18 and 19 of the NPPF provide:

“18. The Government is committed to securing economic growth in order to create jobs and prosperity, building on the country’s inherent strengths, and to meeting the twin challenges of global competition and of a low carbon future.

19. The Government is committed to ensuring that the planning system does everything it can to support sustainable economic growth. Planning should operate to encourage and not act as an impediment to sustainable growth. Therefore significant weight should be placed on the need to support economic growth through the planning system.”

7. Chapter 9 of the NPPF sets out the current national policy in relation to the protection of the Green Belt. The aim and purposes of the Green belt are set out in Paragraphs 79 and 80 in these terms:

“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.”

Planning Policy in relation to development in the Green Belt as set out in Paragraph 81 is to “ ... *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.*”

8. As to the Green Belt’s relationship with development, Paragraphs 87-90 in so far as they are material to this case provide that:

“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:

...

- 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;

...

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 Decision Letter

9. The Inspector identified at DL Paragraph 2 the main issues on the appeal as being:

“... ”

- whether the development would be inappropriate development in the Green Belt for the purposes of the Framework and development plan policy, and linked to that the effect on the openness and the purposes of including land within the Green Belt,
- the effect on the character and appearance of the area, and
- whether any harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify the development.”

At DL Paragraph 4 the Inspector concluded that the proposal would amount to an outdoor sport and recreational use. The SoS does not challenge this conclusion in these proceedings.

10. Having concluded at DL Paragraph 5 that the NPPF outweighed saved policies ENV 63 and ENV 65 the Inspector then concluded at DL Paragraph 6 that the effect of Paragraph 90 of the NPPF was that all material changes of use were by definition “*inappropriate development*” and thus ought not to be permitted in the absence of very special circumstances. His reasoning was that:

“The Framework sets out in paragraph 90 the forms of development (aside from the construction of new buildings) which are not inappropriate in the Green Belt, provided they do not conflict with the purposes of including land in the designated area. The specific types of development are listed in five bullet points – and these do not include material changes of use. Therefore a material change of use of land is inappropriate development in the Green Belt.”

The Inspector rejected a submission by the Claimant that the proposed change of use ought to be treated as not inappropriate development by reason of Paragraphs 81 and 89 of the NPPF on the basis that neither addressed material changes of use. As he put it at DL Paragraph 7:

“...paragraph 81 states that local planning authorities should plan positively to enhance the beneficial use of the Green Belt to provide opportunities for outdoor sport and recreation, and does not deal with the matter of material change of use. Moreover, paragraph 89 deals with construction of buildings and the reference to “it” in the 1st bullet point is in connection with the provision of appropriate facilities.”

The Inspector concluded that in construing the NPPF, it was “...to be read as it is written. It would be wrong to go behind the policies and infer a meaning as suggested by the appellant”.

11. In relation to the effect of Paragraph 89, and the construction of the various buildings that form part of the Scheme, the Inspector concluded that this too would be inappropriate development because openness within the paragraph meant an absence of visible development and on that basis the proposed buildings could not by definition preserve the openness of the Green Belt and in any event would constitute encroachment. As he put it at DL Paragraph 9:

“ ... paragraph 89 of the Framework states that a local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. The exceptions to this include the provision of appropriate facilities for outdoor sport and recreation as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it. Openness was referred to at the inquiry as ‘an absence of visible development’ which is a reasonable definition. While the number of tents and caravans on site would fluctuate with the seasons, the proposed permanent buildings, notwithstanding their design, location within the site and the effects of the proposed screening, would have a clear manifestation as man-made impositions on the landscape which would reduce openness. Added to which, they would also fail to safeguard the countryside from encroachment.”

12. The Inspector concluded that the Scheme would not harm the visual amenity of the Green Belt (see DL Paragraphs 9 and 10-12), that there would not be any harmful change to the outlook from nearby dwellings (DL Paragraph 13) and at DL Paragraph 17 he concluded that “... the proposal would deliver economic growth, enhance employment opportunities, improve local hedgerows and ponds (which are key landscape features) and enhance biodiversity.”.
13. In DL Paragraph 16 the Inspector noted a submission that the Scheme would make a positive contribution to sustainable development but rejected that as a relevant consideration because:

“...paragraph 14 of the Framework states that for decision taking, sustainable development means where relevant policies are out-of-date, granting permission unless policies in the Framework indicate that development should be restricted. That situation exists in this instance so this matter does not weigh in favour of the proposal.”

This conclusion is not challenged in these proceedings.

14. In the result the Inspector dismissed the appeal because:

“18. The proposal would represent inappropriate development in the Green Belt that would reduce openness and conflict with the purposes of designation. Inappropriate development is by

definition harmful and should not be approved except in very special circumstances. Openness is seen as an essential characteristic of Green Belts so a reduction in that quality would also be harmful, in Green Belt terms. The Framework is clear that substantial weight should be given to any harm to the Green Belt.

19. The proposal would have no harmful impact on the character and appearance of the local landscape, living conditions, or subject to conditions cause difficulties in terms of highway safety. However, these are neutral rather than positive considerations. Nevertheless, the proposal would create employment opportunities, generate economic activity, meet an identified tourism need, and improve key landscape features and biodiversity. These considerations weigh in favour of the proposal.

20. The Framework sets out that very special circumstances will not exist unless the harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In this case, I have found that despite the benefits of the scheme the particular characteristics of the appeal site mean that the totality of the harm would not be clearly outweighed by other considerations. The very special circumstances necessary to justify the proposal do not therefore exist.”

The Challenges

15. FHL challenges the decision of the Inspector on four grounds being:

- i) The Inspector was wrong to conclude that a change of use from agricultural use to outdoor sport and recreation was inevitably inappropriate development and thus not to be permitted in the absence of very special circumstances being demonstrated;
- ii) The Inspector was wrong to conclude that Paragraph 89 of the NPPF did not apply to changes of use;
- iii) The Inspector failed to have regard to the NPPF policy that significant weight should be given to the need to support economic growth through the planning system or failed to give any or any sufficient reasons for not following that policy; and
- iv) The Inspector failed to give any or any adequate reasons for concluding that the Scheme failed to safeguard the countryside from encroachment.

Relevant Legal Principles

16. Not surprisingly the relevant legal principles were not in dispute between the parties. In summary they are that:

- i) The NPPF “... *is a material consideration in planning decisions* ...” – see NPPF, Paragraphs 2 and 196;
- ii) The interpretation of planning policy is a matter of law and is to be ascertained by interpreting it objectively in accordance with the language used read in its proper context, but the application of planning policy is a matter of planning judgment – see Tesco Stores v. Dundee [2012] UKSC 13 at [17] to [21];
- iii) A s.288 challenge is an opportunity to correct a failure to take into account material considerations or the taking into account of immaterial considerations or errors of law, not an opportunity to challenge an outcome on the planning merits of an appeal other than on rationality grounds – see R (Newsmith Stainless Steel) v. SSETR [2001] EWHC 74 (Admin) at [6];
- iv) Where statements indicate the weight to be given to relevant considerations, decision makers must have proper regard to them – see Gransden & Co Limited v. SoSE (1987) 54 P&CR 86 at [94]. Even where a policy or statute requires that particular weight be given to an identified consideration, the weight actually given to that factor is likely to be fact sensitive and depend on the other factors against which it is to be weighed – see Stevens v. SSCLG [2013] EWHC 792 (Admin) at [62] – [63];
- v) In the absence of a rationality challenge, the weight to be given to a material consideration is a matter for the Inspector not the Court – see Tesco Stores v. SSE [1995] 1 WLR 759 *per* Lord Hoffmann at 780;
- vi) Decision letters are to be read in a straightforward manner – see South Bucks CC v. Porter (No.2) [2004] 1 WLR 1953 *per* Lord Brown at [33] to [36] – and thus without excessive legalism. Subject to that qualification, the reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal issues and disclosing how any issue of fact or law was resolved. Before a reasons challenge can succeed, the party challenging the decision must be able to show that he has genuinely been substantially prejudiced by the failure to give adequate reasons; and
- vii) The general rule is that if an Inspector fails to take account of a material consideration or makes an error of law then the decision will be quashed unless the point would not have made a difference to the outcome or there was not a real possibility that it would have made a difference – see Bolton MBC v. SSE (1991) 61 P & CR 343 and Europa Oil and Gas Limited v. SSCLG and others [2013] EWHC 2643 (Admin) at [60] and [63].

Discussion

Ground 1

17. Section 55 of TCPA defines “*development*” as being “...*the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land*”. Thus in principle a change of use is as much development as the various forms of operational development identified in s.55.
18. The meaning of the word “*development*” when used in the NPPF has the same meaning as that identified in s.55. This is the meaning adopted generally in a planning law context. No other meaning is suggested. This construction appears to be consistent with the view expressed by Ouseley J in Europa Oil and Gas Limited v. SSCLG (ante) at [53]. It follows that a material change of use is capable of being inappropriate development within the meaning of Paragraph 87 of the NPPF.
19. 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 – 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 “*not inappropriate*”¹ 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 - the construction of new buildings - in the Green Belt is inappropriate unless one of the exceptions identified in the Paragraph applies. Paragraph 90 defines the “*other forms of development*” there referred to as also at least potentially not inappropriate. The effect of Paragraphs 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 by 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 buildings that comes or potentially comes within one of the exceptions referred to in Paragraph 89.
20. Paragraph 90 contemplates not merely the construction of buildings but other development as defined by s.55 TCPA falling within the identified categories. Thus a change of use falling within one of the categories identified in Paragraph 90 is in principle capable of being not inappropriate. That being so, I am not able to agree with the Inspector that no material changes of use fall or are capable of falling within Paragraph 90. The concept of development includes a material change of use and therefore a change of use for example to permit mineral extraction is capable of being not inappropriate providing that the change of use preserves openness and does not conflict with the purposes of including land in the Green Belt as those concepts are to

¹ In the course of the submissions before me, I was told that the correct distinction was between inappropriate development and development that was “not inappropriate”. I note that this is not the phraseology adopted for example in Europa Oil and Gas Limited v. SSCLG (ante) where the antithesis of inappropriate is said to be “appropriate”. In this judgment I have maintained the phraseology used by the parties without reaching any judgment as to whether its use is correct.

be understood in their context – as to which see Europa Oil and Gas Limited v. SSCLG (ante) at [64] to [68].

21. The real issue therefore is not the point identified by the Inspector in DL Paragraph 6 but rather whether development in the form of a material change of use outside the categories identified in Paragraph 90 must by definition be inappropriate development or whether such a change of use has to be considered on its merits with a decision to be taken as to whether it is inappropriate or not inappropriate development, as was the position under PPG2.
22. FHL argues that not all changes of use outside the list set out in Paragraph 90 constitute inappropriate development. FHL maintains that the correctness of its submission follows in particular from Paragraph 81 of the NPPF. It is submitted that enhancing the beneficial use of Green Belt land by providing opportunities for outdoor sport and recreation must by definition include the possibility of a change of use to enable such an opportunity to be provided. It is submitted that if that is right then it would mean that any proposed change of use would have to be assessed by reference to the policy set out in Paragraph 81 and thus such a proposed change of use coming within Paragraph 81 was or could be development that was not inappropriate.
23. Whilst I am satisfied that a change of use is capable of coming within the scope of Paragraph 81, I do not consider that leads to the conclusion that a change of use coming within the scope of Paragraph 81 is by definition not inappropriate development. As to the first of these points, the Inspector rejected FHL's submission at DL Paragraph 7 because Paragraph 81 does not contain an express reference to a change of use. In my judgment the Inspector was wrong to adopt this approach. The Inspector's conclusion would have had more force if the paragraph had referred only to enhancing the existing use of Green Belt land for one of the identified purposes but it is not limited in that way. What is to be enhanced is the use of Green Belt land. That is to be achieved in part by providing opportunities for outdoor sport and recreation. The concept of provision of an opportunity suggests that the opportunity to be provided does not or may not presently exist. This suggests therefore that the policy was intended to include within its scope a proposed material change of use proposed for the purpose of providing that opportunity.
24. However that view of the scope of Paragraph 81 of itself does not meet the point that I have made earlier namely that the structure of the Green Belt policy has changed from that which formerly applied. There is no general exception for changes of use that maintain openness and do not conflict with the purposes of the Green Belt. The current policy is contained in Chapter 9 of the NPPF and as I have said already Paragraphs 87, 89 and 90 have to be read together. Paragraph 90 contains a closed list of classes of development that are capable of being not inappropriate and Paragraph 89 contains a closed list of classes of new building construction not falling within Paragraph 90 that are or are capable of being not inappropriate by way of exception to the general rule that the construction of new buildings is to be regarded as inappropriate in the Green Belt – see Europa Oil and Gas Limited v. SSCLG (ante) at [20] – [21].
25. Paragraph 89 is a closed list on its face. This is apparent from a comparison of the first sentence with the second. The first contains a general policy statement to the effect that the construction of new buildings in Green Belt is inappropriate. The

second creates a list of exceptions and potential exceptions to that general rule. The opening three lines of Paragraph 90, and in particular the phrase “[t]hese are”, shows that the list in that paragraph is also a closed list. The paragraph is of no application to development other than the construction of new buildings.

26. Whilst it is true to say that the reference to “*other forms of development*” and the use of the word “*other*” in Paragraph 90 suggest that there are forms of development other than those falling within the Paragraph 90 list that are capable of being not inappropriate, in my judgment those words and phrases refer back to the exceptions listed in Paragraph 89. Paragraph 89 is exclusively concerned with a particular form of operational development being the construction of new buildings. It does not apply and is not expressed to apply to any other form of development. The word and phrase in the opening lines of Paragraph 90 relied on by FHL do not undermine this analysis, and do not lead to the conclusion that other forms of development not listed in Paragraph 90 and not capable of coming within the scope of Paragraph 89 are nonetheless capable of being development that is not inappropriate. If that was so then Paragraph 90 would not have been drafted in the way it has been drafted (as a closed list of classes of development that is not inappropriate). Contending otherwise applies an over legalistic approach to the construction of a policy statement contrary to the principle referred to Paragraph 16(ii) above. When Paragraph 87, 89 and 90 are read together as they should be the meaning is clear. Development in the Green Belt is inappropriate (and thus can be permitted only in very special circumstances) unless it falls within one of the exceptions identified in Paragraphs 89 and 90.
27. The remaining argument that I have to consider is that the construction I favour achieves absurdity because it would mean for example that a proposal to convert a field used for agricultural purposes into an outdoor sports field with no buildings being proposed as part of the scheme would be regarded as inappropriate and thus could not be permitted in the absence of very special circumstances.
28. In my judgment this submission is misplaced. Merely because a proposed development is inappropriate does not mean that there is a prohibition on it. The categories of what constitute very special circumstances are not closed. As I have explained, a material change of use is capable of coming within the scope of the policy set out in paragraph 81. That a proposal accords with the policy set out in Paragraph 81 is in principle capable of being a material consideration relevant to a decision as to whether very special circumstances have been made out. Thus it would be open to the promoter of a proposal to create a sports facility of the hypothetical type I am now considering to argue that any necessary change of use should be permitted because the proposed change of use accorded with the policy set out in Paragraph 81 and for that and other reasons very special circumstances had been established. That factor (if made out on the facts) is not and is not intended to be decisive however. It will have to be weighed with all other inevitably fact sensitive material considerations in order to arrive at a conclusion as to whether whatever potential harm to the Green Belt is identified is clearly outweighed by the other considerations including compliance with the policy set out in paragraph 81. This approach is consistent with that outlined for example in Paragraph 91 in relation to renewable energy projects, where the environmental benefits of such a project do not mean that such a development is not inappropriate but that those benefits are capable

of being part of the very special circumstances that might justify permission being granted.

29. In the result Ground 1 fails. FHL has not contended in these proceedings that the decision should be quashed on the basis that the Inspector had fallen into error in failing to take account of Paragraph 81 when considering whether very special circumstances had been established. In those circumstances, whilst it is true to say that the Inspector fell into error by failing to take any account of the effect of Paragraph 81 when reaching his conclusions that very special circumstances had not been made out, and that the error was one that I consider would have merited quashing the decision that very special circumstances had not been made out applying the principles referred to in Paragraph 16(vii) above, that course is not open to me.

Ground 2

30. It is submitted that the Inspector failed correctly to construe Paragraph 89 because he decided that the word “it” in the second bullet point was a reference to the facilities element of any proposal when it should have been construed as applying to the relevant use relied on – that is outdoor sport or recreation or cemeteries. I do not agree for the reasons that follow.
31. It was submitted by FHL that there were a number of difficulties about the language that has been used in Paragraph 89 that lie in the way of adopting the construction adopted by the Inspector. The singular “it” does not lie easily with that word being intended to refer either to the plural “*new buildings*” in the opening sentence of Paragraph 89 or “*appropriate facilities*” in the opening line of the second bullet point. Furthermore it is submitted that it is very difficult to see how the construction of a new building or new buildings can in any literal sense “preserve” openness or not conflict with at least the purpose of the Green Belt to assist in safeguarding the countryside from encroachment. In my view both these propositions are to be rejected.
32. As to the first point, in my judgment in the context in which it is used, the word “it” in Paragraph 89 refers to and can only be referring to the “*facilities*” contemplated by the proposal being considered by the decision maker. Such a proposal could include a proposal for the construction of a building or more than one building or alternative buildings. Thus the use of the singular as referring to something that is or might be plural does not justify departing from what otherwise is clear from the context. To take any other course would be to depart from the principle summarised in Paragraph 16(ii) above.
33. As to the second point, as I have said already, the purpose of the exceptions to the general rule set out in the first sentence of Paragraph 89 is to distinguish between those types of new buildings which would be inappropriate if built in the Green Belt from those that are not or potentially are not. Some types of building are not further qualified. A new building for agriculture or forestry is not inappropriate. The provision of facilities for outdoor sport, outdoor recreation and cemeteries on the other hand is only potentially not inappropriate. Such a facility will only be not inappropriate development if it “... *preserves the openness of the Green Belt and does not conflict with the purposes of including land within it...*”. If these further requirements are not made out then the proposed buildings will not fall within the

exception and will fall within the general rule. This language it is said means that all such buildings will by definition be inappropriate development. Plainly that cannot have been what was intended since if that was so there would have been no point in including the exception within the list of exceptions. In my judgment the answer lies in the analysis of Ouseley J in Europa Oil and Gas Limited v. SSCLG (ante) at [66], where he says:

“Secondly, as Green Belt policies NPPF 89 and 90 demonstrate, considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of the building or structures but include their purpose. The same building, as I have said, or two materially similar buildings; one a house and the other a sports pavilion, are treated differently in terms of actual or potential appropriateness. The Green Belt may not be harmed necessarily by one but is harmed necessarily by another. The one is harmed by because of its effect on openness, and the other is not harmed by because of its effect on openness. These concepts are to be applied, in the light of the nature of the particular type of development.”

Thus in each case it will be for the decision maker to apply this approach in order to decide whether a particular building which is, or buildings which are, claimed to be appropriate facilities for outdoor sport or recreation to decide whether what is proposed preserves openness and does not conflict with the purposes of including land within the Green Belt applying these principles. If it does then what is proposed will come within the potential exception created by the second bullet point in the list in Paragraph 89. If it does not then it will fall within the scope of the first sentence of that paragraph and can be permitted only if very special circumstances are made out.

34. Whilst FHL maintains that this construction is illogical. I am not able to agree. First, as I have said already, I consider that very special circumstances will have to be shown for a change of use to Green Belt land not falling within one of the classes identified in Paragraph 90 of the NPPF. If that is so there is no logic in requiring very special circumstances to be shown for example for a change of use from agricultural land to an open sporting ground (where the impact on openness is likely to be less than the facilities to be constructed in connection with the changed use) but not applying the same constraint to facilities to be constructed at such a site if a change of use is permitted, as long as the requirement in the second bullet point within Paragraph 89 that a facility should preserve the openness of the Green Belt and not conflict with the purposes of including land within it is read in the way referred to by Ouseley J in Europa Oil and Gas Limited v. SSCLG (ante) at [66]. Indeed, I consider this approach is correct even if I am wrong to conclude that a change of use not falling within one of the classes identified in Paragraph 90 of the NPPF is inappropriate development by definition. Merely because Green Belt land is used for outdoor sport or recreation does not justify permitting the construction of a building or buildings that fail to preserve the openness of the Green Belt or conflict with the purposes of including land in the Green Belt applying the approach to these concepts identified by Ouseley J in Europa Oil and Gas Limited v. SSCLG (ante) at [66].

35. There is another obvious reason for adopting this approach. If a promoter of a scheme was able to obtain permission to change the use of agricultural to an open sporting ground he or it might well wish to construct or add to facilities in subsequent years. There would be great danger in not requiring very special circumstances to be demonstrated for future applications for the provision of facilities at existing outdoor recreation or sporting sites in the Green Belt. The construction which I consider is appropriate eliminates that risk as long as the requirements imposed by the second bullet point in Paragraph 89 to preserve the openness of the Green Belt and avoid conflict with the purposes of including land in the Green Belt are read subject to the qualifications referred to by Ouseley J in Europa Oil and Gas Limited v. SSCLG (ante) at [66].

Ground 3

36. This challenge is misplaced. Paragraph 19 of the NPPF requires that significant weight be attributed to the need to support economic growth. It is clear that the Inspector did accord weight to the economic benefits of what was proposed – see Paragraph 17 of the DL where having noted and accepted that the proposal would deliver economic growth and enhance employment opportunities, he then said that these considerations weighed in favour of the proposal. He repeated this point in Paragraph 19 of the DL (reproduced above) before concluding that these factors were not sufficient to lead to a conclusion that very special circumstances had been made out. It is apparent when Paragraphs 18-20 of the DL are considered together that the Inspector carried out the evaluation of the effect of the various material considerations relevant to the appeal that he was required to carry out.
37. The Inspector did not specifically use the word “*significant*” that is used in Paragraph 19 of the NPPF. There was no requirement for him to do so however. The Inspector was required to give substantial weight to the harm that he perceived would be caused to the Green Belt and weigh it against the significant weight attributable to the economic benefits of the proposal as well as the weight attributed to the other factors that supported the application before deciding whether very special circumstances had been made out. This is what the Inspector did and the absence of an incantation that “*significant*” weight had been given to the economic benefits of the proposal does not amount to an error of law in this case. The Inspector had been referred to and refers to the NPPF in detail in the decision letter and in those circumstances, the absence of the word is not sufficient to persuade me that he failed to carry into effect the policy set out in the NPPF. Any other approach would involve reading the decision letter otherwise than in its context and applying excessive legalism to it contrary to the principles summarised in Paragraph 16(vi) above.
38. I do not accept the alternative basis on which this ground is put either. It is not arguable that the Inspector failed to follow national policy and thus there was no explanation to be given. His explanation for reaching the conclusions he reached are set out adequately in the circumstances in Paragraphs 18-20 of the DL.
39. In reality this challenge is a disguised attempt to challenge the outcome of the evaluation by the Inspector of the weight in fact to be attributed to various material considerations. That is not something the Court will permit. It is contrary to the principle referred to in Paragraph 16(v).

Ground 4

40. The final challenge is to what is said to be a failure on the part of the Inspector to give reasons for his conclusion that the proposed building would fail to safeguard the countryside from encroachment. There is no substance in this point.
41. DL Paragraph 9 makes entirely clear that basis of the Inspector's conclusion concerning encroachment for the purposes of Paragraph 89 of the NPPF. There the Inspector states:

“Openness was referred to at the inquiry as ‘an absence of visible development’ which is a reasonable definition. While the number of tents and caravans on site would fluctuate with the seasons, the proposed permanent buildings, notwithstanding their design, location within the site and the effects of the proposed screening, would have a clear manifestation as man-made impositions on the landscape which would reduce openness. Added to which, they would also fail to safeguard the countryside from encroachment.”
42. The word “they” clearly refers to the buildings that were proposed and his reason for reaching that conclusion are clear when this paragraph is read as a whole. It may be that the Inspector was wrong because he had failed to approach the issue applying the approach referred to by Ouseley J in Europa Oil and Gas Limited v. SSCLG (ante) at [66]. However that is not the basis of the challenge in these proceedings.

Conclusion

43. For the reasons set out above, these proceedings are dismissed.



Neutral Citation Number: [2016] EWCA Civ 404

Case No: C1/2015/1430

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE DOVE
[2015] EWHC 1471 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 April 2016

Before:

Lord Justice Treacy
Lord Justice Underhill
and
Lord Justice Lindblom

Between:

R. (on the application of Lee Valley Regional Park Authority)
Appellant

- and -

Epping Forest District Council
Respondent

- and -

Valley Grown Nurseries Ltd.
Interested Party

Mr Gregory Jones Q.C. and Mr David Graham (instructed by **Lee Valley Regional Park Authority**) for the **Appellant**

Ms Megan Thomas (instructed by **Epping Forest District Council**) for the **Respondent**
Mr Peter Village Q.C. and Mr Ned Helme (instructed by **Duffield Harrison LLP**) for the **Interested Party**

Hearing dates: 27 and 28 January 2016

Judgment Approved by the court
for handing down

Lord Justice Lindblom:

Introduction

1. This appeal requires the court to consider, among other things, the meaning and effect of the Government's planning policy in England for the construction of agricultural buildings in the Green Belt.
2. With permission granted by Laws L.J., the appellant, Lee Valley Regional Park Authority, appeals against the order of Dove J., dated 13 April 2015, dismissing its claim for judicial review of the planning permission granted on 21 August 2014 by the respondent, Epping Forest District Council, for development proposed by the interested party, Valley Grown Nurseries Ltd., next to their nursery at Paynes Lane, Nazeing, in Essex. The proposal was to extend the nursery by the construction of a very large glasshouse – some 92,000 square metres in area – for the growing of tomatoes and peppers. The site is about 18 hectares of farmland and restored mineral workings in the Metropolitan Green Belt, within the Lee Valley Regional Park, and less than a mile from the Lee Valley Special Protection Area ("the Lee Valley SPA") and Ramsar site. The Regional Park Authority objected to the proposal on several grounds, including the harm it said the development would cause to the Green Belt, alleged conflict with policy in the National Planning Policy Framework ("the NPPF") and in the development plan, and the effects the development might have on the SPA. Dove J. rejected the claim on all grounds. In this appeal the Regional Park Authority seeks to persuade us that in three respects his decision was wrong.

The issues in the appeal

3. The issues in the appeal are these. First, was the judge wrong to conclude that the council had not misinterpreted and misapplied relevant national and local policy, including policies relevant to the "openness" of the Green Belt (ground 1)? Secondly, was he wrong to reject the argument that the council failed to perform the decision-maker's duty, under section 38(6) of the Planning and Compulsory Purchase Act 2004, to determine the application for planning permission in accordance with the development plan unless material considerations indicated otherwise, and that it also misunderstood and misapplied NPPF policy for the "presumption in favour of sustainable development" (ground 2)? And thirdly, was he wrong to conclude that the council had properly discharged its duty, under article 6 of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") and regulation 61 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats regulations"), to consider whether it was necessary to undertake an "appropriate assessment" of the implications of the development for the Lee Valley SPA (ground 3)?

The proposal and the council's decision

4. Valley Grown Nurseries had submitted two previous applications for similar proposals, in June 2011 and in December 2011. The council had refused both, against the recommendation of its officers. Valley Grown Nurseries' appeal to the Secretary of State

against the refusal of the first was dismissed by an inspector in a decision letter dated 6 June 2012. The proposal with which we are concerned was submitted to the council on 27 November 2013. The proposed glasshouse would extend partly into Langridge Scrape – a shallow artificial lake at the south-western end of the site, created when the land was restored after being worked for minerals, with a larger lake called Holyfield Lake next to it. These lakes are used by wintering wildfowl, including two species of surface-feeding duck referred to in the designation description for the Lee Valley SPA – the Gadwall (*Anas strepera*) and the Shoveler (*Anas clypeata*). Ecological mitigation was proposed; Langridge Scrape was to be reshaped and a new pond created to the north of the site, providing a net increase in habitat for Gadwall and Shoveler. As on the previous two occasions, Natural England, when consulted by the council under regulation 61 of the Habitats regulations, did not object to the proposal and recommended the imposition of conditions to secure the ecological mitigation.

5. The application was considered by the council’s District Development Control Committee on 20 March 2014, in the light of a report prepared by Ms Jill Shingler, a Principal Planning Officer. She acknowledged that the proposal was “contrary to the adopted policies of the Local Plan” (paragraph 1 of her report). Having listed many policies in the Epping Forest District Local Plan and Alterations (adopted by the council in 2006), and also several saved policies of the Epping Forest District Local Plan (adopted in 1998), she said the “above policies are broadly consistent with [the NPPF] and are therefore afforded full weight” (paragraph 13). She then identified 11 “main considerations”, considered each in turn, and in her “Conclusion” weighed the benefits of the proposed development for the local economy against its conflict with the development plan and the harm it would cause to the Lee Valley Regional Park and to the landscape. She concluded that the proposal should be approved, and recommended that planning permission be granted. The committee accepted that recommendation and resolved to grant conditional planning permission, subject to a planning obligation under section 106 of the Town and Country Planning Act 1990. The application was then referred to the Secretary of State, who, on 2 May 2014, indicated that he did not wish to intervene. The planning permission granted by the council on 21 August 2014 was subject to 26 conditions. Four of these – conditions 7, 8, 11 and 12 – related to the proposed ecological mitigation measures, as did clause 5 of the section 106 obligation.

National policy for the Green Belt

6. In England, the Government’s policies for the Green Belt are in paragraphs 79 to 92 of the NPPF, which was published in March 2012. These policies replaced Planning Policy Guidance 2: “Green Belts” of January 1995 (“PPG2”).
7. Paragraph 79 of the NPPF says that “[the] fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open”, and that “the essential characteristics of Green Belts are their openness and their permanence”. The concept of “openness” here means the state of being free from built development, the absence of buildings – as distinct from the absence of visual impact (see, for example, the judgment of Sullivan J., as he then was, in *R. (on the application of Heath and Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin), at paragraphs 21, 22, 37 and 38; and the first instance judgment of Green J. in *R. (on the application of Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin), at paragraphs 26 and

68 to 75). Paragraph 80 of the NPPF says the Green Belt serves five purposes, the first of which is “to check the unrestricted sprawl of large built-up areas”, the third “to assist in safeguarding the countryside from encroachment”. Paragraph 81 says “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”.

8. The following paragraphs contain a series of policies for plan-making and development control. Paragraphs 87 to 92 are largely concerned with the making of decisions on proposals for development in the Green Belt. Paragraphs 87, 88 and 89 state:

“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.”

Paragraph 90 says “[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”. There is no difference between the concept of development being not “inappropriate” and the concept of its being “appropriate” (see, for example, the judgment of Keene L.J. in *Kemnal Manor Memorial*

Gardens Ltd. v First Secretary of State [2006] 1 P. & C.R. 10, at paragraphs 24 to 28; and the judgment of Richards L.J. in this court's decision in *Timmins* [2015] P.T.S.R 837, at paragraph 31).

9. Policy in PPG2 was expressed rather less succinctly than in the NPPF. Paragraph 3.1 said that “[the] general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them”, and that “such development should not be approved, except in very special circumstances”. Paragraph 3.2 said:

“Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. 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 view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development.”

Paragraph 3.4 said that “[the] construction of new buildings inside a Green Belt” was “inappropriate” unless it was for one of five specified purposes, the first of which was “agriculture and forestry ...”. Paragraph 3.15, under the heading “Visual amenity”, stated:

“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.”

Local plan policy relevant to the proposal

10. The policies for the Green Belt in the 2006 local plan were modelled on government policy in PPG2. The supporting text says that “PPG2 makes it clear that the quality of the rural landscape is not a material factor in Green Belt designations or in their continued protection ...” (paragraph 5.6a); that “[the] general policies controlling development in the countryside apply with equal force in the Green Belt, but there is, in addition, a general presumption against inappropriate development” (paragraph 5.8a); and that “[the] Guidance also makes it clear that the visual amenities of the Green Belt should not be injured by development either within or conspicuous from the Green Belt” (paragraph 5.9a). Policy GB2A – “Development in the Green Belt” says that “[planning] permission will not be granted for the use of land or the construction of new buildings or the change of use or extension of existing buildings in the Green Belt unless it is appropriate in that it is” in one of eight specified categories. These include “(i) for the purposes of agriculture, horticulture, or forestry”, and “(iv) for other uses which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in the Green Belt”. Paragraph 5.19a in the supporting text refers to several examples of “inappropriate development” in the Green Belt, and says that “[all] such proposals will need to demonstrate very special circumstances that outweigh the harm to the Green Belt”. Under the heading “Conspicuous urban development”, Policy GB7A – “Conspicuous Development” states:

“The council will refuse planning permission for development conspicuous from within or beyond the Green Belt which would have an excessive adverse impact upon the openness, rural character or visual amenities of the Green Belt.”

Policy GB10 – “Development in the Lee Valley Regional Park” applies “[within] the area of Green Belt which lies in the Lee Valley Regional Park”. It supports “uses which are necessary to enhance the function and enjoyment of the park for its users”. Policy GB11 – “Agricultural Buildings” states:

“Planning permission will be granted for agricultural buildings provided that the proposals:

- (i) are demonstrably necessary for the purposes of agriculture within that unit;
- (ii) would not be detrimental to the character or appearance of the locality or to the amenities of nearby residents;
- (iii) would not have an unacceptable adverse effect on highway safety or, with regard to water quality and supply, any watercourse in the vicinity of the site;
- (iv) would not significantly threaten any sites of importance for nature conservation.

11. Policy E13A – “New and Replacement Glasshouses” states:

“Planning permission will be granted for new and replacement horticultural glasshouses within areas identified for this purpose on the Alterations Proposals Map. Glasshouses will not be permitted outside the areas subject to this policy unless the proposed development is either:

- (i) a replacement of, or a small-scale extension to, a glasshouse or nursery outside the areas identified on the Alterations Proposals Map; or
- (ii) necessary for the modest expansion of a glasshouse or existing horticultural undertaking on a site at the edge of an area identified on the Alterations Proposals Map which is unable to expand because all the available land in that designated area is occupied by viable glasshouse undertakings, and where there is no suitable land (including redundant glasshouse land) in this or the other glasshouse areas identified on the Alterations Proposals Map;

and in all cases the proposal will not have an adverse effect on the open character or appearance of the countryside.”

12. Saved policy DBE4 states that “[within] the Green Belt, new buildings will be required to ensure” that “(i) their location respects the wider landscape setting of the site ...”. Saved policy RST24 states that “[all] developments within or adjacent to the Lee Valley Regional Park should”, among other things, “(ii) safeguard the amenity and future development of the park” and “(iii) conserve and, where possible, enhance the landscape of the park or its setting”. It adds that “[developments] which are likely to result in a significant adverse impact on the character or function of the park will not be permitted”.

The appeal inspector's approach to the Green Belt issue

13. In the 2012 appeal the inspector accepted that the proposal before her was not inappropriate development in the Green Belt (paragraph 11 of the decision letter). But she went on to conclude that the “huge volume and bulk” of the proposed development “must diminish the openness of the Green Belt and the purposes of including land within it such as safeguarding the countryside from encroachment”, that the proposal “must conflict with national policy as expressed in the NPPF and LP policy”, and that this harm should be given “significant weight” (paragraph 14). After the appeal was dismissed Valley Grown Nurseries received advice from Mr Peter Village Q.C. on the inspector’s approach. Mr Village’s “Note of Advice”, dated 4 June 2013, was appended to the “Planning Statement” for the proposal with which we are concerned. Mr Village advised that the inspector’s approach was “fundamentally wrong and legally erroneous” because “[in] short, for agricultural development there is no requirement [in paragraph 89 of the NPPF] to demonstrate that the development preserves the openness of the Green Belt or does not conflict with the purposes of including land within it” (paragraph 6 of the “Note of Advice”).

Ground 1 – the “openness” of the Green Belt

14. Although in argument Mr Gregory Jones Q.C., for the Regional Park Authority, divided this ground into two parts – “ground 1(a)” and “ground 1(b)”, I think it is best dealt with as a single ground. It embraces submissions on the council’s interpretation and application of national and local policy for the construction of agricultural buildings in the Green Belt, and of local plan policies not specifically related to development in the Green Belt. Mr Jones submitted that the inspector’s approach in the 2012 appeal was correct. The expression “any planning application” in the first sentence of paragraph 88 of the NPPF means any application for planning permission for development in the Green Belt, whether “inappropriate” or not, and the words “any harm to the Green Belt” mean every possible kind of harm to the Green Belt, including harm to its “openness” and to the purposes of including land in the Green Belt, even if the development is not “inappropriate”. The policies in paragraphs 79, 80 and 81 of the NPPF are relevant in decision-making on proposals for agricultural buildings in the Green Belt, even though such buildings are not “inappropriate” development. Under the NPPF “definitional harm” to the Green Belt is distinct from the “actual harm” caused by a development. Paragraph 88 refers to “harm by reason of inappropriateness and any other harm”. Even if there is no “definitional harm” – because the proposed building is in principle appropriate – it does not follow that there is no “actual harm” to the openness of the Green Belt, or to the purposes of including land in it. Under the policy in paragraph 88, such harm should be given “substantial weight”. This approach applies to proposals for agricultural buildings, even though they are appropriate development in the Green Belt. It was not, however, the approach adopted by the council in this case.
15. I cannot accept that argument. As Ms Megan Thomas for the council and Mr Village for Valley Grown Nurseries submitted, it does not represent the correct interpretation of the policies in paragraphs 87, 88 and 89 of the NPPF, read properly in their context.
16. The interpretation of planning policy is ultimately the task of the court, not the decision-maker. Policies in a development plan must be construed “objectively in accordance with

the language used, read as always in its proper context”, and “not ... as if they were statutory or contractual provisions” (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, with which the other members of the Supreme Court agreed, at paragraphs 18 and 19). The same principles apply also to the interpretation of national policy, including policies in the NPPF (see, for example, the judgment of Richards L.J. in *Timmins*, at paragraph 24).

17. The first sentence of paragraph 88 of the NPPF must not be read in isolation from the policies that sit alongside it. The correct interpretation of it, I believe, is that a decision-maker dealing with an application for planning permission for development in the Green Belt must give “substantial weight” to “any harm to the Green Belt” properly regarded as such when the policies in paragraphs 79 to 92 are read as a whole (consistent with the approach taken, for example, in the judgment of Sullivan L.J., with whom Tomlinson and Lewison L.J.J. agreed, in *Redhill Aerodrome Ltd. v Secretary of State for Communities and Local Government* [2015] P.T.S.R. 274, at paragraph 18). Reading these policies together, I think it is quite clear that “buildings for agriculture and forestry”, and other development that is not “inappropriate” in the Green Belt, are not to be regarded as harmful either to the openness of the Green Belt or to the purposes of including land in the Green Belt. This understanding of the policy in the first sentence of paragraph 88 does not require one to read into it any additional words. It simply requires the policy to be construed objectively in its full context – the conventional approach to the interpretation of policy, as the Supreme Court confirmed in *Tesco v Dundee City Council*.
18. A fundamental principle in national policy for the Green Belt, unchanged from PPG2 to the NPPF, is that the construction of new buildings in the Green Belt is “inappropriate” development and should not be approved except in “very special circumstances”, unless the proposal is within one of the specified categories of exception in the “closed lists” in paragraphs 89 and 90. 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” (see the judgment of Richards L.J. in *Timmins*, at paragraphs 30 and 31). The distinction between development that is “inappropriate” in the Green Belt and development that is not “inappropriate” (i.e. appropriate) governs the approach a decision-maker must take in determining an application for planning permission. “Inappropriate development” in the Green Belt is development “by definition, harmful” to the Green Belt – harmful because it is there – whereas development in the excepted categories in paragraphs 89 and 90 of the NPPF is not. The difference in approach may be seen in the policy in paragraph 87. It is also apparent in the second sentence of paragraph 88, which amplifies the concept of “very special circumstances” by explaining that these will not exist “unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations”. The corresponding development plan policy in this case is policy GB2A of the local plan.
19. The category of exception in paragraph 89 with which we are concerned, “buildings for agriculture and forestry”, is entirely unqualified. All such buildings are, in principle, appropriate development in the Green Belt, regardless of their effect on the openness of the Green Belt and the purposes of including land in the Green Belt, and regardless of their size and location. Each of the other five categories is subject to some proviso, qualification or limit. Two of them – the second, relating to the “provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries”, and the sixth, relating

to the “limited infilling or the ... redevelopment of previously developed sites ...” – are qualified by reference both to “the openness of the Green Belt” and to the “purposes of including land within it”. The five categories of development specified in paragraph 90 are all subject to the general proviso that “they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt”.

20. As Dove J. said (in paragraph 61 of his judgment), the fact that an assessment of openness is “a gateway in some cases to identification of appropriateness” in NPPF policy indicates that “once a particular development is found to be, in principle, appropriate, the question of the impact of the building on openness is no longer an issue”. Implicit in the policy in paragraph 89 of the NPPF is a recognition that agriculture and forestry can only be carried on, and buildings for those activities will have to be constructed, in the countryside, including countryside in the Green Belt. Of course, as a matter of fact, the construction of such buildings in the Green Belt will reduce the amount of Green Belt land without built development upon it. But under NPPF policy, the physical presence of such buildings in the Green Belt is not, in itself, regarded as harmful to the openness of the Green Belt or to the purposes of including land in the Green Belt. This is not a matter of planning judgment. It is simply a matter of policy. Where the development proposed is an agricultural building, neither its status as appropriate development nor the deemed absence of harm to the openness of the Green Belt and to the purposes of including land in the Green Belt depends on the judgment of the decision-maker. Both are inherent in the policy.
21. If the policy in the first sentence of paragraph 88 of the NPPF meant that “substantial weight” must be given to the effect a proposed agricultural building would have on the openness of the Green Belt and on the purposes of including land within the Green Belt, the policy in paragraph 89 categorizing such buildings as appropriate development in the Green Belt, regardless of such effects, would be negated. This cannot have been the Government’s intention.
22. It would be, in any event, an important but unheralded change from “previous Green Belt policy” in the third sentence of paragraph 3.2 of PPG2 – the equivalent policy in PPG2 to the policy in the first sentence of paragraph 88 of the NPPF. Paragraph 3.2 of PPG2 was quite explicit. In view of the presumption against “inappropriate development” the Secretary of State would, it said, attach “substantial weight to the harm to the Green Belt” when considering proposals for “such development” – i.e. “inappropriate development”, as opposed to all development whether “inappropriate” or not. If the Government had meant to abandon that distinction between “inappropriate” and appropriate development, one would have expected so significant a change in national policy for the Green Belt to have been announced. I agree with what Sullivan L.J. said to similar effect in *Redhill Aerodrome Ltd.* (at paragraphs 16, 17, 21 and 23 of his judgment, which were noted by Richards L.J. in paragraph 24 of his judgment in *Timmings*). Leading counsel for the respondent in that case had been right not to submit that there was any material difference between paragraphs 3.1 and 3.2 of PPG2 and paragraphs 87 and 88 of the NPPF. As Sullivan L.J. said (in paragraph 17):

“... The text of the policy has been reorganised ... , but all of its essential characteristics – “inappropriate development is, by definition, harmful to the Green Belt”, so that it “should not be approved except in very special circumstances”, which “will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other

considerations”, and the “substantial weight” which must be given to “harm to the Green Belt” – remain the same.”

23. But I also think that the argument Mr Jones founded on his distinction between “definitional harm” and “actual harm” fails on its own logic. It means that the construction of agricultural buildings in the Green Belt, though always appropriate, must nevertheless always be regarded as harmful both to the openness of the Green Belt and to the purposes of including land within the Green Belt – despite such harm being irrelevant to their appropriateness. And if applied to the second and sixth categories of exception identified in paragraph 89, it would also mean that, for example, a proposed building for outdoor sport or recreation or a proposed redevelopment of a previously developed site could qualify as appropriate development – because it was found to preserve the openness of the Green Belt and not to conflict with the purposes of including land within the Green Belt – and yet still be regarded as substantially harmful to the Green Belt – because it reduced the openness of the Green Belt and conflicted with the purposes of including land within it. I do not think that can be right.
24. The true position surely is this. Development that is not, in principle, “inappropriate” in the Green Belt is, as Dove J. said in paragraph 62 of his judgment, development “appropriate to the Green Belt”. On a sensible contextual reading of the policies in paragraphs 79 to 92 of the NPPF, development appropriate in – and to – the Green Belt is regarded by the Government as not inimical to the “fundamental aim” of Green Belt policy “to prevent urban sprawl by keeping land permanently open”, or to “the essential characteristics of Green Belts”, namely “their openness and their permanence” (paragraph 79 of the NPPF), or to the “five purposes” served by the Green Belt (paragraph 80). This is the real significance of a development being appropriate in the Green Belt, and the reason why it does not have to be justified by “very special circumstances”.
25. That was the basic analysis underlying the judge’s conclusion, with which I agree, “that appropriate development is deemed not harmful to the Green Belt and its [principal] characteristic of openness in particular ...”. Dove J. saw support for this conclusion in the judgment of Ouseley J. at first instance in *Europa Oil and Gas v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin) (at paragraphs 64 to 78). I think he was right to do so. Ouseley J. captured the point well when he said (in paragraph 66 of his judgment) that under the policies in paragraphs 89 and 90 of the NPPF “considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of building or structures but include their purpose”, and that “... two materially similar buildings[,] one a house and one a sports pavilion, are treated differently in terms of actual or potential appropriateness”. Thus, as Ouseley J. said:

“The Green Belt may not be harmed by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness, and the other it is not harmed by because of its effect on openness. These concepts are to be applied ... in the light of a particular type of development.”

That reasoning was adopted and applied by H.H.J. Pelling Q.C., sitting as a deputy judge of the High Court, in *Fordent Holdings Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin) (at paragraphs 33 to 35 of his judgment). An appeal against Ouseley J.’s decision was later dismissed by this court

([2014] EWCA Civ 825). In that appeal Richards L.J. (at paragraphs 35 to 41 of his judgment, with which Moore-Bick and Kitchin L.JJ. agreed) expressly endorsed the “general thrust” of Ouseley J.’s reasoning in the passage of his judgment referred to by Dove J., including the observations I have quoted from paragraph 66 (see, in particular, paragraph 37 of Richards L.J.’s judgment).

26. That is not to say, of course, that proposals for the erection of agricultural buildings in the Green Belt will escape other policies in the NPPF, and in the development plan, including policies directed to the visual effects of development and the protection of the countryside or the character of the landscape. Policies of this kind will bear not only on proposals for development that is inappropriate in the Green Belt but also on proposals for development that is appropriate. When such policies are applied, the size and bulk of the building, and its “siting, materials [and] design” (the factors referred to in paragraph 3.15 of PPG2), are likely to be important considerations. Establishing the status of a proposed development – inappropriate in the Green Belt or appropriate – remains only the first step for the decision-maker (see, for example, the judgment of Stuart-Smith L.J. in *Pehrsson v Secretary of State for the Environment* [1990] 3 P.L.R. 66, at p.72; and Sullivan J.’s judgment in *Heath and Hampstead Society*, at paragraph 33, where he described this as a “threshold question”). As paragraph 88 of the NPPF makes plain, inappropriate development can prove to be acceptable if “very special circumstances” are shown to exist, because “the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations” (see generally the decisions of this court in *Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions* [2002] J.P.L. 1509, and *R. (on the application of Basildon District Council) v First Secretary of State* [2005] J.P.L. 942). And development that is not inappropriate, because it is within one of the exceptional categories in paragraphs 89 and 90 and thus not potentially harmful to the Green Belt “by reason of inappropriateness”, may still be unacceptable for other planning reasons. In this case, however, that was not so.
27. I do not think Mr Jones’ argument gains any strength from the Court of Appeal’s decision in *Redhill Aerodrome Ltd.* or from the judgment of Sullivan J. in *R. (on the application of Hall Hunter Ltd.) v First Secretary of State* [2007] 2 P. & C.R. 5 (in particular at paragraphs 46 to 52). In neither of those cases, nor in any of the others to which counsel on either side referred, was the court faced with the argument now put forward by Mr Jones. In *Redhill Aerodrome Ltd.* the development (the construction of a hard runway to replace the existing grass runways at the aerodrome) was “inappropriate” in the Green Belt. The court rejected the argument that, in the case of such development, the concept of “any other harm” in the second sentence of paragraph 88 of the NPPF meant merely “any other harm to the Green Belt”. In *Hall Hunter Ltd.* Sullivan J. had to consider, among other issues, whether an inspector, in an enforcement appeal concerning the erection of polytunnels and the stationing of caravans on land in the Green Belt, and having accepted that the polytunnels were not inappropriate development in the Green Belt, had erred in his application of a number of local plan policies, including one that referred to the openness of the Green Belt, in coming to the conclusion that “... agricultural needs would be far outweighed by the harm to the countryside arising out of the scale and appearance of the polytunnels” (see paragraphs 46 to 52 of Sullivan J.’s judgment). That case did not raise the issues on the interpretation of national Green Belt policy with which we are concerned here, nor are we dealing with the same local plan policies.

28. In her report to the council's committee the Principal Planning Officer dealt with the "Green Belt" in paragraphs 16 to 20. She said:

"16. The proposed development is required for the purposes of horticulture and is therefore "appropriate" in the Green Belt in terms of national guidance and Policy GB2A of the adopted Local Plan and Alterations. The applicant does not therefore need to demonstrate very special circumstances in order to justify the development. The visual impact, and impact on amenity, the environment and on highway safety do however also need to be addressed in accordance with [policies GB7A] and GB11 of the Plan and these matters are considered below.

17. In considering the previous appeal the Inspector concluded that the development would be harmful to openness of the Green Belt and the purposes of including land within it. The NPPF however, whilst generally setting retention of openness at the heart of its Green Belt Policy, is strangely worded with regard to agricultural buildings. ..."

She then quoted the first sentence of paragraph 89 of the NPPF, and the categories of exception relating to "[buildings] for agriculture and forestry", the "[provision] of appropriate facilities for outdoor recreation and for cemeteries ..." and "[the] extension or alteration of a building ...", and went on to say:

"18. This wording clearly implies that unlike other forms of appropriate development, buildings for agriculture and forestry do not have to preserve openness and can conflict with the purposes of including land within it. This is actually quite logical as many agricultural buildings are by their very nature large and intrusive and will have a significantly adverse impact on openness.

19. The applicants have submitted with their application Counsel advice with regard to the Inspector's suggestion that despite being appropriate development this does not set aside the fundamental requirement of keeping land permanently open. The Legal Opinion of Peter Village QC is that this is "fundamentally wrong and legally erroneous"[.]

20. This is of course only an opinion and Planning case law is full of examples of opinions and legal precedents which provide conflicting views, on almost any issue but it is in [officers'] view a logical interpretation of the wording in the NPPF and despite the fact that the previous appeal inspector placed weight on the openness of the Green Belt, it is not considered that this would be grounds to refuse the application. The Council[']s Policy GB11 relating to agricultural buildings (and is considered to be in accord with the NPPF) does not require that such buildings maintain openness."

29. Mr Jones submitted that those four paragraphs of the officer's report betray a flawed approach. Both NPPF policy for the Green Belt and policy GB7A of the local plan required the committee to give substantial weight to the effect of the proposed development on the openness of the Green Belt, even though it was appropriate development in the Green Belt. Yet the officer clearly treated that consideration as irrelevant.

30. I do not accept that submission. The officer's report shows that she understood both NPPF and local plan policy for development in the Green Belt correctly and applied the relevant policies lawfully. In accepting her advice and recommendation, the members may be taken to have adopted her interpretation and application of the relevant policies. The judge's conclusions to this effect, in paragraphs 59 to 65 of his judgment, are in my view sound.
31. It is well established that planning officers' reports to committee must be read not in an unduly critical way, but fairly and as a whole. Councillors on planning committees can be expected to be reasonably familiar with local circumstances and with relevant policies at national and local level, and to understand what statute requires of them when determining an application for planning permission. If criticism is directed at an officer's report as a means of attacking an authority's grant of planning permission, the question for the court will always be whether the officer has failed to guide the members sufficiently, or has actually misled them, on a matter essential to their decision. Where the officer's advice is founded on planning judgment it will be unassailable unless demonstrably bad as a matter of law. There is ample authority to this effect (see, for example, the judgments of Pill L.J. and Judge L.J., as he then was, in *Oxton Farms, Samuel Smith's Old Brewery (Tadcaster) v Selby District Council*, 18 April 1997, 1997 WL 1106106).
32. No such submission can be made here. It is not in dispute that the officer was right to advise the committee that the proposed development, a building required for horticulture, was appropriate development in the Green Belt, both under national policy and under policy GB2A, and therefore did not have to be justified by "very special circumstances". She was also right to say that policies GB7A and GB11 required the members to consider the likely "visual impact" of the proposed development and the impact it would have on "amenity" and "the environment" – as well as on "highway safety". She said these matters would be considered later in her report, which they were. She did not mention Policy GB10. But that policy did not bear on this proposal because it relates to development "necessary to enhance the function and enjoyment of the Regional Park for its users", which this development was not.
33. Policy GB7A, the policy for "Conspicuous Development", was obviously based on the policy relating to "[the] visual amenities of the Green Belt" in paragraph 3.15 of PPG2. Faithful to national policy in that paragraph of PPG2 and now in the NPPF, it treats "openness" as a concept distinct from the concepts of "rural character" and "visual amenities". It does not override policy GB2A, which identifies development "for the purposes of agriculture, horticulture, or forestry" as a category of "appropriate" development in the Green Belt entirely unqualified by any reference to the "openness" of the Green Belt. Read in the context of the other Green Belt policies in the local plan, including policies GB2A and GB11, and consistently with government policy in paragraphs 88 and 89 of the NPPF, policy GB7A does not make the impact of a proposed agricultural building "upon the openness ... of the Green Belt" a consideration relevant to the status of that development as appropriate development. And if agricultural buildings are in principle appropriate in the Green Belt regardless of their impact on "openness", and are thus not to be regarded as harmful to "openness", their impact on "openness" cannot be an "excessive adverse impact". This does not mean, however, that such buildings cannot have an "excessive adverse impact" upon the "rural character" or upon the "visual amenities" of the Green Belt.

34. In the advice she gave to the committee the officer did not ignore the reference to the “openness” of the Green Belt in policy GB7A. She confronted it, in paragraphs 16 to 20 of her report. She acknowledged what the 2012 appeal inspector had said about the implications of the appeal proposal for the “openness” of the Green Belt and the purposes of including land within it. However, she saw the force of leading counsel’s opinion that the inspector’s approach had been wrong, and she found the interpretation of NPPF policy put forward by Valley Grown Nurseries “logical”. She therefore concluded, in paragraph 20, that the effect of this proposed development on the “openness” of the Green Belt, the development being an agricultural building, was “not ... grounds to refuse the application”. In her “Conclusion”, in paragraph 62, she returned to this matter, advising the committee that Valley Grown Nurseries’ argument was a “strong” one. This echoed the advice she had already given in paragraph 20.
35. I see no error there. In my view the officer’s advice on the relevance and application of policy GB7A to this proposal for an agricultural building in the Green Belt was legally correct. As she clearly appreciated, a scheme for a form of development that under national and local policy is, in principle, not harmful to the “openness” of the Green Belt, could hardly be turned away as contrary to policy GB7A on the grounds of “an excessive adverse impact on the openness ... of the Green Belt”. But as she also very clearly acknowledged, in paragraph 16 of her report, the “visual impact” of the development – in policy GB7A, its impact on “rural character” and “visual amenities” – was nevertheless a matter that had to be considered. She dealt with that matter fully in later sections of her report.
36. The advice she gave on policy GB11, the local plan policy for “Agricultural Buildings”, was also sound in law. Because it relates specifically to agricultural buildings, this policy was of particular relevance to the proposed development. In paragraph 16 of her report the officer identified the specific considerations that arose under it, including “impact on amenity ... and on highway safety”. As she did with the issue of “visual impact” under policy GB7A, she considered those matters elsewhere in her report. But as she also observed, in paragraph 20, policy GB11 is “in accord with” government policy for the Green Belt in the NPPF in that it “does not require that [agricultural] buildings maintain openness”. Here she plainly had in mind the policy in paragraph 89 of the NPPF. Her understanding of policy GB11 was in my view correct, as was her recognition that it is consistent with national policy for the Green Belt.
37. Mr Jones submitted that Dove J. was wrong to hold, in paragraphs 64 and 65 of his judgment, that the officer dealt properly with policy E13A, and also with other policies relevant to the likely visual effects of the development. Again, I disagree. In my view the judge was right to conclude that the officer neither misunderstood nor misapplied policy relating to the effects of the development on the countryside, the visual amenity of the Green Belt and of the Lee Valley Regional Park. I do not think the advice she gave on these matters was in any way deficient or misleading.
38. Her advice in the section of her report headed “Containment of the Glasshouse Industry”, where she considered policy E13A, was, I think, perfectly good. She quoted the policy in its entirety (in paragraph 21). She acknowledged (in paragraph 22) that the existing nursery was within an area identified for glasshouse development under policy E13A, but that the site of the proposed development was not. She also very clearly acknowledged that the development could not be described as a “modest extension”, and that it would have “an adverse impact on the character of the countryside in this location

due to its sheer scale”. She said the proposal was “therefore clearly at odds with this policy, although it is open to dispute whether the ... requirement not to have an adverse impact on the “open” character is ... actually in compliance with the NPPF for the reasons set out in the Green Belt section above”. She was focusing here on the final sentence of policy E13A, which applies “in all cases”. She asked herself, as the policy requires, whether the development would have “an adverse effect on the open character or appearance of the countryside”. She found that it would. It is plain that she recognized this conflict with policy E13A. But was she wrong to add the caveat about “compliance with the NPPF”? I do not believe that she was. The caveat took nothing away from her advice that there would indeed be harm to the “open character” of the countryside. But, as she had already said, on a true understanding of Green Belt policy in the NPPF and in the local plan, the effect of the development on the “openness” of the Green Belt did not, in itself, weigh against the proposal being approved.

39. The officer went on, in paragraph 23, to point out that the council’s policy for glasshouses was based on a study carried out in 2003 and did not address “the current needs of the industry”. A report on the future of the glasshouse industry in the district had been completed and adopted in July 2012 as part of the evidence base for the new local plan. Valley Grown Nurseries had “satisfactorily demonstrated that there are no suitable sites available for this development within the current adopted policy E13 areas”. If the application were refused on “policy grounds”, said the officer, “the consequences may be that the growers will seek to find suitable sites outside the District, leaving the potential problem of a large derelict site” and a loss of existing and potential future jobs. These were “important concerns”, and the decision on the application had “the potential for significantly adverse consequences” (paragraph 25). In the absence of a suitable site within “the existing identified glasshouse areas” she did not think the proposal could be rejected “simply because it is outside the scope of policy E13A” (paragraph 26). At the end of her report, in the “Conclusion”, she did not reduce the weight she gave to policy E13A because of any conflict between it and government policy for the Green Belt in the NPPF. She reduced its weight because it was no longer an effective policy to provide for further glasshouse development in the district, and was therefore out of date (paragraphs 63 and 66 of the report). None of these planning judgments are vulnerable in a claim for judicial review.
40. The same may be said of the officer’s advice on “Landscape Impact” and “Impact on [the] Lee Valley Regional Park”. She acknowledged that the proposal did not accord with the requirement of policy DBE4 that, within the Green Belt, development should “[respect] the wider landscape setting”, though “given the long tradition of glasshouse development in the area the scheme could be regarded as respecting local character” (paragraph 30). “[Due] to its vast scale”, she said, the development would “have an impact on the visual character and amenity of the immediate area ...”. But the council’s “Tree and Landscape Officer” was of the view that the “key landscape character of the area [would] not be compromised” (paragraph 31). The proposal was also “contrary to aims (ii) and (iii) of [policy RST24] – i.e. safeguarding the amenity and conserving the landscape of the [Lee Valley Regional Park]” (paragraph 33). In the Regional Park Authority’s view the development “would be significantly harmful to the aims of the Park” and “may set a dangerous precedent if approved for other such development within the [Park] boundaries”. The appeal inspector had “placed significant weight on the harm to the character and appearance of the Park” (paragraph 35).

41. These considerations featured again in the balancing exercise in the officer's "Conclusion", where she explicitly gave weight to the "harm to the landscape" (paragraph 69) and "the limited harm to the character and amenity of the area and to the [Lee Valley Regional Park] ..." (paragraph 70). Again, I can see no error of law in the advice she gave.
42. Having considered, as she said she would, the likely "visual impact" of the development, which she had identified as a relevant matter under policy GB7A in paragraph 16 of her report, the officer did not find that the effect of the development on the "rural character" of the Green Belt or on its "visual amenities" would be unacceptable. If she had found that there would be, in either of these respects, "an excessive adverse impact" such as to offend policy GB7A, she would have said as much. On a fair reading of her report as a whole, it cannot be said that she failed to grapple with the considerations arising under that policy. She very clearly did so.
43. In my view, therefore, Mr Jones' argument on ground 1 of the appeal must be rejected. The judge was right. The council did not in any respect misinterpret relevant national and local policy, or apply it unlawfully.

Ground 2 – presumptions

44. In England the statutory "presumption in favour of the development plan", as it was described by Lord Hope of Craighead in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 (at p.1449F), is now contained in section 38(6) of the 2004 Act. Several paragraphs of the NPPF refer to it. Paragraph 11, in the section of the NPPF headed "The presumption in favour of sustainable development", acknowledges it, as does paragraph 196 in the section headed "Determining applications". Paragraph 12 confirms that the NPPF "does not change the statutory status of the development plan as the starting-point for decision making".
45. However, the NPPF introduced another presumption, a policy presumption – the "presumption in favour of sustainable development". This presumption is to be applied "[in] assessing and determining development proposals" (paragraph 197), except "where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined" (paragraph 119) – which is in dispute here, in ground 3 of the appeal. Paragraph 14 says that the presumption "should be seen as a golden thread running through both plan-making and decision-taking". It explains that "[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" either "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against policies in this Framework taken as a whole" or "specific policies in this Framework indicate development should be restricted".
46. One of the "core land-use planning principles" set out in paragraph 17 of the NPPF is that planning should "proactively drive and support sustainable economic development ...". In the section headed "Building a strong, competitive economy", paragraph 19 says the Government is "committed to ensuring that the planning system does everything it can to support sustainable economic growth", and that "significant weight should be placed on the need to support economic growth through the planning system". This

policy is elaborated in the following paragraphs, including paragraph 20, which says that “local planning authorities should plan proactively to meet the development needs of business and support an economy fit for the 21st century”. Paragraph 28, in the section headed “Supporting a prosperous rural economy”, says that “[planning] policies should support economic growth in rural areas in order to create jobs and prosperity by taking a positive approach to sustainable new development”.

47. No criticism is made of the officer’s conclusion, in paragraphs 27 to 29 of her report under the heading “Sustainability”, that the proposed development would be “sustainable”. Nor is there any complaint about her conclusion, in paragraph 58 under the heading “Employment/Economic Development”, to the effect that the development would assist government policy for “[building] a strong competitive economy” – in particular the policies in paragraphs 20 and 28 of the NPPF, or her conclusion, in paragraph 59, that the new jobs the development would generate – for “a further 40 full time nursery workers, rising to over 50 at peak picking periods” in addition to the existing workforce of between 80 and 100 – were “a significant consideration”, and that “a development of this scale is a significant local investment that will help to ensure that the existing businesses continue to be competitive in a market that increasingly requires large sites in order to remain competitive”.
48. In her “Conclusion” the officer said, in paragraph 62, that it was necessary to “balance a number of competing issues and make a judgement as to which should carry most weight”. The 2012 appeal decision was “a material consideration that must be taken into account”. But “[countering] this”, she said, “the applicant has submitted a strong argument that the weight the Inspector placed on maintaining the openness of the Green Belt was erroneous”. She went on to say in paragraph 63:

“The development is clearly contrary to policy E13A which seeks to contain the glasshouse area, but this policy is outdated and the Council will not have a new policy until a new local plan is adopted, which is still some time away. Whilst the study on the future of the glasshouse industry has provided an evidence base it has not, nor was it intended to set out a way forward, this will need to be part of the local plan process.”

In the 2012 appeal the inspector had supported the argument “that to approve the development contrary to the adopted policy could have a significant impact on land use policy and set a dangerous precedent making glasshouses more difficult to resist elsewhere, and changing policy by default rather than through the proper plan process”, and had urged the council to resolve “the difficult local balance” (paragraph 64). The officer then said this:

“65. Now nearly 2 years further on unfortunately despite best efforts, we are still in the same position. This leaves the applicants in a state of complete impasse, with no certainty about how to best ensure the continuation and expansion of their business. Government policy seeks to prevent delay and to push forward suitable sustainable development and the policies of the NPPF are supportive of economic development and the rural economy[. It] is considered that with the passage of time the ability to resist development on the basis of Policy E13 has been undermined.

66. On the basis therefore that the openness argument and the [policy] E13 argument are not as strong as they were in 2012 we need to weigh up whether the harm from the development is such as to outweigh the presumption in favour of sustainable economic development.”

The officer referred again to the Regional Park Authority’s objection, and identified “essentially two related issues”, which were “the scale of the development being incompatible with the function of the park and that the glasshouse would adversely affect the landscape setting of the site to the detriment of visitor amenity” (paragraph 67). She said “[the] question is really whether this impact is such that the use of this area of the park for recreation is undermined”. The appeal inspector had concluded that the proposal was “contrary to policy RST24” (paragraph 68). The officer accepted that “the development does not enhance the park and that there is harm to the landscape”, which was “inescapable for a development of this size”. But this was, she said, “just one of the competing factors that need to be balanced” (paragraph 69). Her final conclusions were these:

“70[.] Officers are of the view that even taking account the previous appeal decision and that there are policies that could be used to refuse this application, the potential benefits of the development in terms of economic development, and sustainability outweigh the limited harm to the character and amenity of the area and to the [Lee Valley Regional Park] that would result. It is unlikely that a more suitable location, with less visual impact and impact on wildlife, landscape and residential amenity could be found within the District. If the District is to continue to enable the growth of the Glasshouse industry that has been such an important part of its heritage and not push growers to find sites further afield then development of this nature which provides suitable landscaping, ecological mitigation and transport plans and can not be located within [policy] E13 areas should be considered favourably. It is acknowledged that this could set a precedent for other large horticultural development in the District, but such applications would also need to be considered on their individual merits.

71. Therefore, particularly in the light of the emphasis in the NPPF that “significant weight should be placed on the need to support economic growth through the planning system”, officers again consider that the balance is in favour of the development. The revised application is therefore recommended for approval ...”.

Because this recommendation was “contrary to the adopted Policies of the Local Plan”, the proposal would need to be referred to the Secretary of State “[as] a departure from the plan” (paragraph 72). If the members took a different view, planning permission could be refused “as it is contrary to current adopted policies”, but the council “could ... face criticism at appeal on the basis that the current plan is not up to date and we have as yet no clear strategy to meet the future needs of the Glasshouse Industry” (paragraph 73).

49. Mr Jones submitted that the balance the officer struck in the “Conclusion” of her report was a false one. It was the balance between the harm the development would cause and “the presumption in favour of sustainable economic development”. This was not the “presumption in favour of sustainable development” referred to in the NPPF, but a “presumption” of the officer’s own creation. In any event, as the proposal was contrary to several policies in the local plan, including policy for the Green Belt, and those

policies were not “out-of-date”, the “presumption in favour of sustainable development” did not apply to it. And the presumption in section 38(6), reinforced by the policies in paragraphs 11 and 12 of the NPPF, was against planning permission being granted. Yet the officer never brought her mind to that statutory presumption. In particular, she failed to ask herself whether there were considerations sufficient to outweigh the manifest conflict of the proposal with policy relating to the “openness” of the Green Belt in the development plan.

50. I cannot accept that argument. In paragraph 69 of his judgment Dove J. referred to Mr Jones’ submissions on this ground as “essentially an impermissible over-reading of the contents of the officers’ report”. That, I think, is right.
51. Given the conclusion in paragraph 63 of her report that policy E13A – the policy of the local plan specifically relevant to glasshouse development – was now an “outdated” policy, I think the officer would have been entitled to apply the “presumption in favour of sustainable development” in the way that paragraph 14 of the NPPF says it should be applied where “relevant policies” of the development plan are “out-of-date”. She did not do that. Instead, as Dove J. said in paragraph 69 of his judgment, she undertook a balancing exercise consistent with the requirements of section 38(6). She acknowledged the conflict with the development plan in that the proposal was contrary to policies E13A and RST24 (paragraphs 63, 68, 69 and 72 of the report), and that there would be “harm to the landscape” (paragraph 69) and “limited harm to the character and amenity of the area and to the [Lee Valley Regional Park]” (paragraph 70). But she concluded that these considerations were outbalanced by “the potential benefits of the development in terms of economic development, and sustainability”, and the unlikelihood of finding a “more suitable location, with less visual impact and impact on wildlife, landscape and residential amenity” in the district (also paragraph 70). This was a straightforward application of the decision-maker’s duty under section 38(6). In my view there is nothing legally wrong with it.
52. It was in the course of this exercise that the officer said what she did about the “presumption in favour of sustainable economic development” (paragraph 66). She was not attributing to the NPPF a presumption it does not contain – or, as Dove J. put it in paragraph 69 of his judgment, reinventing the “presumption in favour of sustainable development”. But the “presumption in favour of sustainable development” can operate in favour of “sustainable economic development” – strongly promoted in paragraph 17 of the NPPF – just as it applies to other kinds of sustainable development. And the officer’s reference to a “presumption in favour of sustainable economic development” makes good sense in its context. It followed from what she said about government policy seeking “to prevent delay and push forward suitable sustainable development”, and its support for “economic development and the rural economy” (paragraph 65). This advice reflected what she had already said about the importance of new jobs and economic growth (paragraphs 58 and 59).
53. Taking the officer’s “Conclusion” together with the analysis in the preceding sections of her report, one can see how she formed the crucial planning judgment – that despite the proposal’s conflict with the local plan and the harm the development would cause, its benefits as “sustainable economic development” were sufficient to justify the grant of planning permission. She gave to each consideration, on either side of the balance, the weight she thought it should have. Weight was a matter for her, and, in the light of her advice, the members (see Lord Hoffmann’s speech in *Tesco Stores Ltd. v Secretary of*

State for the Environment [1995] W.L.R. 759, at p.780E-G). The reasons she gave for her conclusions and recommendation are, I think, cogent and clear. As one can see in paragraph 71 of her report, the consideration that carried particular force in her planning judgment was “the emphasis in the NPPF that significant weight should be placed on the need to support economic growth through the planning system” – clearly a reference to the policy in paragraph 19 of the NPPF.

54. In my view, therefore, the officer’s use of the phrase “the presumption in favour of sustainable economic development” was, at the worst, infelicitous. It does not expose a wrong or misleading approach. It comes nowhere near being the kind of error that might lead the court to strike down a planning permission granted on the strength of advice given to members in a committee report. The proposal was not given the full benefit of the policy “presumption in favour of sustainable development” in the NPPF, but the officer’s advice in her “Conclusion”, and throughout her report, was loyal to the statutory presumption in favour of the development plan in section 38(6).
55. I would therefore reject ground 2 of the appeal.

The Habitats Directive and the Habitats regulations

56. Article 6(3) of the Habitats Directive provides that “[any] plan or project not directly connected with or necessary to the management of the [protected] site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives ...”. Article 7 of the Habitats Directive applies the protections of article 6 to Council Directive 79/409/EEC on the conservation of wild birds. The Habitats Directive is transposed into domestic law by the Habitats regulations. Regulation 61 provides:

- “(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –
- (a) is likely to have a significant effect on a European site ... (either alone or in combination with other plans or projects), and
 - (b) is not directly connected with or necessary to the management of that site,
- must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.

...

- (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.

...

- (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site ...

- (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.”

Regulation 5(1)(b)(i) defines “the appropriate nature conservation body” for England as Natural England. Regulation 7 defines “competent authority” to include local authorities and other public bodies.

The consultation of Natural England on the first two proposals

57. The supporting material for the June 2011 application included the “Phase 1 Habitat and Ecological Scoping Report” dated 21 March 2011, revision C of the “Habitat Enhancement & Landscaping” plan dated 17 May 2011, and the “Wetland Bird Survey” dated July 2011. The scheme for habitat management included measures for protecting and increasing habitat for Gadwall and Shoveler. When consulted by the council under regulation 61 of the Habitats regulations, Natural England did not object to the proposal. In their letter to the council dated 6 July 2011 they noted that the survey on 17 March 2011 had “recorded the presence of 30 Gadwall: which equates to 6.6% of the population of the Lee Valley SPA and Ramsar site at the time of its designation as an SPA and Ramsar site; or 10% of the minimum number required to qualify a site for selection as an SPA”. The survey had also recorded the presence of five Shoveler, but this number was “not considered to [be] of particular significance in terms of the population of the SPA and Ramsar site”. The application site was, therefore, “undoubtedly of considerable importance as a supporting habitat which is used by the SPA bird interest”. And “in the absence of mitigation”, they said, the development was “likely to have a significant effect on the European site” and had the potential to “adversely affect the integrity of the European site”. However, the proposed mitigation measures, they said, “should be capable of providing an adequate extent and continuity of supporting habitat, in order to ensure that there would not be a detrimental impact upon those bird species which are designated interest features of the Lee Valley SPA and Ramsar site”. If “fully implemented and adequately maintained”, these mitigation measures would be “sufficient to prevent the proposal having a significant effect on the European and international site”. Natural England’s conclusion was this:

“Based on the information provided, Natural England has no objection to the proposed development subject to the inclusion of our recommended conditions and the proposal being carried out in strict accordance with the details of the application. The reason for this view is that subject to the inclusion of our recommended conditions, the proposed development, either alone or in combination with other plans or projects, would not be likely to have a significant effect on the Lee Valley SPA and Ramsar site.”

The recommended conditions were then set out. Natural England maintained and amplified that view in further correspondence with the council and with the Royal Society for the Protection of Birds (“the RSPB”).

58. When the second application for planning permission was made in December 2011 the same ecological material was relied on, with the addition of a “Phase 1 Habitat Survey

Report” dated November 2011, which relied on counts of Gadwall and Shoveler on the site made between May and August 2011. On 6 January 2012 Natural England responded to consultation under regulation 61 in terms similar to their response on the first application, again stating that they had no objection to the proposal provided the recommended conditions were imposed on the planning permission.

The appeal inspector’s doubt

59. In her decision letter dismissing the appeal on the first proposal the inspector referred to the RSPB’s view that Langridge Scrape was “functionally linked to the [Lee Valley] SPA since species for which [it] has been designated are dependant on this habitat”. It was therefore “necessary to consider the ecological importance of the lake habitat in supporting a proportion of these species” (paragraph 27). She said (in paragraph 28) it was “interesting that these species have taken so readily to the lake and [this] indicates that, all other circumstances being similar, they might take readily to the re-modelled lake”. But in this proposal, she said, it was intended “to bring greater numbers of people right up to the [water’s] edge and over it on timber walkways” and to re-route the public footpath “[immediately] adjacent to it”, and “the picnic area and glasshouses would be within a few metres”. The “re-modelled lake would not be the relatively secluded and distant body of water it is at present and the species associated with the [Lee Valley] SPA may not use it to the same extent”. Finally, she said this:

“While I note that Natural England raised no objection I am not satisfied, on the basis of the evidence I have, that the scheme would not adversely affect the integrity of the European site.”

The consultation of Natural England on this proposal

60. The ecological reports submitted with the two previous applications were again relied upon in support of the proposal with which we are concerned, together with additional material including an “Ecological Walkover and Update Site Assessment”, dated 10 September 2013, an “Outline Landscape Management Plan”, and a “Letter of Intention and Specification of Mitigation Works” dated 14 February 2012. A new “Wetland Bird Survey”, dated April 2012, had also been prepared, setting out survey results for the period between May 2011 and March 2012. This further survey had been undertaken because the previous one had not included the winter months and so did not show how many over-wintering birds were using Langridge Scrape.
61. The April 2012 “Wetland Bird Survey” was not submitted to the council. But it was referred to in the “Planning Statement”, which said that “[the] results indicate that the water bird counts in the gravel pit pond (application area) are considerably lower than counts made on Holyfield Lake”, that “[there] is a notable size difference between the two water bodies and the gravel pit pond is therefore of lower habitat value”, and that “[Twig Group], the Consultancy who undertook the survey work, is satisfied that the application demonstrates a low impact on optimal habitat for listed species provided that works take place outside the breeding season and the operations do not disturb bird populations utilising key areas of the site” (paragraph 5.24). The proposed “Habitat Enhancement” works were described as including “extensive habitat enhancement measures ... for the reconfigured splash, the overall surface area of which will remain

the same as existing ...” (paragraph 5.26), the creation of “a new island area in the splash ..., the banks of the splash ... regraded to provide shallow waters suitable for Gadwall”, and “[the] rerouted footpath [to] run parallel with the northern and eastern edges of the splash and ... separated from the water by a mixture of wetland grass” (paragraph 5.27). The aim of these works was then stated (in paragraph 5.30):

“With regard to the habitat proposals and in particular the design of the splash area, every effort is being made to enhance the ecology within the area. The overall ambition is to make the area of sufficient interest from a habitat and ecological perspective in order to attract visitors to what is at present, an under used area of the Lee Valley [Regional] Park.”

62. When Natural England were consulted again under regulation 61(3), they had available to them all of the documents submitted to the council with the application for planning permission, including the “Planning Statement”, to which the appeal inspector’s decision letter was appended. They did not have the April 2012 “Wetland Bird Survey”. In their letter to the council dated 3 December 2013, they said they had “no objection”. Their reason for not objecting was simply stated:

“Based upon the information provided, Natural England advises the Council that the proposal is unlikely to affect any statutorily protected sites or landscapes but also refers you to our previous response ... issued on 06 January 2012.”

Ground 3 – did the council fail to discharge its duties under the Habitats Directive and the Habitats regulations?

63. The council’s planning officer considered the possible effects on biodiversity in a section of her report headed “Wildlife and Conservation”. She said the ecological survey reports submitted with the previous applications “all date back to 2011 ... and are therefore not up to date”. But “a daytime ground based Ecological Walkover and updated site assessment carried out in September 2013” had also been submitted, which “concludes that the phase 1 habitat survey is still accurate and can therefore still be relied upon, and identifies suitable mitigation measures to ensure impacts on wildlife are minimised” (paragraph 47). She recorded Natural England’s response to consultation on this proposal (paragraph 48), their view that the proposed development “would not directly impact on the European or Ramsar Site”, the reasons why they had not objected (paragraph 49), and their consultation responses on the previous two proposals (paragraphs 50 and 51). She then referred to the concern expressed by the 2012 appeal inspector about the possible consequences of “bringing the public into the site with walkways and picnic areas”, so that “the lake would no longer be a distant and secluded feature and that the species associated with the [Lee Valley] SPA may not use it to the same extent”, and to her having said she was “not satisfied, on the basis of the evidence [she had] that the scheme would not adversely affect the integrity of the European Site” (paragraph 52). The officer went on to say (in paragraph 53):

“This leaves us in a difficult position, Natural England is the Statutory Consultee with regard to impact on Statutory Nature Conservation sites and they have concluded from the information provided that there is unlikely to be an adverse impact. The thrust of recent government guidance for dealing with planning applications is to avoid delay in the determination of applications and not to

request excessive supporting information. On balance it is considered that despite the concerns raised by the Planning Inspector and the LVRPA with regard to potential impact on wildlife, adequate information has been provided and any likely impact will be suitably mitigated and not so great as to warrant refusal.”

She reminded the members that the previous applications were not refused “on grounds of harm to wildlife or habitats” (in paragraph 54). The inspector’s decision letter was appended to the report.

64. Mr Jones submitted that Dove J. was wrong to conclude that the council had lawfully determined the question of whether the development was likely to have a significant effect on the integrity of the Lee Valley SPA. It was for the council, as competent authority, to decide that question. But it had delegated the decision to Natural England, or allowed Natural England to dictate to it what the decision should be without considering the matter for itself. No reasons were given for departing from the decision of the inspector, as “competent authority”, on a proposal very similar to this. The council’s decision was one that no reasonable authority would have made on the evidence before it. Dove J. ought to have accepted that the number of Gadwall and Shoveler using the application site was relevant and important. Wetland bird counts for Holyfield Marsh (Holyfield Lake and Langridge Scrape) made by the British Trust for Ornithology on seven days between September 2010 and March 2011 showed that on two occasions there had been more than 30 Gadwall on Langridge Scrape (53 and 62), and on another three, more than five Shoveler (14, 23 and eight). These counts demonstrated that the 2011 survey data – for a single day in March of that year – was out-of-date, insufficient to show the number of Gadwall and Shoveler using Langridge Scrape and the pattern of their activity on the site, and an unreliable basis for judging the adequacy of the proposed replacement habitat. There was no analysis of the likely disturbance of birds by recreational visitors to the site. As the European jurisprudence has emphasized, the Habitats Directive embodies a “preventative and precautionary approach”. It “cannot be held that an assessment is appropriate when information and reliable updated data concerning the birds in [the] SPA are lacking” (see the judgment of the Court of Justice of the European Union in *Nomarchiaki Aftodioikisi Aitolokarnanias and others v Ypourgos Perivallantos, Chorotaxias kai Ergon Dimosion and others* [2013] Env. L.R. 21, at paragraphs 112 to 115, applying the jurisprudence in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 C.M.L.R. 31, at paragraphs 32, 36, 44 and 59 of the judgment, and in *Sweetman v An Bord Pleanola* [2013] 3 C.M.L.R. 16, at paragraphs 28 to 33, 41 and 44 of the judgment).
65. I cannot accept those submissions. In my view Dove J. was right to conclude, in paragraphs 74 to 83 of his judgment, that the council had lawfully discharged its duties under the Habitats Directive and the Habitats regulations, and had properly concluded that there was no need for an “appropriate assessment” to be undertaken in this case. It must be remembered, as Sullivan J. said in *R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 16 (in paragraph 72 of his judgment), that the Habitats Directive is “intended to be an aid to effective environmental decision making, not a legal obstacle course”. Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional *Wednesbury* grounds (see the judgment of Sales L.J., with whom Richards and Lewison L.JJ. agreed, in *R. (on the application of Dianne Smyth) v Secretary of State*

for *Communities and Local Government* [2015] EWCA Civ 174, at paragraphs 78 to 81). I cannot see how the council's decision on the need for appropriate assessment in this case could be said to be in any way vulnerable on that standard of review.

66. As Ms Thomas and Mr Village submitted, the context in which we have to consider Mr Jones' argument on this ground is important. The site of the proposed development was not in, or adjoining, a European site, but some distance from it. The proposed mitigation measures were not novel or complicated: the re-shaping and enlargement of Langridge Scrape, with no loss of surface water area, and the creation of additional habitat for Gadwall and Shoveler. As the judge said, the "ecological works" proposed were "clearly mitigation, not compensation", having been "designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place" (paragraphs 79 to 81 of the judgment). When consulted on this proposal, Natural England, as "appropriate nature conservation body", maintained the position they had taken throughout: that, with the proposed mitigation in place, there would be no "significant effect" on the Lee Valley SPA and the Ramsar site. Their advice was accepted by the council as "competent authority". It was now informed by the further material before them when consulted on this application. Once again, it was wholly unambiguous.
67. There is nothing in the submission that the council simply delegated its decision on the question of the need for appropriate assessment to Natural England, or allowed them to tell it what to decide. That is not what happened. Nor did Dove J. find that it had. He referred, in paragraph 83 of his judgment, to "other cases where, in effect, a local planning authority delegates their decision on such an issue to Natural England, upon whose views, on the recent authorities, they are entitled to rely ...". That observation must be read in the light of what the judge had already said about Natural England's statutory remit. He had acknowledged the role of Natural England as "an important consultee" under regulation 61(3) of the Habitats regulations (paragraph 58 of the judgment). In doing so, he mentioned relevant authority, including the Supreme Court's decision in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2 (see, in particular, paragraph 30 of the judgment of Lord Brown of Eaton-under-Heywood, and paragraph 45 of the judgment of Baroness Hale of Richmond). He concluded that the council had "adopted and relied upon the conclusions of Natural England", which it was entitled to do (paragraph 74). And he found that Natural England had reached their conclusion on the possibility of there being any "significant effect" on the Lee Valley SPA in accordance with the "correct legal tests" (paragraph 75). I agree.
68. As Dove J. concluded (in paragraph 77 of his judgment), none of the material before the court on the numbers of Gadwall and Shoveler using Langridge Scrape disproves Natural England's judgment based on the count of 30 Gadwall in the "Phase I Habitat and Ecological Scoping Report". In fact, the April 2012 Wetland Bird Survey lent some support to the earlier data on which Natural England had relied. All of the counts of Gadwall in that document show numbers at 30 or below, the highest numbers recorded being 30, 24 and 22 on days in January, February and March 2012. The counts of Shoveler were all below five, except on two days in December 2011, when eight and six were recorded. And the data put before the court by the Regional Park Authority did not show that the information before Natural England was an inadequate basis for their response to consultation under regulation 61. The British Trust for Ornithology counts were generally consistent with the information on which Natural England had relied. In only two of them did the number of Gadwall on Langridge Scrape exceed 30 – the average number being 26, and in three there were more than five Shoveler – with an

average of seven. As the judge said (in paragraph 77 of his judgment), the data showing that the numbers of Gadwall and Shoveler were sometimes higher than the number used by Natural England was “unsurprising given the transitory character of the nature conservation interest concerned and the fact that counts will therefore vary from time to time” and “[did] not come close to rendering the factual basis for Natural England’s conclusions unsound”.

69. What Natural England had to consider here, as the judge said (at paragraph 78), was not whether there was a “sufficient abundance of [Gadwall and Shoveler] to give rise to the potential for a likely significant effect”, but rather, in view of their conclusion that a significant effect could arise “in the absence of mitigation”, whether the mitigation measures proposed were adequate to preclude any such effect. Was this development, with the proposed mitigation measures in place, “likely to have a significant effect on a European site” so that an “appropriate assessment” under the Habitats Directive and the Habitats regulations was required? That was the essential question for Natural England and the council in this case. Natural England’s answer to it – and the council’s in reliance on their advice – was a clear “No”.
70. I do not read Dove J.’s analysis in this part of his judgment as imposing a burden on the Regional Park Authority to demonstrate that the answer ought to have been “Yes”. And, like the judge, I do not accept that the conclusion reached by Natural England, and accepted by the council in making its determination as “competent authority” under regulation 61, was other than soundly based on the information before them by this stage, or that it fell short of what the “preventative and precautionary approach” required. It certainly cannot be said to be unreasonable or, in the light of the case law on which Mr Jones relied, unlawful. There was, in my view, sufficient material before Natural England and the council to justify the decision the council made (see paragraphs 112 to 115 of the court’s judgment in *Nomarchiaki*). I reject Mr Jones’ submission that it would only have been possible to conclude that there was no likelihood of a “significant effect” on the Lee Valley SPA and Ramsar site if further work had been done to investigate how Langridge Scrape was being used by Gadwall and Shoveler and whether this might be affected by visitors to the site, and to test the adequacy of the proposed replacement habitat. Had Natural England seen any need for further work to be done, they would have asked for it.
71. Lastly on this issue, I come to the submission that the council’s decision under regulation 61 was vitiated by Natural England’s failure to comment, in their response to consultation, on what the 2012 appeal inspector had said in paragraph 28 of her decision letter, and to explain why they disagreed. The judge was not persuaded by this submission. And I think he was right.
72. Because of her doubts about the possible disturbance of birds by recreational activity on the site, the inspector was “not satisfied” that there would be no harm to “the integrity of the European site”. She did not, however, express any view of her own, let alone a clearly reasoned view, about the likely efficacy of the proposed mitigation measures, which was, of course, the crucial consideration in Natural England’s judgment that there was not likely to be any “significant effect” on the Lee Valley SPA and Ramsar site. That, it should be remembered, was not a contentious matter in the appeal before her. She acknowledged that she had come to her view on the basis of the evidence she had. When the time came for Natural England and the council to consider this third proposal, there was material before them that had not been before her when considering the first.

73. Dove J. accepted the submission that Natural England, having considered the inspector's view, was "simply not impressed" by it, and did not need to go further than repeating their own conclusion, which had not changed. It was, he said, "unfortunate that Natural England did not provide reasons for rejecting [her] conclusions, which would have dealt with this point conclusively". In other cases that might have mattered. But in the circumstances of this case, in his view, it was enough to conclude that Natural England "had the inspector's view and ... were undeterred by it". He was "satisfied that Natural England had access to the appeal decision and that it clearly did not in any way impact upon their conclusion that the approach they had taken in respect of the earlier two applications was one which remained legally valid" (paragraph 83 of the judgment).
74. That, in my view, was correct. Conscious of the inspector's doubt, and conscious of the proposed habitat enhancement works and arrangements for attracting visitors to the application site described very clearly in the "Planning Statement" for this application, Natural England, when consulted again as "appropriate nature conservation body", had adhered to the conclusion they had previously stated. It was not incumbent on them to explain why they did not share the inspector's misgivings about the possible effect of the development on "the integrity of the European site", even though she had been the "competent authority" when she had expressed those misgivings. The divergence of her view from theirs was highlighted in the officer's report. The officer's advice was suitably cautious, and clear. She did not spell out the legal test to be applied – and she did not have to (see the judgment of Pill L.J. in *R. (on the application of Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes Teesside Ltd.* [2009] 1 W.L.R. 83, at paragraphs 84 to 86). But she did give the members adequate guidance on the matters the council needed to consider as "competent authority" under regulation 61 (see the judgment of Pill L.J. in *R. (on the application of Lowther) v Durham County Council* [2001] EWCA Civ 781). She reminded them of precisely what the inspector had said in paragraph 28 of her decision letter. And she set against the inspector's doubt, and the Regional Park Authority's objection, Natural England's considered and expert view that, with the proposed mitigation, the development was not likely to have a "significant effect" on the Lee Valley SPA and Ramsar site, and her own conclusion that that expert view should again be accepted.
75. The officer's conclusion and advice on this question were scarcely surprising. The view of Natural England, when consulted under regulation 61 of the Habitats regulations, will generally merit the weight one would expect to be given to the opinion of such a body, with the responsibilities it has for nature conservation and the expertise available to it. A local planning authority, as "competent authority", must make the decisions for which it is responsible under regulation 61. But when it has consulted Natural England as the "appropriate nature conservation body" it would need to have convincing reasons for departing from their view on the likelihood of development having a significant effect on a European site (see the judgment of Sullivan J. in *Hart*, at paragraph 49). In this case the council concluded that there was no good reason to disagree with the view Natural England had expressed as "appropriate nature conservation body". That was a conclusion well within the bounds of a lawfully made decision under regulation 61.
76. In my view, therefore, the council complied with its duties under article 6 of the Habitats Directive and regulation 61 of the Habitats regulations, and it follows that the appeal should not succeed on ground 3.

Conclusion

77. For the reasons I have given, I would dismiss this appeal.

Lord Justice Underhill

78. I agree.

Lord Justice Treacy

79. I also agree.

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	<u>Appellant</u>
- and -	
(1) Secretary of State for Communities and Local Government	<u>Respondents</u>
(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 (“the site”). 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 (“the NPPF”) 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 “openness” 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 appellant’s 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 “would not have a greater impact on the openness of the Green Belt” 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 appellant’s 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 “very special circumstances” (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:

“10. 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 dwelling’s 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 development’s 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.”

9. It is this part of the Inspector’s reasoning which is under challenge. (I should mention that although in paras. 11 and 12 of the decision the Inspector referred to “operational development” rather than simply “development”, 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 appellant’s section 288 application the appellant had three grounds of challenge to the Inspector’s 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 “openness of the Green Belt” 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 (“the volumetric approach”); 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 “openness of the Green Belt” is not narrowly limited to the volumetric approach suggested by Mr Rudd. 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.
15. The question of visual impact is implicitly part of the concept of “openness of the Green Belt” 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 “the unrestricted sprawl of large built-up areas” and the merging of neighbouring towns, as indeed the name “Green Belt” 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 “safeguarding the countryside from encroachment” includes preservation of that quality of openness. The preservation of “the setting ... of historic towns” 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 “to retain and enhance landscapes, visual amenity and biodiversity” 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 (“PPG 2”), and drew from it the propositions

that “there is a clear conceptual distinction between openness and visual impact” and “it is therefore wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact”: para. [78] (Green J’s emphasis). The case went on appeal, but this part of Green J’s 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:

“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 ...”
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 – 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 – 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 “providing the new dwelling is not more visually intrusive than the dwelling it replaces” for the test actually stated in para. 3.6, namely whether the new dwelling was materially larger or not: [20]. As Sullivan J said, “Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact”: [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 “openness of the Green Belt”. 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, “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”. 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:
- “The planning officer’s approach can be paraphrased as follows:
- ‘The 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.’

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 para. 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 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 – 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.”

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 J’s 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 *Timmings* 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 Inspector’s 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 “directly compared as proposed by the appellant” (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.

Case No: CO/2496/2014

Neutral Citation Number: [2015] EWHC 185 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2015

Before :

MR JUSTICE OUSELEY

Between :

**THE QUEEN (on the application of LEE VALLEY
REGIONAL PARK AUTHORITY)**

Claimant

- and -

BROXBOURNE BOROUGH COUNCIL

Defendant

-and-

BRITANNIA NURSERIES

**Interested
Party**

Gregory Jones QC and David Graham (instructed by Lee Valley Regional Park Authority)
for the Claimant

Richard Harwood QC (instructed by Broxbourne Borough Council) for the Defendant

Jenny Wigley (instructed by Attwaters Jameson Hill) for the Interested Party

Hearing dates: 3rd and 4th December 2014

Judgment

MR JUSTICE OUSELEY:

1. The Lee Valley Regional Park Authority, the claimant, is a statutory body established under the Lee Valley Regional Park Act 1966, for the purposes of improving and preserving the land adjoining the River Lee, passing through Essex, Hertfordshire and Greater London, as a regional park for the purposes of providing opportunities for recreation and leisure. The Lee Valley Regional Park Authority, LVA, has certain plan making functions and particular procedural rights in relation to development control, although it is not itself a development control authority. The nine district and two county councils whose areas include part of the Regional Park provide the members of the authority. One such district council is the defendant, Broxbourne Borough Council.
2. Broxbourne Borough Council granted planning permission on 22 April 2014 to Britannia Nurseries, the interested party, for the development of 4.4 ha. of land, within the Regional Park and within the Green Belt, for the demolition of existing former nursery buildings and structures, and redevelopment with 90 dwellings, public open space and public car parking spaces. The LVA had objected to this proposal because it was contrary to Green Belt policy and its own policies for the Regional Park.
3. The Council referred the application to the Secretary of State for Communities and Local Government who, on 24 July 2013, having considered the LVA objections, declined to call the application in for his own determination, not because of any consideration of the detailed merits of the application but because it did not raise issues of more than local importance. There is no challenge to that decision, but the Council was then entitled to and did proceed to grant planning permission, after the conclusion of an agreement with the developer under s106 of the Town and Country Planning Act 1990.
4. The planning application site was originally a horticultural nursery. It comprises a northern part which amounts to approximately half or a little more of the whole site, and which is open, grass scrub land. It appears that at one time there had been substantial nursery buildings on part of the northern area which were demolished to make way for mineral extraction, after which the land was to be restored for agricultural purposes with inert landfill, according to the conditions of that permission. This is consistent with its appearance as grass scrub land. The southern part of the site contains substantial former nursery buildings concentrated in the south-east part, including some which have collapsed after fire damage. There are other buildings and substantial areas of hard standing.
5. The site as a whole is in the south-west corner of the Regional Park in this section, the main body of which lies to the north and east of the site. To the south, and outside the Green Belt, is built development, as there is to its west beyond the north-south railway line.
6. The LVA challenges the grant of permission on the grounds that the Council misinterpreted Green Belt policy in the National Planning Policy Framework, NPPF, in an unlawful manner particularly with reference to the concepts of openness and

previously developed land. The officer's report failed to identify the harm done to the Green Belt, or to identify the breach of Green Belt policy or what very special circumstances were sufficient to outweigh the harm done. There are a number of other aspects of the report which were also said to be misleading and unlawful. The LVA also raised a particular and to some extent esoteric point, about the role of Lee Valley Regional Park plans and the statutory development plan system which involved some examination of the development of statutory plan making provisions since the Town and Country Planning Act 1962.

The Officer's Report

7. The officer's report for the committee on 21 May 2013 summarised the responses to consultation including that of the LVA. It set out the relevant policies from the Borough of Broxbourne Local Plan Second Review 2001-2011 adopted in December 2005. The policies listed as applicable include GBC2 dealing with Green Belt development and CLT4 dealing with the Lee Valley Regional Park. Subject to the issue over the role and status of the LVRP plans, the Second Review Plan 2001-2011 is the relevant statutory development plan. Section 5 of the report dealt with the location and described the site and its location much as I have set out already. It described the northern part of the site as being within a Landscape Character Area, a designation within the Development Plan. It also stated that the site "is split into two defined character areas", the southern half and the northern area as I have described them. An aerial view of the application site and photographs of it were included in the report. The majority of committee members also went on a site visit.
8. The proposed development is described in section 6. Mr Jones QC for the LVA pointed out that it was an outline planning application with all matters reserved which meant, as the report said, that the layout, house types and "road relocation" were all illustrative. The illustrative material provided would assist the committee in visualising the style of properties which could be built and arranged. "However, a future reserved matters application could look significantly different". There would be four different house types of a largely traditional nature ranging between 2-2½ stories. Typical upper limits of property heights would be 9.5 metres with lower limits of 7 metres. Dwellings widths would range between 4-11 metres and depths would range between 6-9 metres. The illustrative layout demonstrated a greater number of 2 storey detached dwellings on the eastern side of the development "in order to minimise visual impact from the Regional Park". It noted that design and appearance were not part of the application.
9. The planning history of the site was referred to briefly, noting the permission in 1984 for the extraction of minerals with restoration to agriculture with inert fill. In 1998 permission had been granted for cladding part of the glass houses and for the continued use of part of the site for trade in florist's sundries and cut flowers.
10. It is the appraisal section which matters for these purposes. The main issues to consider included first "the principle of redevelopment for residential use in the Metropolitan Green Belt and the Lee Valley Regional Park"; other main issues included the supply of housing land, layout and density and other development control matters. In dealing with the first main issue, which the report repeated, it first

set out policy GBC2 of the Local Plan, which states that planning permission will not be granted for development in the Green Belt other than for the purposes specified in the policy, none of which apply to residential development as proposed here. Paragraph 8.3 continued:

“8.3 Development of this site for housing does not accord with this policy. However, the provisions of this policy in relation to this site are now to some extent superseded by the National Planning Policy Framework. Whilst the NPPF retains the previous stance of national guidance in that there is a presumption against inappropriate development within the Green Belt, it now allows for:

“limited infilling or partial or complete redevelopment of previously developed sites (brown field land), whether redundant or in continuing use 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”.

8.4 This is a change in emphasis to provide a more flexible approach to derelict green belt sites provided that the openness of the green belt is not compromised.”

11. The report then continued in paragraph 8.5: “In addition to the foregoing, the applicant also contends that there are ‘very special circumstances’ in support of this scheme and has put forward the following case as to why development is justifiable.” There then followed eight points:

- The development would be well contained within the boundaries;
- The development would not result in coalescence settlements;
- The site was not rural countryside due to former activities;
- It was Local Plan Policy to promote the re-use of previously developed and derelict urban land;
- Green Belt land had to be released in order to meet the Council’s short and medium term housing requirements;
- There was an overwhelming need for affordable housing which would not be provided within the urban area;

- There was a need for family housing with gardens which could not normally be provided within the urban area; and
- The site is a logical extension to the existing urban area.”

12. Mr Harwood QC for the Council submitted that those eight points were no more than a summary of the applicant’s case, and that it was the following paragraphs that contained the officer’s appraisal of very special circumstances.

“8.6 With regard to the points made by the applicant, the proposal would be a comprehensive redevelopment of this derelict and redundant site resulting in the removal of dilapidated buildings. It would remediate any contamination and also address a history of anti-social behaviour. In total, police have been called 14 times to the site as a result of theft, squatting, drinking and trespass.

8.7 It is not considered that a residential development on this site would unacceptably extend the urban area into a high quality area of the Green Belt. It is noted that the scrub to the north of the site is formed from an area of landfill. Any development on this site would not result in the merging of urban areas and the 90 dwellings proposed would be sited appropriately after taking account of the sites constraints.

8.8 Whilst the objections raised by the Lee Valley Regional Park Authority are noted, it is considered that this development would not be harmful to the character of the Park. On the contrary, it is considered that the clearance of a long derelict site and its replacement with high quality housing facing out across a new area of public space should be seen as a substantial improvement. In addition, the creation of a major new entrance to the Park will open it up to Waltham Cross and visitor numbers will be increased. Access to the Park for Waltham Cross residents currently requires an 800 metre walk down Eleanor Cross Road to the Lee Valley White Water Centre. This development will create an attractive new route for pedestrians and cyclists as well as providing 30 visitor parking spaces for Users of the Park.

8.10 Overall, it is considered that a high quality development could secure significant long term benefits to the openness and attractiveness of the Green Belt and Lee Valley Regional Park. It would replace a derelict site with a high quality and sustainable housing scheme within well landscaped surroundings.”

13. Paragraph 8.9 was incomplete and members were advised to ignore it. The next issue dealt with in the report was the supply of housing land. Mr Jones criticised this paragraph because he said that it did not make clear whether there was or was not a 5 year housing supply, when in fact there was a 5 year housing supply even without this proposed development. Paragraph 8.11 reads as follows:

“The Supply of Housing Land

8.11 The Council needs to take into account the provisions of the National Planning Policy Framework to boost significantly the supply of housing and should at all times retain a five year supply of housing land. This currently means that there must be sufficient land within the borough to enable 1,250 new homes to be built. In order to maintain this figure, a limited number of sites need to come forward before a more comprehensive review of the green belt takes place through the new Local Plan site [sic]. [allocation plan, I infer]. Permission for this site would make a significant contribution to the supply.”

14. The report next turned to the layout and density of the development, pointing out that the application was in outline but illustrative plans had been submitted; the development would need to incorporate extensive landscape buffers to the north and to the east and the illustrative plan showed open space areas including the play area and drainage pond located to the east adjacent to the site entrance. There was potential for a central north-south boulevard with landscaping and a landscaped courtyard. Housing with the more urban feel was to the west of the site, and to the east it would appear more open and less dense “helping to diffuse the development into the more open area of the site proposed adjacent to the boundary with the LVRP”. Mr Jones pointed out that the reference to the boundary with the LVRP was a misconception since the site itself was within the LVRP; the site was merely not land owned by the LVA.
15. In paragraph 8.19, the officer concluded that the density, illustrative housing mix and layout accorded with policy H8 on design. It added that if elements of the proposal differed significantly in the reserved matters application the “current positive elements of this scheme might be lost. In particular the spaciousness and openness of the development and its positive relationship with the LVRP are central to a positive recommendation and would need to be carried through to any reserved matters submission”. The planning obligation would include the payment of £250,000 for improvements to the LVRP and recreation in the vicinity of the site.
16. The conclusion to the report said:
- “10.1 The application site is located within the Green Belt and the Lee Valley Regional Park. However, it is a long standing derelict site that in its current state is seriously detrimental to both. It is in private ownership and no realistic proposals have been made that would take the site into Park use. On balance, it

is considered that a high quality sustainable housing development that opens up a major new entrance into the Park from Waltham Cross would be a major benefit to the Park. It is also considered that the development as set out would provide greater benefits to the green belt than the current dereliction. The development would be an extension of the existing urban area and would not extend excessively into the open countryside. It would provide much needed housing, help to retain a five year land supply within the borough and provide affordable housing.”

17. The next paragraph dealt with what would be expected in the reserved matters application. It pointed out that more than 90 dwellings were highly unlikely to be permitted and that 90 was the upper limit which the site could accommodate. Even that number would need to be fully demonstrated through a detailed layout.
18. The LVA’s Head of Planning addressed the Council’s committee briefly, referring to the LVA’s policies, to the support which the Development Plan gave to refusing permission, and to the “unacceptable precedent” which the grant of permission for this housing development in the Green Belt and in the Regional Park would create.
19. The reasons for the grant of permission produced in April 2014, after negotiations were concluded on the s106 agreement, were:

“Reasons for Grant of Permission: Overall, it is considered that the proposal complies with Policies SUS10, SUS17, GBC2, H8, H13, T3, T9, T11 and IMP2 and all other relevant policies of the Borough of Broxbourne Local Plan Second Review 2001-2011 (December 2005) and the Supplementary Planning Guidance August 2004. Very special circumstances have been demonstrated in this case which allow for development in the green belt, there will not be a materially detrimental impact on the area generally, upon the local and strategic highway network nor upon the amenity and outlook of the adjoining properties. The development has secured community benefits for the area local to the site and the Lee Valley Regional Park.”

20. The s106 agreement limits the number of houses to 90. Conditions require the provision of 30 car parking spaces for Park users, and that the reserved matters application conform to a Design Brief, the current draft of which supports the illustrative layout considered by the committee.

The Policy Framework

21. Relevant parts of the National Planning Policy Framework on Green Belts are:

“79...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.

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.

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”.

22. Paragraph 89 affirms, as GBC2 does, that the construction of new buildings in the Green Belt is inappropriate, subject to exceptions of which I mention two. One is replacement buildings for the same use provided that the new is “not materially larger” than the old. That is not directly applicable here, save that it indicates why there would generally be no harm to the openness of the Green Belt. The other exception is fully quoted in paragraph 8.3 of the officer’s report, and applies to the redevelopment of previously developed land which does not have a greater impact on the openness of the Green Belt and on the purposes of including land within the Green Belt than the existing development. The glossary defines “previously developed land”, and is important:

“Previously developed land:

Land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This excludes: land that is or has been occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill purposes where provision for restoration has been made through development control procedures; land in built-up areas such as private residential gardens, parks, recreation grounds and allotments; and land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time.”

23. Other NPPF policies deal with the maintenance of a five year supply of housing, and in paragraph 47 with boosting significantly the supply of housing but not so as to breach specific NPPF policies such as the Green Belt. On 1 July 2013, a written Ministerial statement in Parliament on the Green Belt made it clear that “the single issue of unmet demand... for conventional housing, is unlikely to outweigh harm to the Green Belt and other harm to constitute the “very special circumstances” justifying inappropriate development in the Green Belt”. The NPPF also requires high quality in the design of development whilst discouraging unduly prescriptive design policies on the imposition of particular styles or tastes: paragraphs 57, 59 and 60.
24. The supporting text to Local Plan policy GBC2 refers to the problem of derelict glasshouses in West Cheshunt, where the 1986 Structure Plan Review incorporated provision for a review of Green Belt boundaries, which was said to have achieved a good balance between development and retaining countryside.
25. The Local Plan policies place the northern two-thirds of the site, in a Landscape Character area where policy GBC16 seeks to include landscape enhancement measures, whenever development is permitted in the Green Belt countryside.
26. The Local Plan also contains retained policy CLT4 on the Lee Valley Regional Park. It provided that the Council supported the LVA in continuing development of the Park in the expectation that development would be predominantly recreational uses appropriate to a Regional Park, though some more intensive recreational uses might also be permitted.
27. Strategic Proposal LVRP1 of the Lee Valley Regional Park Plan, adopted in 2000, envisages the achievement of the Park’s role in providing a range of recreation, leisure and nature conservation “experiences” through the protection of a “continuous corridor of connecting and interrelated open space, water and vegetation” and the definition and protection of the Park boundary through “the creation, enhancement and management of visually attractive, quality Park edges.” The Park is recognised as a link in a Green Chain of regionally significant open spaces. The Park itself provides a network of open space reaching from London into the countryside. A key feature of the Park is its openness. Its role is reliant on the quality of agricultural and rural land in and adjoining the Park, although some agricultural activities have an adverse impact on it. Strategic Proposal LVRP3 seeks to make appropriate use of the Park’s resources in a number of ways, including the “regeneration of areas of vacant and derelict land to provide a balanced range of sites for regional leisure, recreation and nature conservation”.
28. The site lies within area 3.1 of this Plan, which is an area proposed “for informal recreation and nature conservation with an emphasis on quiet recreation within a wooded, grassland and water environment.” Open space was to be protected, and acquired if necessary. Intrusive uses which were incompatible with the Park were to be removed or their adverse impact was to be mitigated. The explanatory text referred to pockets of housing, chalets and glasshouses in this context. The Plan makes it clear that housing development is not compatible with the leisure purposes for which the Park was established, and precludes the opportunity being taken to bring the land into uses compatible with the Park.

29. Policy L1.1 seeks to protect and enhance the openness of the Park by “ensuring no development in or adjacent to the Regional Park adversely affects the open character of the Park”, and “avoiding built development which compromises the purpose of areas of Green Belt ...” Other policies oppose development incompatible with Park purposes, L.2.1; and L.2.3 seeks to ensure that derelict and unused land is brought in to Park use. Development for purposes which are not those of the Regional Park should be located within “existing established areas”, where they would have a negligible effect on the openness of the Park.

The Legal Framework

30. S38(6) of the Planning and Compulsory Purchase Act 2004 provides that, if s 70 requires regard to be had to the development plan in the determination of a planning application, “the determination must be made in accordance with the plan unless material considerations indicate otherwise.”
31. Certain provisions of the Lee Valley Regional Park Act 1966, the 1966 Act, are relevant. S12 creates the duty of the LVA, among other tasks, to develop, improve, preserve and manage the Park as a place for leisure, recreation and sport and for the provision of nature reserves and for the enjoyment of any kind of entertainment. The LVA may do all such things as it thinks necessary to fulfil that duty.
32. S14 makes special provisions for planning. First, the LVA had to prepare a plan showing proposals for the use and development of the Park, about which it had to consult the local planning authorities in relation to whose areas those proposals relate; this plan is to be kept under review, in a similar fashion. By s14(2)(a):

“The local planning authorities shall from time to time include in their development plans or in any proposals for any alterations ...such part of the [LVA plan] or of any amendment to that plan as relates to their area.”

Copies of this plan and amendments must be sent by the LVA to the local planning authorities and be kept available for public inspection. However, by s14(2)(b), the inclusion of a part of the LVA plan in a local planning authority’s Development Plan:

“shall not be treated as indicating the approval of the local planning authority to such plan...nor shall such inclusion prejudice any representation to the Minister which the local planning authority may think fit to make thereon.”

33. Development control is dealt with in s14 (4). The local planning authority has to notify the LVA of any application which appears to the planning authority as likely to affect any part of the park, and then to consult it. S14(8) contains a special provision which empowers the LVA to require the local planning authority to refer its determination of the application to the Minister, who can require the application to be referred to him, for determination after the LVA has had an opportunity to be heard by an Inspector.

General

34. The approach of the two main parties to the issues was quite different. Mr Jones took issue with many aspects of the officer's report, contending that in a variety of ways, they showed errors of law. However at root, his complaint was that development had been permitted to spread to undeveloped areas of open Green Belt land with no appreciation of the harm which that did according to policy, and with no proper appraisal of the very special circumstances required to overcome such harm. Mr Harwood's over-arching defence was that one should stand back from the detail of the criticisms and, recognising that the committee would have some experience of Green Belt issues, see the bigger picture which the report painted. The report recognised that the development was in breach of Green Belt policy; it analysed the degree of harm, and it set out the very special circumstances which the committee was entitled to conclude clearly outweighed that harm. The site contained large and derelict buildings close to the edge of the open part of the Park; the appearance of this part of the Green Belt and of the Park would be improved by the removal of the dereliction and the new housing, located so as to create a greater area of open space at the boundary to the recreational area of the Park. There would also be a significantly more accessible new entrance to the Park for those in Waltham Cross. The housing itself would be an additional benefit.
35. Nonetheless, in order to deal with the issues it is necessary to look at the detail of the criticism. But I say at the outset, that there are significant problems with the structure and reasoning in the report, and indeed in ascertaining with what point it was dealing at various stages. Mr Harwood's detailed submissions showed rather more awareness of the pitfalls facing this particular proposal in this location than did the report, so his analysis and the report did not always chime. I have not dealt separately with Ms Wigley's submissions on behalf of Britannia Nurseries, save as to discretion, since they essentially echoed Mr Harwood's.

Ground 1: The lawfulness of the approach in the Officer's Report to the Green Belt: (a) the site as previously developed land

36. Mr Jones contended that the report treated the whole site as previously developed land, to which the new approach in the NPPF applied. That was wrong in law since no part of the site was previously developed land: the northern part was simply not previously developed; the southern part was excluded from "previously developed land" because it was land "that is or has been occupied by agricultural or forestry buildings". On that, he made two points. First, although the agricultural use had ceased in the buildings on the southern part, that use had not been replaced by a non-agricultural use; and second, even if it had been, the land would still be land which is or has been occupied by agricultural buildings. Mr Harwood accepted that the northern part was not previously developed land, but denied that the report had treated the northern part, or the site as a whole, as previously developed land. Its approach had been that the southern part was indeed previously developed land, and that that was a factor which contributed to the very special circumstances which could justify a breach of Green Belt policy through permitting inappropriate development on the site as a whole. The definition of previously developed land did not require the whole of any application site to have been previously developed land for the new provision to have some application. Mr Jones' submissions were wrong on both aspects of whether the southern part was excluded from being previously developed land.

37. I take first of all the question of whether the southern part of the site was previously developed land. There was no issue but that the southern part was “previously developed land” subject only to the scope of the exception. I accept Mr Harwood’s analysis of the planning history: the glasshouses had been agricultural buildings but their agricultural use did not just cease; it had been replaced by a non-agricultural use or by a mixed agricultural and non-agricultural use. Although plants were still grown there, a retail component was introduced when the plants, along with florist’s sundries, were sold from the glasshouses. This use was permitted on appeal in 1999; the use had already commenced. So, the agricultural buildings occupying the land were last used for non-agricultural purposes, and now were not used at all. So, the buildings were not last lawfully used for agricultural purposes, but for a mixed use including agricultural and non-agricultural components.
38. But did that mean that they had ceased to be “agricultural buildings” for the purposes of the NPPF? This is an issue of some nicety not addressed specifically in the report. The report must have assumed that the permitted change of use to include a related non-agricultural component meant that they were no longer agricultural buildings. No statutory definition of “agriculture”, or “agricultural” in s55(2)(c) or s336 of the Town and Country Planning Act 1990, or in Schedule 2 Part 6 of the Town and Country Planning (General Permitted Development) Order 1995 SI NO.418 offers any assistance beyond the reference to permitted development rights for agricultural buildings applying only to buildings designed for the purposes of agriculture. They had been designed as horticulture, so they had in part last been used for the purposes of agriculture. The mere cessation of an agricultural use would not cause them to cease being agricultural buildings. An unlawful change of use which would still be enforced against, would not change the use of the building in this context. But I conclude that the implied approach of the report is correct. The words “agricultural building” in the NPPF, as in the legislation, in my view mean a building used for the purposes of agriculture alone and do not include one which was used for the purposes of agriculture alone and do not include one which was used for agricultural purposes but which, lawfully, is now used for another purpose, mixed with agriculture or not. These buildings were in fact no longer used for agricultural purposes alone. A barn now converted to a dwelling was once used for agricultural purposes, it was an agricultural building, but it is now a dwelling house and not an agricultural building.
39. The second aspect of this issue is whether nonetheless, as Mr Jones contended, the previous agricultural use of the buildings meant that the land was still excluded from “previously developed land” as it remains land which “is or has been occupied by agricultural buildings”. The language of the exclusion was quite straightforward. Mr Harwood contended that the exclusion could not apply where the agricultural use of the buildings had ceased and had been replaced by another use, whether a permitted use, or one which had become a lawful use. The position would be even more obvious if the buildings had been demolished and lawfully replaced with other buildings for use for non-agricultural purposes, but which logically on Mr Jones’ submission would still mean that the land “has been occupied” by agricultural buildings.
40. In my judgment, those words must be read in the context of the words defining previously developed land. That is land which “is or was occupied by a permanent structure”. The exception uses the words “is or has been occupied by agricultural buildings”. The policy first looks at the present position and asks what buildings

occupy the site, to which the answer is: buildings lawfully not used for agricultural purposes. The present tense deals with the position as it is. The policy then looks at whether the land “was” or “has been” occupied by permanent structures or certain buildings. The past tense deals with the position where the buildings which once occupied the land no longer do so, having been demolished, or fallen down. Their removal does not in general prevent land being previously developed land, and in the case of agricultural buildings, their removal does not end the exception. The past tense is not used to deal with former agricultural buildings which continue occupy the land but which are no longer agricultural buildings. That is covered by what “agricultural building” means.

41. The problem with Mr Jones’ approach is three fold, although I can see that his interpretation is a possible one. First, it does not seem to me the most natural reading of the language of the policy. The policy would have to cover the position where buildings still occupy on the site, and where they once occupied the site but have since been demolished or have fallen down. That is what the two tenses deal with. The use of the past tense to cover both sites no longer occupied by any buildings, and sites still occupied by buildings but which have changed from a use within the exception to one outside it, rather strains the scope of quite simple language. Second, the policy justification for his suggested interpretation is not strong enough to overcome that reading. The aim of the agricultural building exception is to avoid a necessary exception to normal policies, agricultural buildings in the countryside and the Green Belt, often permitted development not requiring specific planning permission, becoming the vehicle, through this new policy, for allowing built development which would otherwise be inappropriate in the Green Belt, or not normally allowed in the countryside. Were the lawful change of use of an agricultural building to become the vehicle for a new non-agricultural building, the aim of the policy could be to some degree undermined though it would still cover the erection of new non-agricultural buildings. I do not think that that makes a sufficient dent in the rationale for the policy to overcome the simple reading of straightforward language. Third, it would introduce some very odd consequences which I cannot accept are intended. If agricultural buildings had once occupied a site, whether they had changed their use long ago, or had been demolished and replaced with non-agricultural buildings with permission, the site could not be previously developed land. If the whole of the southern site is redeveloped for housing, it would still be within the exception to previously developed land when any further redevelopment took place. Accordingly, I conclude that the southern part of the site was correctly treated as previously developed land.
42. Mr Jones contended next that, even if the southern part as a whole had been previously developed land, the report failed to consider the very material differences between the policies and their effect as applied to the northern and southern parts of the site. Applying the definition of previously developed land, as Mr Harwood said it should be applied, would have required the two parts to be treated separately, because the northern part of the site was not previously developed land, whereas the southern part was. Instead, the report had run the two parts together, and treated the site as a whole.
43. Mr Harwood first submitted that the report had treated the northern part as not previously developed land, for the development of which for housing very special circumstances were required, but had treated the southern part as previously

developed land, for which on its own, no very special circumstances were required for development for housing.

44. I reject Mr Harwood's first submission. At no stage does the report draw any distinction between the northern and southern parts of the site in this context, and certainly not in the context of which parts were previously developed land. That is important in view of the way in which the new flexibility is introduced in the report as offsetting or diminishing the significance of the breach of GBC2. Paragraphs 8.3 and 8.6-8.10 of the report treat the application site as one: it is derelict, redundant, with dilapidated buildings and anti-social behaviour; development of the whole would not affect the Green Belt; the long derelict site would be cleared and replaced with high quality housing. The effect of the reference to the new policy exception for previously developed land in paragraph 8.3, in the context of the reference to the need for very special circumstances, is to treat the policy exception as constituting or as being part of very special circumstances for the whole site, and to avoid the committee grappling with the clear effect of the admitted breach of Green Belt policy over at least the northern part of the site. It was, I note, never suggested that the development of the northern part was necessary to enable clearance and redevelopment of the southern part. I appreciate that the majority of committee members had seen the site, but the report does not draw the distinction which their visit would have suggested, and so would have diminished rather than affirmed any distinction which they ought to have appreciated in the application of policy as between the southern and northern parts.
45. The report, taking the whole site as derelict land needing clearance and improvement by quality housing, treated the site as all previously developed land, and therefore treated the whole development as not now being inappropriate under the new Green Belt policy. Paragraph 8.3 sets out the Local Plan policy which the development breached, but it then referred to the new NPPF policy, introducing flexibility and in part superseding it, with no suggestion that it only applied to part of the site. GBC2 and the NPPF are treated as applying to the site as a whole, the former superseding the latter. That conclusion is not displaced by the subsequent reference to very special circumstances in paragraph 8.5. Although such a reference implies a breach of Green Belt policy, paragraph 8.5 commences "In addition", that is it introduces additional points in favour of the proposal, rather than as factors required to outweigh harm through inappropriateness and specific harm. Indeed Mr Harwood submitted that paragraph 8.5 was merely listing the applicant's arguments, and not setting out the planning officer's appraisal. The officer thereafter makes no comment at all as to what he sees as the very special circumstances. I do not read paragraphs 8.6-8.10 as being his appraisal of very special circumstances, outweighing unidentified harm: the concept is not mentioned in the report after paragraph 8.5. Rather it is a commentary on the applicant's points, regardless of whether they are or are not capable of being very special circumstances. I also point out that the reason for the grant of permission states that there was no breach of GBC2; GBC2 would be breached of course even if very special circumstances were found to outweigh the harm. In reality, for there to have been no breach of GBC2, it had to have been read as now subject to the new policy in the NPPF.
46. Some of the factors in paragraphs 8.6 and 8.7 are distinctly odd as very special circumstances anyway, which is why I do not accept that that is what those paragraphs refer to. On paragraph 8.6, I find it hard to square the fact that most of the site is not previously developed land, with the description of the site as a whole as derelict, in the absence of specific reasoning. Restored land is excluded from the

definition of previously developed land; and its restored state therefore would not usually be a basis for treating development of it for housing as a very special circumstance. No connection was suggested between the removal of dereliction, notably of derelict buildings and hardstanding where it exists on the south, and the extent of housing development on the north, so it is difficult to see why that was treated as a very special circumstance -if it was- justifying development to the north.

47. That is then compounded in paragraphs 8.7 and 8.10. If these are very special circumstances, they all ignore the harm done by reason of the very inappropriateness of this development in the Green Belt. It is also difficult to see how the absence of some more severe harm to the Green Belt could be a very special circumstance permitting harm by reason of inappropriateness, unless perhaps the development must take place in the Green Belt and the question is which is the least harmful location for it, which was not the issue here. The lower quality of an area of Green Belt land does not reduce the harm done by inappropriate development, and though it may or may not affect any particular specific harm, the way in which the lesser quality of the surface area of the Green Belt might reduce harm to openness would require careful explanation. It may also be right that the development would not result in the actual merging of urban areas; were it in fact to do so, that would be a very strong form of harm. But the absence of such a form of severe harm cannot reduce the harm by reason of inappropriateness or the harm actually done to the openness of the Green Belt. The assertion that the urban area would not “extend excessively into the open countryside” or “unacceptably into high quality Green Belt” in reality is an unrecognised but real assertion of harm by inappropriateness, and of specific but not great harm to openness. That cannot be a very special circumstance at all. Those passages merely set out as positive points a degree of the harm, not very special circumstances clearly outweighing it.
48. The next question is whether that absence of distinction matters in law. Mr Harwood’s second submission was that the absence of greater differentiation did not matter. In effect, the committee was told it could be satisfied that there were very special circumstances, needed because the development did not comply with Green Belt policy, and the existence of previously developed and derelict land within the site which would be cleared and improved was one of those very special circumstances.
49. I cannot accept Mr Harwood’s submission as to how the report informed the committee the facts and analysed the issues for it. I have already set out my reading of the report. The committee had to be advised that part only of the site was previously developed land and as to the significance in Green Belt policy terms of that fact. This would be done by treating the site as two parts: the southern part which was for these purposes accepted as previously developed land to which the new flexibility could apply, subject to the issue of openness; and the northern part, the development of which for housing would be a clear breach of GBC2 and of the NPPF, which should be refused in the absence of sufficient very special circumstances. If the site were treated as a whole, how was the committee to approach compliance with Green Belt policy as a whole, when there was a breach on part and not the other? How was it to analyse whether very special circumstances existed, and whether that outweighed the harm done? And how could the gain from developing the southern part, reflected in the very fact that the policy was now more flexible, count towards the very special circumstances on the northern part? I do not know how that could have been done, but it most certainly was not done.

50. Drawing the distinction, by whatever means, would have enabled the proper identification of the relevant harm, notably the impact on openness of the inappropriate development on the northern part, would have required identification of the degree of very special circumstances required, and what the relevant very special circumstances actually were. The northern part was neither previously developed land nor in need of the clearance of dereliction or at least not dereliction remotely of the same order as on the southern part. The removal of dereliction in the southern part, the most important of the very special circumstances, could not have been used to support housing development in the northern part, whether as previously developed land or as very special circumstances, at least not without some very careful reasoning the nature of which I cannot at present envisage, given that it was not said that the development of the north was necessary to achieve removal of dereliction from the south. I have already dealt with some of the other factors which Mr Harwood said were very special circumstances.
51. This is not a case in which the previously developed land is so large a proportion of the whole site as to make the distinction one which could reasonably be ignored. While I accept Mr Harwood's point, that the flexibility in the NPPF for previously developed land may not require every part of the application site to have been previously developed land, the presence of some previously developed land within an application site does not make the whole site previously developed land either, applying the definition in the NPPF. The NPPF itself draws a limit on whether a site is previously developed land by reference to the curtilage of the buildings.
52. I have come to the conclusion that the report and the committee took into account irrelevant considerations in dealing with the whole site either as if previously developed land or as if at least some of the same very special circumstances applied to it as a whole. They ignored important policy based distinctions going to whether there had been a breach of policy, as to the harm done, as to the extent of very special circumstances required, and in their identification. The relevant analysis simply did not happen at all. I would quash the decision on ground 1(a). This failure also affected the approach to openness to which I now come.

Ground 1 (b): the meaning of "openness"

53. This ground, which Mr Jones put first, contended that the report to committee had misinterpreted the concept of 'openness' or reached an irrational conclusion about it in paragraph 8.10. It was legally flawed, whether it was an analysis as to why the exclusion from the exception for previously developed land in the NPPF did not apply, (the proposed development having no greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development), or an analysis of the absence of harm which the proposed development would do to the Green Belt (by reason of its lack of greater impact on openness), or an analysis of very special circumstances. The application of the NPPF policy on previously developed land required an assessment of whether the development of that land had a greater effect on openness than did the existing development on it. It did not contemplate an analysis of the effect of development on that land plus land which was not previously developed land.
54. Paragraph 8.10 had treated the effect of a housing development on both northern and southern parts of the site as having no greater an effect on openness than the existing development, and indeed as having a "significant long term beneficial effects" for

openness. Yet the housing would cover a very much greater area than the existing buildings which lay to the south-east of the southern part of the site, albeit that they were taller, bulkier and closer together than the proposed housing would be. Even if that approach might have been adequate for the southern part, it could not rationally apply to the whole site. Although paragraph 8.4 was not objectionable in itself, it did not suggest that openness would in any way be compromised by the proposal. Visual impact was not to be confused with “openness”, which simply meant an absence of any buildings or development”; *Timmins v Gedling BC* [2014] EWHC 654 (Admin). Nor did the report refer to the fact that inappropriate development was by definition harmful to the Green Belt, in addition to any specific harm which it might do to openness; paragraph 88 of the NPPF.

55. Mr Harwood submitted that members of the committee would have been very familiar with Green Belt policy. They were entitled to take the view as a matter of planning judgment that the housing on the whole site would lead to no greater a reduction in openness than had been created by the large buildings in the southern part which would be removed: spreading the area of built development in return for reducing the height of development was said to be a conventional way of maintaining or improving openness and visual amenity in what was not an open site. Reduced density and greater space between buildings was relevant to the judgment on openness. The housing would also be further away from the recreational area of the Park, beyond the site boundary; the south-east part would become open and the north-east part would remain open. The northern part was also required to provide for the northern vehicular access to the allotments to the north and Park parking. The visual improvement of the site brought about by the removal of the derelict buildings, and its development with high quality housing and landscaping had been taken into account as very special circumstances, not as going to openness.
56. I cannot accept Mr Harwood’s submissions. They presented a rather more sophisticated analysis of how a tenable decision might have been arrived at than the report provided. The report simply did not deal with the extent of built development on the site as a whole and compare it with the proposed development by foot print, whether by reference to the footprint of buildings alone or to the area occupied by man-made development. No such exercise was done, nor was it suggested that the basis of the comparison which should be undertaken. Nor does the report suggest that if the built area of the existing buildings were compared to the footprint of the proposed houses alone and found to be greater, that the effect of an openness of dispersal of the smaller footprint of the housing over a much wider area, with its accompanying enclosed gardens, ancillary buildings, roads, paved areas and so on, could be traded off against the reduction in height.
57. There is support for a comparison of built footprints being relevant to openness and to a trade-off between height reduction and an increase in footprint being permissible in the formula PPG2 on Green Belts in Annex C, “The Future of Major Developed Sites in the Green Belt”. Paragraph C9d0 says that new development should “not occupy a larger area of the site than the existing buildings (unless this would achieve a reduction in height which would benefit visual amenity)”. For these purposes, the footprint was the ground floor area of the existing buildings, excluding for example hard standing. But C6 warned that the “character and dispersal of proposed redevelopment will need to be considered as well as its footprint. For example, many

houses may together have a much smaller footprint than a few huge buildings, but may be unacceptable because their dispersal over a large part of the site and enclosed gardens may have an adverse impact on the character of the Green Belt compared with the current development.”

58. If such an approach is being adopted, and even if the data on heights and areas of spread and footprints could be left to the impressions of a site visit or photographs and to an illustrative layout, the question of how the two sides of the comparison played out in their effects on openness should have been presented as the key question. Some analysis of the key points would have been required, especially in view of the way in which housing development would spread to such a large extent beyond the area of existing built development, and over the bulk of the open northern part. It is obvious that the report and committee had to address how the impact on openness could be no greater, even if no greater on the southern part alone, given that the open northern part would be largely developed for housing.
59. I would accept that the effect of development on openness may involve questions of degree, and that there may be scope for some reduction in height and bulk offsetting some greater extent or spread of built area, and, if so, that how far the offset goes before the impact on openness increases can be a matter of impression. A conclusion on the degree of impact on openness is essential to reliance on the new flexibility for “previous developed land” in the first place, as noted in paragraph 8.3 of the report, and to the analysis of harm. There might be a benefit to openness on the southern part of the site but to treat that as benefiting the whole site would require explanation that that is the approach being adopted and how it could rationally lead to the answers here.
60. The spread of urban housing development over the northern site is such an obvious and extensive increase in the developed area and in the area of openness lost, that I do not see, in the absence of clear analysis and explanation, how the report rationally could have avoided saying that there was a significant loss of openness- most of the currently open northern part was to be developed- and that was a breach of the NPPF as well as of GBC2. The conclusion in paragraph 8.10 was irrational on the information and analysis available to the committee, and might well be irrational however presented.
61. I accept that this planning committee had training and experience in dealing with Green Belt issues, and that can make up for some apparent deficiencies or short cuts in an officer’s report. But these are very significant. This decision also was significantly affected by the role of the new flexibility given to previously developed land, on which proper analysis was required.
62. Accordingly, the grant of permission is quashed on this ground too.

Ground 1 (c): misunderstanding of the need to give “substantial weight” to harm to the Green Belt

63. This concerns the approach in the officer’s report to paragraph 88 of the NPPF, set out above. This required, on Mr Jones’ submission that “substantial weight” be given to the harm done to openness by the extension of development on to the open land in the north of the site. He submitted that the report contained no such advice, and such

harm as was identified was to be given no greater weight than that of any other harm. Nor did it contain any reference to the harmful precedent which this development would set to the advantage of those who left Green Belt sites derelict, albeit after a serious fire, for a few years.

64. Mr Harwood again referred to the experience which the committee would have of Green Belt policy, and submitted that it was not necessary, in order for the decision to be lawful, for the report explicitly to refer to the need to give substantial weight to harm to the Green Belt. It had referred to the harm and to the need for very special circumstances. This case turned on its particular facts, and could not be a precedent for other cases. The site became derelict after a serious fire destroyed half the buildings and the business ceased to trade; it was not just left to go derelict.
65. There is no substance in the precedent point. However, if it is inappropriate development, which is what Mr Harwood contended was indeed the case on the northern part, the harm by reason of inappropriateness needed to be set out, together with any specific harm, and then the very special circumstances needed to be set out, which had to be sufficient clearly to outweigh the harm. The report reads as though it involves a straightforward balancing exercise. I am conscious of the need to avoid creating an error of law out of a failure in the precise repetition of a hallowed or perhaps hackneyed planning phrase. That might not suffice to show that an experienced committee misunderstood its task, if it stood alone. But it reinforces my earlier views about the unlawful way in which the Green Belt issues were approached.

Ground 1(d): the treatment of housing need

66. Mr Jones submitted that the report relied upon housing need as part of the justification for the development, as part of the very special circumstances. That required the committee to be told whether or not there was a shortfall in the five year housing land supply, its extent, and what steps other than granting permission for the use of Green belt land, in advance of a review of its boundaries, could be taken. A shortfall in housing land supply was not normally a very special circumstance, since Green Belt boundaries were marked by their permanence, and Green Belts were only to be built on exceptionally. The NPPF, paragraphs 14, with footnote 9, and 47, required the full and objectively assessed housing needs to be met, but only where that was consistent with NPPF policies, which include Green Belt policy. If there were no shortfall, it would be irrational to treat the reducing surplus over five years as a very special circumstance. The committee ought also to have been asked to reconsider its decision after the written Ministerial statement of June 2013, which made it clear before the grant of permission that the “single issue of unmet housing demand” was unlikely to outweigh Green Belt objections.
67. Mr Harwood contended in his written submissions that the report should not be read as if housing need had been a very special circumstance; but it was another benefit. As I understood his oral argument, he contended that housing need could be a very special circumstance. The very special circumstances here were the quality of design, openness and attractiveness of the redevelopment and its removal of dereliction. Housing was a factor, but only in the context of the committee being told that Green Belt sites would have to be released before the general review of the Green Belt in order to maintain a five year supply of housing land. In September 2012, there had been a 5.24 year’s supply, on a 252 dwellings requirement a year, and the 90

dwelling on this site enabled a supply at 5.4 years to be maintained. The Ministerial statement made no change to policy, and the Committee had not taken unmet housing demand on any view as the sole basis for finding very special circumstances.

68. Mr Harwood is on the stronger ground here. A shortfall in housing land supply can, as a matter of policy, be a very special circumstance, although the occasions when it is likely to suffice by itself to warrant the grant of permission for housing development in the Green Belt are expected to be few and far between. That is in effect what the NPPF and the Ministerial statement say. So there is nothing unlawful in the committee treating it as one of a number of very special circumstances. I do not accept Mr Harwood's submission that the committee considered it as another material consideration rather than as a very special circumstance. But, if so, it does not help the claimant. Once the issue is whether or not inappropriate development should be permitted in the Green Belt, all factors which tell in favour of the grant go to making up very special circumstances, which may or may not suffice. It is not necessary to go through the process of considering whether a factor is not a very special circumstance but nonetheless falls to be taken into account in favour of the development as another relevant material consideration. See *Secretary of State for Communities and Local Government v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386.
69. It is surprising that the committee was not told that there was in fact a five year supply of housing land. It may have known that that was the position anyway. But what is said in paragraph 8.11 does not significantly mislead the committee anyway. It was not said that there was now a shortfall, which is what I would have expected to be said if there had been such a shortfall. The comment in paragraph 8.11 that to maintain the five year supply, "a limited number of sites need to come forward before a more comprehensive review of the green belt takes place through the new Local Plan site" accords with the facts, and 90 dwellings would make a significant contribution to a year's supply. It indicates that the supply position is very tight. This ground of challenge is rejected.

Ground 1(e): attractiveness of development as a very special circumstance

70. This challenge was first to the potential relevance of the attractiveness of the housing development as a very special circumstance and then to the certainty attached to its attainment. The former was at issue because all development was required by the NPPF, paragraphs 57-59, and various other development control policies in the Local Plan to be of good quality. So there could be nothing special about this development being of an especial quality. The latter was at issue because the plans relied on were merely illustrative, and not part of the outline application.
71. I have set out the way in which the design of the housing and its layout would be controlled by condition and s106 agreement to conform to the illustrative layout and to what was said about design. There is nothing in the second point raised by Mr Jones. The first point is more troubling. I accept that there may be features of a design which can amount to very special circumstances. But that has to go beyond satisfaction of the normal quality of design required by development control policies. The housing may be more attractive than the buildings it replaces; it may even be more attractive to some eyes than the open grass and scrubland. But no feature of the design of the houses themselves is identified, beyond that they would be traditional, to suggest that something more than compliance with normal development control

policies, just as would be required on non Green Belt land, is to be attained. So it is difficult to see, absent specific reasoning, how that could constitute a very special circumstance. The layout however may be more spacious, with greater open space, a boulevard, courtyard and new entrance to the recreational area of the Park. If the layout were treated as part of the very special circumstances, I cannot conclude that that would not be lawful. Paragraph 8.8 focuses on those layout points. I reject this aspect of the challenge.

Ground 1(f): ignoring the need for the development to address concerns about dereliction

72. This ground alleges that the committee had to have far more information about the inefficacy of ways of dealing with those problems, other than by inappropriate development in the Green Belt, before it could give weight to the removal of dereliction and anti-social behaviour as a very special circumstance. For example, suggested Mr Jones, the committee should have had information about the extent, nature and cost of removal of the contamination, the possible use of other powers to secure the removal of dilapidated buildings as in ss102 and 215 of the 1990 Act, or the use of CCTV to deter anti-social behaviour. As Mr Harwood pointed out, whatever their merits as suggestions, the LVA had not raised them in its objection to the application for planning permission. The committee were told that there was no prospect of the problems being solved by the LVA, bringing the site into Park recreational use. The application had been accompanied by a preliminary contamination assessment identifying the risks from contamination as “low to moderate”, as reported to the committee. This was not put forward as a very special circumstance, but merely as the answer to what could otherwise have been a separate development control problem for housing use.
73. Mr Harwood provided to my mind compelling arguments why the particular statutory powers to which Mr Jones had referred for dealing with dereliction had not been expressly discussed as answers to the problems which the committee was dealing with, and why CCTV would not be much of a deterrent to anti-social behaviour, because of the screening provided by large buildings on site. There is nothing in this aspect of the challenge.
74. Nonetheless, the LVA has succeeded on many aspects of ground 1 of its challenge, and the decision falls to be quashed.

Ground 2: the Development Plan

75. The statutory question is whether the development was in accord with the development plan. Non-compliance with one policy does not necessarily mean that the proposal is not in accordance with the Development Plan viewed as a whole. Different policies may pull in different directions. But here, the policy which dealt with the principle of the development, GBC2, was not complied with. All the other policies referred to deal with the sort of development control issues which arise whether or not development of the sort proposed is objectionable in principle in the location proposed. There was no policy dealing with the principle of development for housing in this location which pulled in a different direction from GBC2, though other policies may have been relevant to the existence of very special circumstances. Indeed, neither the Green Belt conclusions in paragraph 8.10 nor the overall

conclusions in paragraph 10.1 express any view at all that the development accords with the Development Plan, though I have explained that the report reads as though the development complies with the Plan, read as subject to the NPPF. The report does not approach this important issue by identifying the position in relation to the Development Plan, and then the other material considerations, in effect here the very special circumstances.

76. In reality, non-compliance with GBC2 meant that this development did not accord with the Development Plan. But this does not provide a further ground of challenge; rather it covers the same territory as the legally defective treatment of the Green Belt and very special circumstances, albeit in a different guise.

Ground 3: the Regional Park Plan and the development plan

77. Mr Jones submitted that the Park Plan had been incorporated into the Development Plan by virtue of s14 (2)(a) of the 1996 Act. This is a rather different point. He sought a mandatory order compelling the Council to adopt the Plan as part of the Development Plan. His initial submissions treated this point as a glimpse of the obvious.
78. Mr Harwood submitted that the issue of how the Park Plan related to the Development Plan was beyond the scope of these proceedings. The simple fact was that the statutory provisions for development plans had changed on a number of occasions since the 1962 Act, it was not easy to see how the 1966 Act could fit the development plan regime, or how it could have done so back in 2005. The Park Plan had not in fact been incorporated into the Plan adopted in 2005. Besides, the 1966 Act did not require the Park Plan to be incorporated in the adopted Plan; it provided a vehicle for including the Park Plan in the Local Plan as submitted to the Minister for approval, where it might or might not survive scrutiny. The committee had also considered the relevant Park Plan policies.
79. I was concerned that the Park Plan had been adopted in 2000, the Development Plan in 2005, and yet it was only now that the issue was raised, although it must have been abundantly clear that the Development Plan had not incorporated the Park Plan, if that was what was required. I could not readily see how s14 (2) could fit readily with the various plan-making regimes which have succeeded that in the 1962 Act, with differing roles for the involvement of the Ministers or his Inspectors. I asked for short further submissions.
80. Whether properly raised in the grounds or not, and I am inclined to agree with Mr Harwood, I do not consider that I can resolve the issue of how the Park Plan relates to, nor how it should be dealt with during the course of preparation of, current Development Plan documents on the basis of the submissions which I have received. It is a very difficult topic, and not one to be handled without notice to other affected authorities, or on the basis of the short and not fully considered submissions I received.
81. The only question which arises here is whether or not the Park Plan is part of the Development Plan. It is not: it has not been incorporated in it, and s14 (2) of the 1966 Act does not make incorporation in the adopted plan automatic. Nor is this a mere

failure in formality, since the 1966 Act contemplates that the merits of the policies would be considered before incorporation.

82. If there were a procedural failing before 2005 in the preparation of the Development Plan, it is too late now for issue to be taken with it. It seems to me that Mr Jones has to contend either that the Development Plan is invalid because it omitted the Park Plan at the preparation stage, or that there was a procedural failing at that stage. He denied that this was questioning the validity of the Plan, such that it fell foul of the ouster provision in s284 of the 1990 Act, or that he was contending that it fell outside the powers of Part II of the 1990 Act, or that any requirement of that Part or of any regulations made under it had not been complied with; s287. He may be right, but if so, he is still many years out of time for questioning its validity by a form of judicial review, and to the extent necessary I refuse to extend time for such a challenge.
83. Mr Jones sought to avoid that by saying that he raised no challenge to the validity of the Development Plan at all, all he was submitting was that the Park Plan was entitled to be given the same weight as the Development Plan, even if s38 (6) of the 2004 Act did not strictly apply to it, as it could not do. This is ingenious, but not correct. S38(6) applies only to the development plan, giving it a unique statutory role. To require, on pain of error of law, that the Council or any other decision-maker, treat the Park Plan as part of the Development Plan when in fact it is not, would be to achieve by the back door an illicit result, shut out by the front door. It would not be consistent with s38(6). Yet the only justification for this argument is that the Park Plan ought to have been part of the Development Plan as a matter of law. The Park Plan in law now can only be another source of planning policy to which regard is to be had, as it was in this case. Moreover, Mr Jones' submission would achieve more than the 1966 Act necessarily requires, since it is impossible to tell how the Park Plan would have fared if subjected to whatever statutory process is to be read as the replacement for the 1962 Act. In 1962, it would not necessarily have survived, as now written, into the Development Plan. There is no reason to treat it as having undergone such a test when it has not, and the LVA did not require it to do so through a legal challenge at the time when it says that the Council failed to do what it should have done. I reject this ground of challenge.
84. Mr Jones' alternative submission was that policy CLT4 of the adopted Development Plan should be interpreted as the incorporation of the Park Plan into the Development Plan. I disagree: if a policy is to have such a significant effect, it would have said so. It does not. It simply means what it says.

Conclusion

85. For the reasons which I have given this decision is unlawful, and save for any issue of discretion should be quashed. Ms Wigley contended that the LVA had failed to follow the pre-action protocol, and in consequence her clients had expended tens of thousands of pounds on necessary pre-development work which would be wasted; and so the decision should not be quashed. That is untenable. If there were such a failure, nonetheless the proceedings were commenced without delay. The expenditure was undertaken at a time when it was at the risk of Britannia Nurseries. The public interest in lawful planning decisions, and especially so of this scale, prevents that early expenditure of money being a sound basis for the exercise of a discretion not to quash the decision. Besides, if the decision is quashed, the planning application remains

undetermined. There may be very special circumstances, but they have to be addressed properly, even if they apply only to enable part of the site to be developed. But it does not mean that all or perhaps any of the expenditure will have been wasted. The decision is quashed.

From: WEA Planning wea@weaplanning.co.uk
Subject: Fwd: 2688/APP/2016/4029: Land to the south of Cherry Yard, Holloway Farm
Date: 28 December 2016 at 09:59
To: ntamplin@hillingdon.gov.uk
Cc: Planning . planning@hillingdon.gov.uk, Peter Brogden Peter.Brogden@transdevplc.co.uk, Oliver Thompson Oliver.Thompson@PJSA.uk.com



Dear Ms Tamplin,

Please can you update me on the progress of this application? We have not had any correspondence so it can be assumed you have all the relevant information to make an informed decision including any amendments to the proposed plans and time-limit condition.

We did send some revised forms and plans in November but these don't appear on the application portal.

Regards,

William Avery MRTPI

Begin forwarded message:

From: WEA Planning <wea@weaplanning.co.uk>
Subject: 2688/APP/2016/4029: Land to the south of Cherry Yard, Holloway Farm
Date: 28 November 2016 at 17:47:13 GMT
To: "Planning ." <planning@hillingdon.gov.uk>
Cc: Peter Brogden <Peter.Brogden@transdevplc.co.uk>, Oliver Thompson <Oliver.Thompson@PJSA.uk.com>

Dear Sir/Madam,

Further to the receipt of the acknowledgement letter for the above, we have been notified by the landlord that the description of development is inaccurate and I hereby request a formal change. The following documents reflect this change:

Revised application form;
revised pre-existing site plan; and
revised planning statement incorporating details of land degradation.

The revised description of development should read:

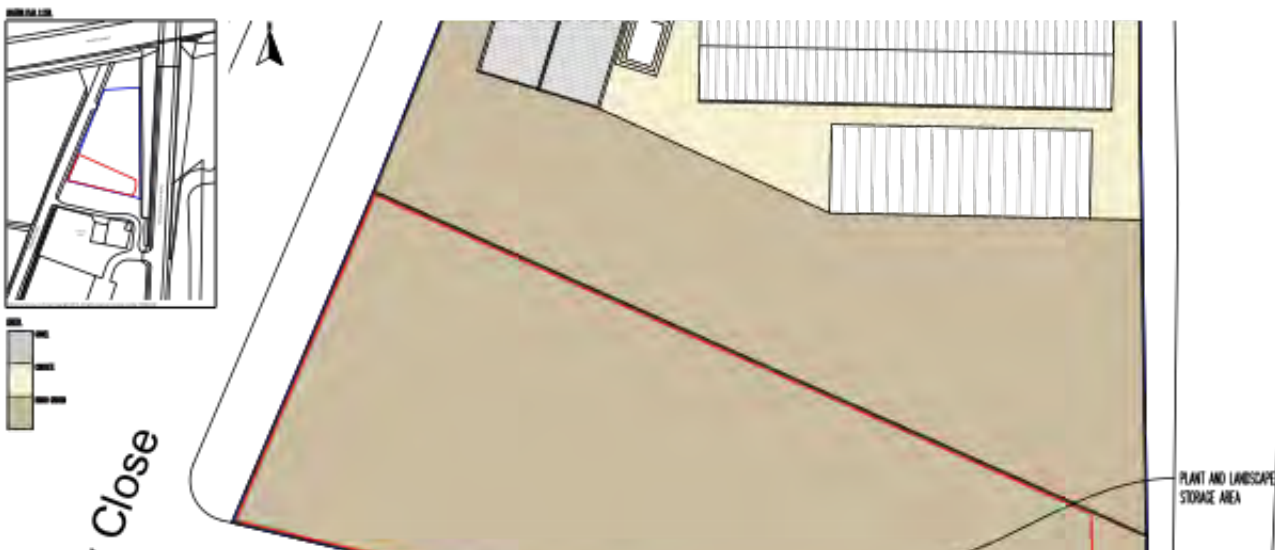
"Change of use of land for plant storage and landscaping materials to a temporary staff car park for CCH Ltd. The use of the land will be limited to a temporary 5 year time period."

There is no recent history of commercial plant growing in this location.

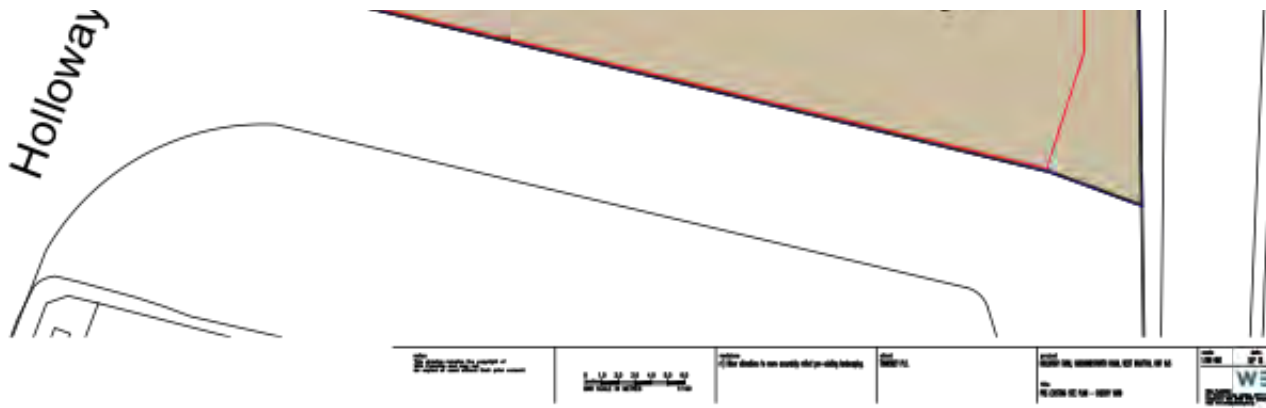
We trust you will make the appropriate changes and re-consult should you deem appropriate.

Regards,

William



Holloway



plformv2.pdf



temporary staff
car par....16.pdf

William Avery MRTPI
Director
WEA Planning
98 Victoria Road
London
NW10 6NB

Tel: 020 3488 0127
Mob: 078 1767 1750
email: wea@weaplanning.co.uk
www.weaplanning.co.uk

Company Number: 08648537
VAT Number: GB 169 6455 61
Company registered at: 6a St Andrews Court, Wellington Street, Thame, Oxfordshire, OX9 3WT.

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Company Number: 000 1000

VAT Number: GB 169 6455 61

Company registered at: 6a St Andrews Court, Wellington Street, Thame, Oxfordshire, OX9 3WT.

From: WEA Planning wea@weaplanning.co.uk
Subject: 2688/APP/2016/4029: Land to the south of Cherry Yard, Holloway Farm
Date: 28 November 2016 at 17:48
To: Planning . planning@hillingdon.gov.uk
Cc: Peter Brogden Peter.Brogden@transdevplc.co.uk, Oliver Thompson Oliver.Thompson@PJSA.uk.com



Dear Sir/Madam,

Further to the receipt of the acknowledgement letter for the above, we have been notified by the landlord that the description of development is inaccurate and I hereby request a formal change. The following documents reflect this change:

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There is no recent history of commercial plant growing in this location.

We trust you will make the appropriate changes and re-consult should you deem appropriate.

Regards,

William



nlformv2.pdf

promiv2.pdf



temporary staff
car par....16.pdf

William Avery MRTPI
Director
WEA Planning
98 Victoria Road
London
NW10 6NB

Tel: 020 3488 0127
Mob: 078 1767 1750
email: wea@weaplanning.co.uk
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Company registered at: 6a St Andrews Court, Wellington Street, Thame, Oxfordshire, OX9 3WT.

Appendix 8

Proposed Conditions:

The appellant would accept either of the following:

1. "The use hereby permitted shall be limited only to vehicles registered at the Driver and Vehicle Licensing Agency to COMET CAR HIRE (CCH) LIMITED (Company Registration Number 06667754), Holloway Farm, Harmondsworth Road, West Drayton, Middlesex, UB7 9JS (shown edged blue on the location plan) and no other operator."
2. "The use hereby permitted shall be limited only to vehicles registered at the Driver and Vehicle Licensing Agency to a registered keeper whose address is the land shown edged blue on the location plan"

SITE LOCATION PLAN
AREA 2 HA
SCALE 1:1250 on A4
CENTRE COORDINATES: 506313, 178251



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13/10/2017 10:42