

Ms Jennie Townsend
Senior Planning Officer
Development Management
Bury Metropolitan Borough Council
Town Hall
Knowsley Street
Bury
Lancashire
BL9 0SW

20 June 2023
EP ref: 21-694

Dear Ms Townsend

Re: Planning application - Ainsworth Hall Farm, Ainsworth Hall Road, Ainsworth, Bolton – Erection of a new dwelling (part-constructed) with associated works

We are instructed by our clients, Mr & Mrs Vause, to progress a full planning application for the erection of a single dwelling house with associated works at Ainsworth Hall Farm, Ainsworth Hall Road, Ainsworth.

This new planning application follows on from planning application 68880, which was withdrawn following discussions with the local planning authority on procedural points. Our client remains keen to work with the local planning authority to agree a solution for the site that satisfies all parties.

The site and surrounding area

The wider Ainsworth Hall estate is summarised below:

- The remnants of the former Ainsworth Hall and its gardens. The large manor house was demolished at some point in the past.
- Former workers cottages that were located to the north-eastern part of the application site.
- Ainsworth Hall Farmhouse, which has been extended and altered in the past, and this is where Mr & Mrs Vause live.
- A complex of former agricultural buildings to the southern part of the application site.
- Access to the site is via Ainsworth Hall Road.
- There are a number of trees on the site protected by way of Tree Preservation Order (TPO).

The Ainsworth Hall Farm complex can be seen on the following historic map with the footprint of the former workers cottages clearly visible to the north-eastern corner of the site:



We enclose a photograph at Appendix **EP1** of this letter and this shows the former workers cottages in-situ. The external walls of the original cottages have been retained in the new build and this is evident on-site, and you saw that this was the case during your site inspection on 7 February 2023.

The proposed development

The works subject to this planning application are for the completion of a part-built single dwelling house on the same footprint as former workers cottages to the north-eastern part of the site. The house would be finished in facing natural stone with stonework to the window mullions and surrounds and the roof would be finished in natural slate.

Planning policy context

The development plan comprises the saved policies of the Bury Unitary Development Plan (UDP), which was adopted by the Council in 1997. The Proposals Map shows that the site is within the designated Green Belt and a Special Landscape Area. Saved Policies directly relevant to The Site include the following:

- EN9/1 – Special Landscape Areas.
- OL1/2 – New Buildings in the Green Belt.

Saved Policy OL1/2 does not fully reflect paragraphs 149 and 150 of the National Planning Policy Framework (the Framework) and the Framework takes precedence in such circumstances. The Bury New Buildings and Associated Development in the Green Belt Supplementary Planning Document (SPD) is also relevant.

Planning considerations

Green Belt policy

Annexe 2 of the Framework provides a definition of 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 was last occupied by agricultural or

forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill, where provision for restoration has been made through development management procedures; land in built-up areas such as 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.”

The application site has been occupied by the original workers cottages that formed part of the Ainsworth Hall estate. They were occupied for residential purposes rather than for agricultural or forestry purposes. The site comprises previously developed land for the purposes of paragraph 149(g) of the Framework, which is permissive of the following in Green Belt planning policy terms:

“limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt than the existing development.”

The key consideration is whether the proposed development would have a greater impact on openness.

The Planning Policy Practice Guidance (PPG) at paragraph 64-001 advises what factors should be considered when assessing openness. It reflects law such as the recent Samuel Smith Old Brewery Supreme Court Judgment (2020) (see Appendix **EP2**) whereby it is established that visual impacts should be taken into consideration alongside spatial impacts when assessing openness. There is no definition set out through policy or law as to what openness should comprise, and there is no standard methodology as to assessing impact. It may sometimes be the case that volumetric calculations are the most, or only, relevant considerations whereas it may in other cases be more relevant to consider visual prominence or a combination of both.

The decision-maker must consider whether there is ‘harm’ (not merely change) to the openness of the Green Belt further to the Euro Garages Judgment (see Appendix **EP3**). In this case, the Judge found that the Inspector had appeared to approach the appeal decision on the basis that any change had a greater impact on the openness of the Green Belt (i.e. a quantitative increase in built form equates to a greater impact), rather than considering the actual impact or harm brought by that change including an assessment of visual or perceived impacts. It is not simply a matter of whether there has been a quantitative increase in built form. The decision-maker must be able to demonstrate tangible ‘harm’ rather than merely ‘change’ to substantiate the proposition that there would be a greater impact on openness.

The benchmark in terms of assessing openness is the structure of the former workers cottages and the surrounding context. The site is located within the original Ainsworth Hall Estate and it is within a complex of buildings that includes Ainsworth Hall Farmhouse and a complex of former agricultural buildings to the south. This is not an open and rural context and the site already has a domestic and developed character:

1. The remains of the former workers cottages are still in-situ and the proposed development is on the same footprint. The proposed development retains the external walls of the former cottages as noted during our site visit with the LPA on 7 February 2023.
2. The Ainsworth Hall complex is very well-screened by existing mature trees and woodland.
3. The scheme would be seen within the context of the urbanising features of the Ainsworth Hall Farmhouse and the remains of the former Ainsworth Hall. The original garden and domestic features of the hall are still evident e.g. the stone walling and gate pillars to the site entrance.
4. There have been cottages in-situ on the same footprint as the proposed house for over 100 years and there is no change in terms of the historic character of the site.
5. The proposed house would be finished in high-quality external materials that are evident on-site (e.g. natural facing stone, walls and slate roof and stone surrounds to the windows) and it would integrate sensitively to the surrounding buildings.

The proposed house would have an external volume of 820m³ and a footprint of 115sqm¹. The footprint is the same as for the former cottages. As per your site visit on 7 February 2023, there are already external walls in-situ from the former cottages and the proposed scheme incorporates these walls into the final build and is essentially for a new roof only.

There would be no 'harm', or greater impact, in relation to the openness of the Green Belt as a result of the proposed development. The scheme does not comprise inappropriate development for the purposes of paragraph 149(g) of the Framework, and there is a presumption in favour of the grant of planning permission in Green Belt planning policy terms.

Very special circumstances

If the LPA conclude that there is a 'harm' in relation to the openness of the Green Belt and notwithstanding our case set out above, we assess below whether there are the 'very special circumstances' to justify the grant of planning permission. The proper way to assessing Green Belt policy and whether there are 'very special circumstances' is summarised below:

1. Substantial weight is afforded to the harm caused by inappropriate development.
2. This harm, together with any other identified harm (e.g. highways or residential amenity), should be weighed in the planning balance.
3. If the sum of the harm identified above is outweighed by 'other considerations' then very special circumstances exist and planning permission is justified in Green Belt planning policy terms.
4. The 'other considerations' referred to above need not be 'very special' in themselves. The scheme need not be 'very special' for planning permission to be justified².
5. The accumulated weight attributed to different factors is capable of outweighing the harm identified through step nos. 1 and 2 above. The test is whether the harm caused is clearly outweighed by other factors.

In terms of no. 2 above, the proposed development would not result in any harm in relation to matters such as highways, design, ecology and drainage. The site is already residential and there is no conflict with the main purposes of including land within the Green Belt for the purposes of paragraph 138 of the Framework.. If the LPA has identified any greater impact in terms of openness, then this can only reasonably be considered to be a limited impact rather than something towards the significant end of the spectrum. There would be no 'other harm' as a result of the proposed development

In terms of nos. 3, 4 and 5 above, ordinary factors in themselves may combine to create something that collectively clearly outweighs the identified harm i.e. very special circumstances. The Judgment in *Brentwood BC v. SoS for the Environment and Gray* 1995 makes this clear:

"the factors which, when together, may clearly outweigh harm so as to generate very special circumstances, are not circumscribed by policy, and a series of "ordinary" factors are capable of generating that outcome."

We summarise below the factors that weigh in favour of the grant of planning permission. The accumulated weight of these benefits combine to far outweigh any alleged harm:

1. The Heritage Statement prepared by Townscape Heritage Consultants concludes that the proposed scheme would result in net benefits in terms of the setting of Ainsworth Hall Farmhouse as a non-designated heritage asset. The reinstatement of a cottage in this location is spatially and historically

¹ Figures provided by Good & Tillotson Architects.

² R (Basildon DC) vs. First Secretary of State (20040 WEHC 2759 (Admin)).

correct and the high-quality materials provides an enhancement to the site. This weighs heavily in favour of the grant of planning permission.

2. The alternative scenario would be for the external walls of the original cottages to remain in-situ (the Council cannot require the removal of this structure as it is pre-existing). This would result in an undesirable and unsightly outcome that would undermine the character and appearance of the area.
3. There would remain an impact on the openness of the Green Belt in the alternative scenario of the external walls of the original cottages remaining in-situ.
4. The proposed scheme presents the opportunity to secure ecology benefits and a management plan for the future beneficial management of the existing trees and woodland.
5. There would be no obligations on the landowner to manage the land in any beneficial way if planning permission is not forthcoming for the proposed scheme.
6. The refusal of planning permission would lead to adverse consequence in terms of the historic setting of Ainsworth Hall Farmhouse for the reasons outlined by Townscape Heritage Consultants.

The proposed development is fully compliant with the provisions of the development plan in either scenario of the scheme being considered to be inappropriate development or not inappropriate development within the Green Belt.

We trust that this clarifies our client's position. Should you wish to discuss this any further then please do not hesitate to contact us.

Yours sincerely,
Emery Planning

Gareth Salthouse

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Enc:

EP1 – Photograph of workers cottages in-situ.

EP2 – E (on the application of Samuel Smith Old Brewery (Tadcaster) and others) vs. North Yorkshire CC (2020).

EP3 – Euro Garages Ltd vs. Secretary of State for Communities and Local Government and Cheshire West and Chester Council (2018).

EP1



EP2



Hilary Term
[2020] UKSC 3

On appeal from: [2018] EWCA Civ 489

JUDGMENT

**R (on the application of Samuel Smith Old Brewery
(Tadcaster) and others) (Respondents) v North
Yorkshire County Council (Appellant)**

before

**Lady Hale
Lord Carnwath
Lord Hodge
Lord Kitchen
Lord Sales**

JUDGMENT GIVEN ON

5 February 2020

Heard on 3 December 2019

Appellant
Daniel Kolinsky QC
Hannah Gibbs

(Instructed by North
Yorkshire County Council
Legal Services)

Respondents (1 and 2)
Peter Village QC
James Strachan QC
Ned Helme
Ruth Keating
(Instructed by Pinsent
Masons LLP (Leeds))

Respondent (3)
Alison Ogley
(Instructed by Walker
Morris LLP)

Respondents:-

- (1) Samuel Smith Old Brewery (Tadcaster)
- (2) Oxton Farm
- (3) Darrington Quarries Ltd

LORD CARNWATH: (with whom Lady Hale, Lord Hodge, Lord Kitchin and Lord Sales agree)

Introduction

1. The short point in this appeal is whether the appellant county council, as local planning authority, correctly understood the meaning of the word “openness” in the national planning policies applying to mineral working in the Green Belt, as expressed in the National Planning Policy Framework (“NPPF”). The Court of Appeal ([2018] EWCA Civ 489), disagreeing with Hickinbottom J ([2017] EWHC 442 (Admin)) in the High Court, held that, in granting planning permission for the extension of a quarry, the council had been misled by defective advice given by their planning officer. In the words of Lindblom LJ, giving the leading judgment:

“It was defective, at least, in failing to make clear to the members that, under government planning policy for mineral extraction in the Green Belt in para 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor in their approach to the effect of the development on the ‘openness of the Green Belt’, ...” (para 49, per Lindblom LJ)

He thought that, having regard to the officer’s own assessment, it was “quite obviously relevant”, and therefore a necessary part of the assessment. The court quashed the permission.

2. In this court, the council, supported by the quarry operator (the third respondent), argues that the Court of Appeal’s reasoning was based on misunderstandings both of the relevant policies and of the officer’s report, and that the permission should be reinstated. The first and second respondents (collectively referred to as “Samuel Smith”) seek to uphold the decision and reasoning of the Court of Appeal.

Green Belt policy

History and aims

3. Although we are directly concerned with the policies in the NPPF (in its original 2012 version), Green Belt policies have a very long history. It can be traced back to the first national guidance on Green Belts in Circular 42/55 (issued in August 1955). More recently Planning Policy Guidance 2: Green Belts (published in 1995 and amended in 2001) (“PPG2”) confirmed the role of Green Belts as “an essential element of planning policy for more than four decades”; and noted that the purposes of Green Belt policies and the related development control policies set out in 1955 “remain valid today with remarkably little alteration” (para 1.1). The NPPF itself, as appears from ministerial statements at the time, was designed to consolidate and simplify policy as expressed in a number of ministerial statements and guidance notes, rather than to effect major policy changes (see *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] PTSR 274, paras 16ff, 22 per Sullivan LJ).

4. In the NPPF the concept of “openness” first appears in the introduction to section 9 (“Protecting Green Belt land”) which gives a statement of the fundamental aim and the purposes of Green Belt policy:

“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.”

5. This statement of the “fundamental aim” of the policy and the “five purposes” is unchanged from PPG2. The PPG included a fuller statement of certain “objectives” for the use of land within defined Green Belts, including (for example) providing opportunities for access to open countryside, and retaining and enhancing attractive landscapes (para 1.6), but adding:

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

It is clear therefore that the visual quality of the landscape is not in itself an essential part of the “openness” for which the Green Belt is protected.

Control of development in Green Belts

6. Key features of development control in Green Belts are the concepts of “appropriate” and “inappropriate” development, and the need in the latter case to show “very special circumstances” to justify the grant of planning permission. In *R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404; [2016] Env LR 30 (“the *Lee Valley* case”), Lindblom LJ explained their relationship:

“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 paras 89 and 90. ... The distinction between

development that is ‘inappropriate’ in the Green Belt and development that is not ‘inappropriate’ (ie 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 paras 89 and 90 of the NPPF is not. ...”

7. These concepts are expressly preserved in the policies for the control of development set out in paras 87ff of the NPPF:

“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.

... ‘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.” (paras 87-88)

8. Paragraph 89 indicates that construction of new buildings is to be regarded as “inappropriate” with certain defined exceptions. The exceptions include, for example, “buildings for agriculture and forestry”, and (relevant to authorities discussed later in this judgment):

“- 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;

- 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.”

9. Paragraph 90, which defines forms of development regarded as “not inappropriate” is directly in issue in the present case:

“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.” (Emphasis added. I shall refer to the words so emphasised as “the openness proviso”)

10. Paragraphs 89-90 replace a rather fuller statement of policy for “Control of Development” in section 3 of PPG2. Paragraphs 3.4-3.6 (“New buildings”), and paras 3.7-3.12 (“Re-use of buildings”, and, under a separate heading, “Mining operations, and other development”) cover substantially the same ground, respectively, as NPPF paras 89 and 90, but in rather fuller terms. The policy for “Mining operations, and other development” was as follows:

“3.11 Minerals can be worked only where they are found. Their extraction is a temporary activity. Mineral extraction *need not be inappropriate development: it need not conflict with the purposes of including land in Green Belts, provided that high environmental standards are maintained and that the site is well restored*. Mineral and local planning authorities should include appropriate policies in their development plans. Mineral planning authorities should ensure that planning conditions for mineral working sites within Green Belts achieve suitable environmental standards and restoration ...

3.12 The statutory definition of development includes engineering and other operations, and the making of any

material change in the use of land. The carrying out of such operations and the making of material changes in the use of land are inappropriate development *unless they maintain openness and do not conflict with the purposes of including land in the Green Belt ...*” (Emphasis added)

11. It will be noted that a possible textual issue arises from the way in which the PPG2 policies have been shortened and recast in the NPPF. In the PPG the openness proviso is in terms directed to forms of development other than mineral extraction (it also appears in the section on re-use of buildings: para 3.8). By contrast, mineral extraction is not expressly subject to the proviso, but may be regarded as not inappropriate, subject only to “high environmental standards” and the quality of restoration. In the shortened version in the NPPF these categories of potentially appropriate development have been recast in para 90, and brought together under the same proviso, including the requirement to preserve openness.

12. I do not read this as intended to mark a significant change of approach. If that had been intended, one would have expected it to have been signalled more clearly. To my mind the change is explicable as no more than a convenient means of shortening and simplifying the policies without material change. It may also have been thought that, whereas mineral extraction in itself would not normally conflict with the openness proviso, associated building or other development might raise greater problems. A possible example may be seen in the *Europa Oil* case discussed below (para 26).

Other relevant policies

13. *Mineral policies* A later part of the NPPF (section 13, headed “Facilitating the sustainable use of minerals”) deals with mineral development generally. It emphasises the importance of ensuring a sufficient supply of minerals to support economic growth (para 142); and gives advice on the inclusion of mineral policies in local plans (para 143), and on the determination of planning applications (para 144). The latter includes (inter alia) a requirement to ensure that there are “no unacceptable adverse impacts on the natural and historic environment ...”, and that provision is made for “restoration and aftercare at the earliest opportunity to be carried out to high environmental standards ...”. No issue arises under these policies in the present case, but they show that development which is “appropriate” in Green Belt may be found unacceptable by reference to other policy constraints.

14. *Local plan policies* The proposal was also subject to Green Belt and other policies in the local plan (the Selby District Core Strategy Local Plan). These are

summarised by Lindblom LJ (para 9). It is not suggested by either party that these materially affect the legal issues arising in the present appeal.

The application and the officer's report

15. The application was for an extension to the operational face of Jackdaw Crag Quarry, a magnesian limestone quarry owned and operated by the third respondent, Darrington Quarries Ltd. The quarry, which extends to about 25 hectares, is in the Green Belt, about 1.5 kilometres to the south-west of Tadcaster. It has been operated by Darrington Quarries for many years, planning permission for the extraction of limestone having first been granted in July 1948 and subsequently renewed. The proposed extension is for an area of about six hectares, expected to yield some two million tonnes of crushed rock over a period of seven years.

16. The application had received planning permission in January 2013, but that permission was quashed because of failings in the environmental impact assessment. The application came back to the county council's Planning and Regulatory Functions Committee on 9 February 2016, when the committee accepted their officer's recommendation that planning permission be granted. Following completion of a section 106 agreement planning permission was granted on 22 September 2016.

17. The officer's report, prepared by Vicky Perkin for the Corporate Director, Business and Environmental Services, was an impressively comprehensive and detailed document, running to more than 100 pages, and dealing with a wide range of planning considerations. Under the heading "Landscape impact", the report summarised the views of the council's Principal Landscape Architect, who had not objected in principle to the proposal, but had drawn attention to the potential landscape impacts and the consequent need to ensure that mitigation measures are maximised (paras 4.118, 7.42-5).

18. For present purposes the critical part of the report comes under the heading "Impacts of the Green Belt" (paras 7.117ff). Having summarised the relevant national and local policies, she referred (para 7.120) to the consultation response from Samuel Smith stating that:

"... the application site falling within the Green Belt is critical in the determination of the proposal and added that 'mineral extraction remains inappropriate development in the Green Belt unless it can be demonstrated that the proposal both preserves the openness of the Green Belt and doesn't conflict

with the purposes of including land within the Green Belt'. The objector also stated that one of the aims of the Green Belt, in 'assisting in urban regeneration will be materially harmed by the development' ..." (her italics)

19. The officer commented:

"7.121 When considering applications within the Green Belt, in accordance with the NPPF, it is necessary to consider whether the proposed development will firstly preserve the openness of the Green Belt and secondly ensure that it does not conflict with the purposes of including land within the Green Belt.

7.122 It is considered that the proposed development preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Openness is not defined, but it is commonly taken to be the absence of built development. Although the proposed development would be on existing agricultural land, it is considered that because the application site immediately abuts the existing operational quarry, it would not introduce development into this area of a scale considered to conflict with the aims of preserving the openness of the Green Belt.

7.123 In terms of whether the proposed development does not conflict with the purposes of including land within the Green Belt, the proposed quarrying operations are not considered to conflict with the purposes of including land within the Green Belt. Equally, it is not considered that the proposed development would undermine the objective of safeguarding the countryside from encroachment as it should be considered that the site is in conjunction with an operational quarry which will be restored. The proposed development is a temporary use of land and would also be restored upon completion of the mining operations through an agreed [restoration plan].

7.124 The purposes of including land within the Green Belt to prevent the merging of neighbouring towns and impacts upon historic towns are not relevant to this site as it is considered the site is adequately detached from the settlements of Stutton,

Towton and Tadcaster. It is also important to note that the A64 road to the north severs the application site from Tadcaster.

7.125 As mentioned in the response from [Samuel Smith], one of the purposes of the Green Belt is assisting in urban regeneration which the objector claims will be undermined by the proposed development. Given the situation of the application site, adjacent to an existing operational quarry and its rural nature, and the fact that minerals can only be worked where they are found, it is considered that the site would not, therefore, undermine this aim of the Green Belt.

7.126 The restoration scheme is to be designed and submitted as part of a section 106 Agreement, it is considered that there are appropriate controls to ensure adequate restoration of the site. Due to the proposed restoration of the temporary quarry and the fact that it is considered the proposal doesn't conflict with the aims of the Green Belt, it is considered that the proposed development would not materially harm the character and openness of the Green Belt, and would, therefore, comply with Policy SP3 and SP13 of the Selby District Core Strategy Local Plan and NPPF."

20. Section 8 of the report gives the planning officer's conclusion:

"8.4 It is considered that the proposed screening could protect the environment and residential receptors from potential landscape and visual impacts.

8.5 Due to the proposed restoration of the temporary quarry and the fact that it is considered the proposal doesn't conflict with the aims of the Green Belt, it is considered that the proposed development would not materially harm the character and openness of the Green Belt."

Legal principles

21. Much time was taken up in the judgments below, as in the submissions in this court, on discussion of previous court authorities on the relevance of visual impact under Green Belt policy. The respective roles of the planning authorities and the courts have been fully explored in two recent cases in this court: *Tesco Stores Ltd v*

Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, and *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 WLR 1865. In the former Lord Reed, while affirming that interpretation of a development plan, as of any other legal document, is ultimately a matter for the court, also made clear the limitations of this process:

“Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse ...” (para 19)

In the *Hopkins Homes* case (paras 23-34) I warned against the danger of “over-legalisation” of the planning process. I noted the relatively specific language of the policy under consideration in the *Tesco* case, contrasting that with policies:

“expressed in much broader terms [which] may not require, nor lend themselves to, the same level of legal analysis ...”

22. The concept of “openness” in para 90 of the NPPF seems to me a good example of such a broad policy concept. It is naturally read as referring back to the underlying aim of Green Belt policy, stated at the beginning of this section: “to prevent urban sprawl by keeping land permanently open ...”. Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt. As PPG2 made clear, it is not necessarily a statement about the visual qualities of the land, though in some cases this may be an aspect of the planning judgement involved in applying this broad policy concept. Nor does it imply freedom from any form of development. Paragraph 90 shows that some forms of development, including mineral extraction, may in principle be appropriate, and compatible with the concept of openness. A large quarry may not be visually attractive while it lasts, but the minerals can only be extracted where they are found, and the impact is temporary and subject to restoration. Further, as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land.

23. It seems surprising in retrospect that the relationship between openness and visual impact has sparked such legal controversy. Most of the authorities to which we were referred were concerned with the scope of the exceptions for buildings in para 89 (or its predecessor). In that context it was held, unremarkably, that a building which was otherwise inappropriate in Green Belt terms was not made appropriate by its limited visual impact (see *R (Heath and Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin), upheld at *R (Heath and Hampstead Society) v Vlachos* [2008] EWCA Civ 193; [2008] 3 All ER 80). As Sullivan J said in the High Court:

“The loss of openness (ie unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness ...” (para 22)

To similar effect, in the *Lee Valley* case, Lindblom LJ said:

“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.” (para 7, cited by him in his present judgment at para 19)

24. Unfortunately, in *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin) (a case about another familiar Green Belt category - cemeteries and associated buildings), Green J went a stage further holding, not only that there was “a clear conceptual distinction between openness and visual impact”, but that it was:

“wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact.” (para 78, emphasis in original)

25. This was disapproved (rightly in my view) in *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466; [2017] 2 P & CR 1, para 18. This concerned an inspector’s decision refusing permission for a proposal to replace a mobile home and storage yard with a residential bungalow in the Green Belt. In rejecting the contention that it was within the exception for redevelopment which “would not have a greater impact on the openness of the Green Belt”, the inspector had expressly taken account of its visual effect, and that it would “appear as a dominant feature that would have a harmful impact on openness here”. The Court of Appeal upheld the decision. Sales LJ said:

“The concept of ‘openness of the Green Belt’ is not narrowly limited to the volumetric approach suggested by [counsel]. 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 ... and factors relevant to the visual impact on the aspect of openness which the Green Belt presents.” (para 14)

Before us there was no challenge to the correctness of this statement of approach. However, it tells one nothing about how visual effects may or may not be taken into account in other circumstances. That is a matter not of legal principle, but of planning judgement for the planning authority or the inspector.

26. The only case referred to in argument which was directly concerned with mineral extraction as such was *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin); [2014] 1 P & CR 3 (upheld at [2014] EWCA Civ 825; [2014] PTSR 1471). That concerned an application for permission for an exploratory drill site to explore for hydrocarbons in the Green Belt, including plant and buildings. The inspector had considered the potential effect of the development on the Green Belt:

“... I consider Green Belt openness in terms of the absence of development. The proposal would require the creation of an extensive compound, with boundary fencing, the installation of a drilling rig of up to 35 metres in height, a flare pit and related buildings, plant, equipment and vehicle parking on the site. Taking this into account, together with the related HGV and other traffic movements, I consider that the Green Belt openness would be materially diminished for the duration of the development and that there would be a conflict with Green Belt purposes in respect of encroachment into the countryside over that period.” (quoted by Ouseley J at para 16)

He refused permission, taking the view that it did not fall within the exception for “mineral extraction”, and that there were no very special circumstances to outweigh the harm to the Green Belt identified in that passage.

27. It was held that he had erred in failing to treat the proposal as one for mineral extraction, and therefore potentially within the exception in NPPF para 90. Ouseley J noted the special status of mineral extraction under Green Belt policy. As he said:

“67. One factor which affects appropriateness, the preservation of openness and conflict with Green Belt purposes, is the duration of development and the reversibility of its effects. Those are of particular importance to the thinking which makes mineral extraction potentially appropriate in the Green Belt. Another is the fact that extraction, including exploration, can only take place where those operations achieve what is required in relation to the minerals. Minerals can only be extracted where they are found ...

68. Green Belt is not harmed by such a development because the fact that the use has to take place there, and its duration and reversibility are relevant to its appropriateness and to the effect on the Green Belt ...”

28. However, he made clear that it remained necessary for the decision-maker to consider the proposal under the proviso to para 90. Affirming his decision in the Court of Appeal, Richards LJ said (para 41):

“The key point, in my judgment, is that the inspector approached the effect on Green Belt openness and purposes on the premise that exploration for hydrocarbons was necessarily inappropriate development since it did not come within any of the exceptions. He was not considering the application of the proviso to para 90 at all: on his analysis, he did not get that far. Had he been assessing the effect on Green Belt openness and purposes from the point of view of the proviso, it would have been on the very different premise that exploration for hydrocarbons on a sufficient scale to require planning permission is nevertheless capable in principle of being appropriate development. His mind-set would have been different, or at least it might well have been different ...”

Although the decision turned principally on a legal issue as to the meaning of “mineral extraction”, it is significant that the impact on the Green Belt identified by the inspector (including a 35 metre drill rig and related buildings) was not thought necessarily sufficient in itself to lead to conflict with the openness proviso. That was a matter for separate planning judgement.

Material considerations

29. Section 70(2) of the Town and Country Planning Act 1990 (“the Act”) required the council in determining the application to have regard to the development plan and “any other material consideration”. In summary Samuel Smith’s argument, upheld by the Court of Appeal, is that the authority erred in failing to treat the visual effects, described by the officer in her assessment of “Landscape impact” (para 17 above) as “material considerations” in its application of the openness proviso under para 90.

30. The approach of the court in response to such an allegation has been discussed in a number of authorities. I sought to summarise the principles in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19. The issue in that case was whether the authority had been obliged to treat the possibility of alternative sites as a material consideration. I said:

“17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it ...

18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so.”

31. I referred to the discussion of this issue in a different context by Cooke J in the New Zealand Court of Appeal, in *CreedNZ Inc v Governor General* [1981] 1 NZLR 172, 182 (adopted by Lord Scarman in the House of Lords in *In re Findlay* [1985] AC 318, 333-334, and in the planning context by Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (1991) 61 P & CR 343, 352):

“26. Cook J took as a starting point the words of Lord Greene MR in the *Wednesbury* case [1948] 1 KB 223, 228:

‘If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.’

He continued:

‘What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision ...’ (Emphasis added)

27. In approving this passage, Lord Scarman noted that Cook J had also recognised, that -

‘... in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers ... would not be in accordance with the intention of the Act.’ (*In re Findlay* at p 334)

28. It seems, therefore, that it is not enough that, in the judge’s view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because ‘obviously material’) requires to be taken into account ‘as a matter of legal obligation’.”

32. Mutatis mutandis, similar considerations apply in the present case. The question therefore is whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the

policy as considerations required to be taken into account by the authority “as a matter of legal obligation”, or alternatively whether, on the facts of the case, they were “so obviously material” as to require direct consideration.

The reasoning of the courts below

33. Hickinbottom J in the High Court held in summary that consideration of visual impact was neither an implicit requirement of the openness proviso, nor obviously relevant on the facts of this case. He said:

“64. I stress that we are here concerned with differential impact, ie the potential adverse visual impact over and above the adverse spatial impact. On the facts of this case ... it is difficult to see what the potential visual impact of the development would be over and above the spatial impact, which, as Mr Village concedes, was taken into account. In any event, even if there were some such impact, that does not mean that openness would be adversely affected; because, in assessing openness, the officers would still have been entitled to take into account factors such as the purpose of the development, its duration and reversibility, and would have been entitled to conclude that, despite the adverse spatial and visual impact, the development would nevertheless not harm but preserve the openness of the Green Belt.

65. In this case, the potential visual impact of the development falls very far short of being an obvious material factor in respect of this issue. In my judgment, in the circumstances of this case, the report did not err in not taking into consideration any potential visual impact from the development. Indeed, on the facts of this case, I understand why the officers would have come to the view that consideration of visual impact would not have materially added to the overarching consideration of whether the development would adversely impact the openness of the Green Belt.”

34. Lindblom LJ took the opposite view. He summarised the visual impacts described by the officer:

“42. The proposed development was a substantial extension to a large existing quarry, with a lengthy period of working and

restoration. As the Principal Landscape Architect recognized in her response to consultation, and the officer acknowledged without dissent in her report, there would be permanent change to the character of the landscape (paras 4.109 and 4.115 of the report). The ‘quality of the Locally Important Landscape Area as a whole would be compromised’ (para 7.41). *The exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so* (paras 4.111 and 7.42). *Long distance views could be cut off by the proposed bunding and planting.* Agricultural land would ultimately be replaced by a ‘deep lower level landscape’ of grassland (para 4.113). The ‘character and quality’ of the landscape would be ‘permanently changed’ and the ‘impact cannot be described as neutral’ (paras 4.115 and 7.44). Concluding her assessment of ‘Landscape Impact’, the officer was satisfied that the ‘proposed screening could protect the environment and residential receptors from potential landscape and visual impacts’, and that with the proposed mitigation measures the development would comply with national and local policy (paras 7.47 and 8.4).

43. That assessment did not deal with the likely effects of the development on the openness of the Green Belt as such, either spatial or visual. *It does show, however, that there would likely be - or at least could be - effects on openness in both respects, including the closing-off of long distance views by the bunding and planting that would screen the working* (para 4.111 of the officer’s report). The officer’s conclusion overall (in para 7.47) was, in effect, that the proposed screening would be effective mitigation, without which the development would not be acceptable. But this was not followed with any discussion of the harmful effects that the screening measures themselves might have on the openness of the Green Belt.” (Emphasis added)

35. He then directed particular attention to para 7.122 of the report, which he understood to encapsulate her views on the application of the openness proviso under NPPF para 90:

“45. So it is to para 7.122 that one must look, at least in the first place, to see whether the officer considered the relevance of visual impact to the effect of this development on the openness of the Green Belt. Did she confront this question, and bring the committee’s attention to it? I do not think she did. *She neither considered, in substance, the likely visual impact of the*

development on the openness of the Green Belt nor, it seems, did she ask herself whether this was a case in which an assessment of visual impact was, or might be, relevant to the question of whether the openness of the Green Belt would be preserved. Indeed, her observation that openness is ‘commonly taken to be the absence of built development’ seems deliberately to draw the assessment away from visual impact, and narrow it down to a consideration of spatial impact alone. And the burden of the assessment, as I read it, is that because the further extraction of limestone would take place next to the existing quarry, the ‘scale’ of the development would not fail to preserve the openness of the Green Belt. This seems a somewhat surprising conclusion. But what matters here is that it is a consideration only of spatial impact. Of the visual impact of the quarry extension on the openness of the Green Belt, nothing is said at all. That was, it seems to me, a significant omission, which betrays a misunderstanding of the policy in para 90 of the NPPF.

46. One must not divorce para 7.122 from its context. The report must be read fairly as a whole. The question arises, therefore: did the officer address the visual impact of the development on the openness of the Green Belt in the remaining paragraphs of this part of her report, or elsewhere? I do not think she did. *Her consideration of the effects of the development on the ‘purposes of including land in the Green Belt’, in paras 7.123 to 7.125, is unexceptionable in itself. However, she did not, in these three paragraphs, revisit the question of harm to the openness of the Green Belt, either in spatial or in visual terms.* The conclusion to this part of the report, in para 7.126, is that the ‘character and openness of the Green Belt’ would not be materially harmed by the development - a conclusion repeated in para 8.5 - and that the proposal would therefore comply with Policy SP3 and Policy SP13 of the local plan and the NPPF. But I cannot accept that this conclusion overcomes the lack of consideration of visual impacts on ‘openness’ in the preceding paragraphs. It seems to treat ‘character’ as a concept distinct from ‘openness’. Even if these two concepts can be seen as related to each other, and however wide the concept of ‘character’ may be, there is no suggestion here that the officer was now providing a conclusion different from that in para 7.122, or additional to it.

47. The same may also be said of the officer's earlier discussion of 'Landscape Impact' in paras 7.41 to 7.47. Her assessment and conclusions in that part of her report are not imported into para 7.122, or cross-referred to as lending support to her conclusion there ..." (Emphasis added)

36. This led to the overall conclusion in para 49 (quoted in part at the beginning of this judgment):

"49. I can only conclude, therefore, that the advice given to the committee by the officer was defective. It was defective, at least, *in failing to make clear to the members that, under government planning policy for mineral extraction in the Green Belt in para 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor* in their approach to the effect of the development on the 'openness of the Green Belt', and hence to the important question of whether the proposal before them was for 'inappropriate' development in the Green Belt - and, indeed, in implying that the opposite was so ... One can go further. *On the officer's own assessment of the likely effects of the development on the landscape, visual impact was quite obviously relevant to its effect on the openness of the Green Belt. So the consideration of this question could not reasonably be confined to spatial impact alone.*" (Emphasis added)

37. Although it is necessary to read the discussion in full, I have highlighted what seem to me the critical points in Lindblom LJ's assessment of the failure to take account of visual effects; in summary:

i) In paras 42 and 43, he extracts from the officer's own landscape assessment the observation that "the exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so ..." and that "long distance views could be cut off by the proposed bunding and planting". This leads to the view that:

"there would likely be - or at least could be - effects on openness in both respects, including the closing-off of long distance views by the bunding and planting that would screen the working."

ii) In para 7.122, where the officer purported to address the issue of openness, she failed to consider the likely effect of such visual impact nor its relevance to whether the openness of the Green Belt would be preserved. Instead, by in effect equating openness with absence of built development, she tended to narrow the issue down to a consideration of spatial impact alone. That betrayed a misunderstanding of the policy in para 90 of the NPPF.

iii) The subsequent paragraphs dealt with other aspects of the effect on the purposes of the Green Belt, and were unexceptionable in themselves; but they did not revisit the question of visual impact or so make up for the deficiency in para 7.122.

iv) The officer's advice was defective in this respect. Further on her own assessment visual effect was "quite obviously relevant" to the issue of openness, and the committee could not reasonably have thought otherwise.

38. I hope I will be forgiven for not referring in detail to the arguments of counsel before this court, which substantially reflected the reasoning respectively of the High Court and the Court of Appeal. I note that Mr Village QC for Samuel Smith made a further criticism of para 7.122, not adopted by Lindblom LJ, that the officer treated the fact that the site abutted the existing quarry as reducing its impact on openness.

Discussion

39. With respect to Lindblom LJ's great experience in this field, I am unable to accept his analysis. The issue which had to be addressed was whether the proposed mineral extraction would preserve the openness of the Green Belt or otherwise conflict with the purposes of including the land within the Green Belt. Those issues were specifically identified and addressed in the report. There was no error of law on the face of the report. Paragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication. As explained in my discussion of the authorities, the matters relevant to openness in any particular case are a matter of planning judgement, not law.

40. Lindblom LJ criticised the officer's comment that openness is "commonly" equated with "absence of built development". I find that a little surprising, since it was very similar to Lindblom LJ's own observation in the *Lee Valley* case (para 23 above). It is also consistent with the contrast drawn by the NPPF between openness and "urban sprawl", and with the distinction between buildings, on the one hand, which are "inappropriate" subject only to certain closely defined exceptions, and

other categories of development which are potentially appropriate. I do not read the officer as saying that visual impact can never be relevant to openness.

41. As to the particular impacts picked out by Lindblom LJ, the officer was entitled to take the view that, in the context of a quarry extension of six hectares, and taking account of other matters, including the spatial separation noted by her in para 7.124, they did not in themselves detract from openness in Green Belt terms. The whole of paras 7.121 to 7.126 of the officer's report address the openness proviso and should be read together. Some visual effects were given weight, in that the officer referred to the restoration of the site which would be required. Beyond this, I respectfully agree with Hickinbottom J that such relatively limited visual impact which the development would have felt far short of being so obviously material a factor that failure to address it expressly was an error of law. For similar reasons, with respect to Mr Village's additional complaint, I see no error in the weight given by the officer to the fact that this was an extension of an existing quarry. That again was a matter of planning judgement not law.

Conclusion

42. For these reasons, I would allow the appeal and confirm the order of the High Court dismissing the application.

EP3

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT (BIRMINGHAM)

Birmingham Civil Justice Centre

Date: 11/07/2018

Before :

MRS JUSTICE JEFFORD DBE

Between :

EURO GARAGES LIMITED
- and -
(1) THE SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL
GOVERNMENT
(2) CHESHIRE WEST AND CHESTER
COUNCIL

Claimant

Defendant

Mr Kevin Leigh (instructed by **Shoosmiths LLP**) for the **Claimant**
Mr Jack Parker (instructed by **Government Legal Department**) for the First Defendant

Hearing date: 16 May 2018

Judgment Approved

Mrs Justice Jefford:

Introduction

1. The claimant, Euro Garages Ltd. (“Euro Garages”), is a company which owns and operates a chain of petrol filling stations across the Midlands and the North of England. Those filling stations commonly incorporate food outlets and shops selling convenience goods.
2. Euro Garages operates such a filling station at the Red Ensign Service Station which lies beside Park Gate Road on the A540 beside a roundabout where the A494 and the A5117 bypass intersect. The M56 also joins the A5117. The site is at the junction of the north-south route between Chester and the Wirral and the east-west route between Liverpool and North Wales. At the service station site there are fuel pumps (with a canopy above), Starbucks and Subway outlets, a Spar convenience shop (which I will refer to as “the shop”) and parking for 20 vehicles. The site and the surrounding area are within the Green Belt.
3. Euro Garages carried out works, principally to the shop, for which they subsequently sought retrospective planning permission. At the time this claim was made, the works were almost complete.

4. The nature of the works is uncontroversial and can be described as follows:
 - (i) a storage area was created on one side of the shop surrounded by close boarded fencing with a link to the shop. A storage container was placed in the storage area. The area had previously contained an LPG storage tank surrounded by palisade fencing.
 - (ii) A side extension was added to the shop to relocate an external ATM with internal storage space behind for the shop and a new entrance, the old entrance becoming a window. Previously this area had been occupied by a storage container.
5. Euro Garages sought retrospective planning consent for these works: the storage area was the subject matter of application 17/00885/FUL and the side extension the subject matter of application 17/00657/FUL. Both applications were refused on the basis that they involved inappropriate development within the Green Belt.
6. Euro Garages appealed. The storage area was the subject matter of appeal A0665/W/17/3181400 and the extension was the subject matter of appeal A0665/W/17/3181397. After the original applications had been refused but before the appeals, Euro Garages realised that what had been built did not match the drawings accompanying the original applications in all details. In the appeals, therefore, Euro Garages sought permission for what was in the drawings on the basis that, if permission was granted, it would alter what had already been built.
7. The appeals were made under section 78 of the Town and Country Planning Act 1990 to the first defendant, the Secretary of State for Housing Communities and Local Government, and transferred by the Secretary of State to an Inspector. The appeal was dealt with by written representations to the Inspector who also undertook an accompanied site visit.
8. The Inspector's decision letter was issued on 29 November 2017 and the Inspector refused the appeals and refused to grant planning permission. Euro Garages then made this claim to quash the Inspector's decision under section 288 of the Town and Country Planning Act 1990 on the grounds principally that the decision is not within the powers of the Act, and alternatively that a relevant requirement has not been complied with. Permission was granted on 16 February 2018. The Secretary of State has contested this challenge to the Inspector's decision. The second defendant Council informed the court that it did not contest the claim and would not be represented at the hearing before me.

General principles

9. The applicable general principles were not in dispute between the parties. In summary:
 - (i) a challenge under s. 288(1)(b)(i) to the validity of a decision on the grounds that it is not within the powers of the Act is made on the same basis as would be a claim for judicial review.
 - (ii) The reasons in the decision letter must be adequate, clear and intelligible so that the person against whom the decision is made may understand why he lost,

ascertain whether the decision maker erred in law, and decide what he may lawfully do in the light of the decision.

10. For the latter propositions, counsel helpfully referred me to the speech of Lord Brown in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33 at [36]:

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

I set out this passage in full because it is pertinent not only to a reasons challenge but to the way in which the Decision Letter should be read – that is in a straightforward manner and in context.

The National Planning Policy Framework

11. Before I turn to the Inspector’s decision, it is convenient to set out the relevant provisions of the National Planning Policy Framework (“NPPF”) which provided the basis for that decision.

12. Under the heading Protecting Green Belt land, the NPPF says this:

“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 that openness and their permanence.

80. Green Belt serves five purposes:

- to check the unrestricted sprawl of the 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;
- to assist in urban regeneration, by encouraging the recycling derelict and land.

.....

87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
- [1] buildings for agriculture and forestry;
 - [2] provision of appropriate facilities for outdoor sport, outdoor recreation and the cemeteries, so long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
 - [3] 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;
 - [4] the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
 - [5] limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
 - [6] 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 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 the 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..."

For ease of reference I have numbered the bullet points that appear in the paragraphs of the NPPF.

13. It was common ground that the policy is not to be interpreted as if it were a statute. It was also, however, common ground at the hearing before me that the interpretation of policy was an objective matter for the court to determine: see *Tesco Stores Ltd v Dundee* [2012] UKSC 13. The further decision of the Supreme Court in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37 [22]-[26] emphasises that the role of the court should not be overstated; that the court should start at least from the presumption that specialist planning inspectors will have understood the policy framework correctly; and that it is important to distinguish between issues of interpretation (suitable for judicial analysis) and issues of judgment in the application of policy, which can, in the normal course, only be challenged if irrational or perverse.

The decision letter

14. In the Decision Letter, the Inspector identified the main issues as being:
- (i) whether or not the proposed developments would be inappropriate development in the Green Belt for the purposes of the development plan and the National Planning Policy Framework (the Framework);
 - (ii) the effect of the proposed developments on the openness of the Green Belt and the purpose of including land within it; and
 - (iii) if the development was inappropriate, whether that was outweighed by other considerations, so as to amount to the very special circumstances necessary to justify it.

No criticism can be made of that identification of the issues.

15. The Inspector identified paragraphs 89 and 90 of the NPPF as the relevant paragraphs. She recorded that the parties agreed that, whilst the volume and floor area of the two proposed developments was limited as a result of previous extensions to the building, both on their own and cumulatively they would represent disproportionate additions to the building so that they would not fall within the exception in bullet point [3] under paragraph 89.
16. The decision, therefore, focussed on bullet point [6]. The Inspector considered that the extension with a floor area of 61m² and the storage area with a floor area of 22.4 m² would be “limited infilling”. As she then said, to fall within the exception in this bullet point, the development must also not have a greater impact on the openness of the Green Belt and the purposes of including land within it.
17. Her analysis and reasoning continued as follows:

“13. Openness is an essential characteristic of the Green Belt. It can be taken as the absence of building and development. Whether harm is caused to openness depends on a variety of factors such as the scale of the development, its locational context and its spatial and/or visual implications.

14. The appellant’s photographic evidence shows that the container would be located in an area that was formerly surrounded by palisade fencing and contained two LPG storage tanks that were around 3.5 m in height, as well as being used for bin storage. Although not as high as these tanks, the overall scale and mass of the container is greater than them, and the proposed 2.6m timber fencing surrounding the container is not as open as the previous palisade fencing.

15. The appellant has indicated that the extension to the shop building would be located in an area that was formerly occupied by a storage container. However, no details have been provided of how large this container was, how long it had been there, or when it was removed. In the absence of any evidence to the contrary, on the basis that this was a standard sized container, I consider that the scale and mass of the proposed extension is likely to be slightly greater than that of a container.

16. In addition, the appellant has calculated that overall the appeal scheme would result in a 9.2% increase in floor area, and a 5% increase in volume on the existing filling station, shop and Starbucks building. Whilst these may be relatively small increases, the scale and mass of the resulting building would still be greater than at present.

17. Overall, I therefore consider that the scale and mass of the proposals would have a slightly greater impact on the openness of the Green Belt than the site did previously. I accept that [the] proposals are, to a certain extent, screened by other development on the site and the boundary treatment to the rear. Nevertheless, whilst visibility can be a factor in considering the effect on openness, this does not mean that the proposals would not affect openness, as a lack of visibility does not, in itself, mean that there would be no loss of openness. Moreover, even a limited adverse impact on openness means that openness is not preserved.

18. The purposes of including land in the Green Belt are set out in paragraph 80 of the Framework. As the proposals would be small additions to an existing building within a previously developed site, I am satisfied that the appeal schemes would not conflict with any of the purposes of including land within the Green Belt.

19. Therefore, although the proposal represents the limited infilling of previously developed site, and would not conflict with the purposes of including land in the Green Belt, it would still represent inappropriate development because it would have a greater impact on the openness of the Green Belt than the site does at present.”

Bullet point [6] and the interpretation of the policy

18. Perhaps precisely because it is not a statute, bullet point [6] does not entirely make sense. A sensible reading requires the insertion of a few words so that the exception reads:

“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 [conflict more with] the purpose of including land within it than the existing development.”

Not only is this a sensible reading but it accords with the wording used in bullet point [2] of paragraph 89 and in paragraph 90.

19. There are thus two limbs to this exception or two tests which the development must pass to fall within the exception to inappropriateness, namely (i) that the infilling must not have a greater impact on the openness of the Green Belt than the existing development and (ii) that the infilling must not conflict more with the purpose of including land within the Green Belt than the existing development. In the course of the argument before me, Euro Garages appeared to conflate these two. They are distinct elements and the Inspector was right to treat them separately and on the basis that to fall within the exception the development had to meet both tests.
20. So far as the second limb was concerned, the Inspector decided that the development did not conflict with the purposes of including the land in the Green Belt and no issue arises about this. The battleground, therefore, was the meaning of the “greater impact on the openness of the Green Belt” and whether the Inspector had properly interpreted that part of the exception and applied the appropriate test.
21. “Openness” is not a defined term but, in my view, it is clear in this context that it is openness of the Green Belt that must be considered not the site as such. That is not

merely the wording of the paragraph but must be the case because any infill would, almost by definition, have an impact on the openness of a site.

22. I trust that I will do no injustice to the further detailed submissions of Mr Leigh, on behalf of Euro Garages, on this issue, if I summarise them as follows:
- (i) Firstly, it is submitted that for there to be “greater impact” there must be something more than merely a change. The answer to what is meant by that greater impact and what more is required is to be found in the decision of the Court of Appeal in *Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2018] EWCA (Civ) 489.
 - (ii) Paragraph 90 is concerned with other forms of development which are not inappropriate “provided they preserve the openness of the Green Belt”. It is submitted that, although the wording is different in bullet point [6] of paragraph 89, it amounts to the same thing: if the openness of the Green Belt is preserved, there is no greater impact. Conversely, if the openness of the Green Belt is not preserved, there will be greater impact.
 - (iii) Given that the policy is not to be construed as a statute, one can conclude that greater impact occurs where the openness of the Green Belt is not preserved. In that context “preserved” does not mean not changed but means not harmed. So whether there is greater impact involves, in application, an assessment of the harm occasioned by the change.
23. I largely accept these submissions on behalf of Euro Garages. Firstly it seems to me that Mr Leigh is right to submit that, in the context of the exceptions under paragraph 89, for there to be a greater impact on the openness of the Green Belt there must be something more than just some change to the environment. In each of the instances under the bullet points, it is contemplated that there will be some change to what is presently there. But, despite that change, the openness of the Green Belt will be preserved (bullet point [2]) and/or there will not be a “disproportionate” addition or something “materially larger” (bullet points [3] and [4]). In the case of infill there will necessarily be a change to the scope of the build. So for there to be a greater impact there must be something more. That view is consistent with the decision in the *Samuel Smith* case to which I refer further below. Whether or not there is a greater impact is a matter of judgment.
24. I would not wish to decide, for all purposes, that the concepts of not having a greater impact on the openness of the Green Belt and of preserving the openness of the Green Belt are identical. Having said that, there is an obvious reason why the wording in differs paragraphs and bullet points differs. Where there is no existing development, consideration must be given to whether the development preserves the openness of the Green Belt. Where there is some existing development, the openness of the Green Belt has not been wholly preserved and there will necessarily have been some impact on the openness of the Green Belt already. It makes sense, therefore, to consider whether there will be a greater impact from the contemplated limited infilling. Asking the question whether there is any greater harm is one way of assessing the impact.

25. However one expresses it, a judgment must be made as to whether there is greater impact on the openness of the Green Belt. It is a judgment that needs to be exercised.
26. On behalf of the Secretary of State, Mr Parker drew my attention to the decision of the Court of Appeal in *Turner v Secretary of State of Communities and Local Government* [2016] EWCA Civ 466. In that case, Sales L.J. described the concept of “openness of the Green Belt” as open-textured such that a number of factors were capable of being relevant. Visual impact was implicitly part of the concept of openness of the Green Belt. However, the openness of the Green Belt also has a spatial 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 the result of the location of a new or materially larger building there” [at 25].
27. As I have said, Euro Garages placed reliance on the decision in the *Samuel Smith* case. The case concerned a challenge to the grant of planning permission for a significant extension to a quarry. The matter fell within paragraph 90 of the NPPF. The inspector’s decision was, in part and in summary, challenged on the basis that, although she had considered the visual impact of the development, she had not done so when considering the visual effect on the openness of the Green Belt. At first instance, the court had rejected this challenge, relying on *Turner* as authority for the proposition that the inspector could take into account visual impact but was not obliged to do so. The appeal succeeded on this issue, the Court of Appeal finding that the inspector had taken too narrow a view of the concept of openness of the Green Belt and that she had failed to consider the visual impact of the development on that openness.
28. Euro Garages relied in particular on the following passages in the judgment of Lindblom LJ:

“37. The concept of “openness of the Green Belt” is not defined in paragraph 90. Nor is it defined elsewhere in the NPPF. But I agree with Sales L.J.’s observations in Turner to the effect that the concept of “openness” as it is used in both paragraph 89 and paragraph 90 must take its meaning from the specific context in which it falls to be applied under the policies in those two paragraphs. Different factors are capable of being relevant to the concept when it is applied to the facts of a case. Visual impact, as well as spatial impact, is, as Sales L.J. said “implicitly part” of it. In a particular case there may or may not be other harmful visual effects apart from harm in visual terms to the openness of the Green Belt. And the absence of other harmful visual effects does not equate to an absence of visual harm to the openness of the Green Belt.

38. As a general proposition, however, it seems to me that the policy in paragraph 90 makes it necessary to consider whether the effect of a particular development on the openness of the Green Belt can properly be gauged merely by its two-dimensional or three-dimensional presence on the site in question – the very fact of its being there – without taking into accounts the effects it will have on the openness of the Green Belt in the eyes of the viewer. To exclude visual impact, as a matter of principle, from a consideration of the likely effects of development on the openness of the Green Belt would be artificial and unrealistic. The policy in paragraph 90 does not do that. A realistic assessment will often have to include the likely perceived effects on openness, if any, as well as spatial effects. Whether, in the individual circumstances sofa a particular case, there are likely to be visual as well as spatial effects on the openness of

the Green Belt, and if so, whether those effects are likely to be harmful or benign, will be for the decision-maker to judge. But the need for those judgments to be exercised is, in my view, inherent in the policy.

39. *The first part of the question posed by the preamble in paragraph 90 – whether the development would “preserve” the openness of the Green Belt – cannot mean that a proposal can only be regarded as “not inappropriate in the Green Belt” if the openness of the Green Belt would be left entirely unchanged. It can only sensibly mean that the effects on openness must not be harmful – understanding the verb “preserve” in the sense of “keep ... safe from harm” – rather than “maintain (a state of things)” There may be cases in which a proposed development in the Green Belt will have no harmful visual effects on the openness of the Green Belt. Indeed, there may be cases in which development will have no, or no additional, effect on the openness of the Green Belt, either visual or spatial ... But development for “mineral extraction” in the Green Belt, the category of development with which we are concerned, will often have long-lasting visual effects on the openness of the Green Belt, which may be partly or wholly repaired in the restoration phase – or may not. Whether the visual effect of a particular project of mineral working would be such as to harm the openness of the Green Belt is, classically, a matter of planning judgment.*

40. *In my view, therefore, when the development under consideration is within one of the five categories in paragraph 90 and is likely to have visual effects within the Green belt, the policy implicitly requires the decision-maker to consider how these visual effects will bear on the question of whether the development would “preserve the openness of the Green Belt”. where that planning judgment is not exercised by the decision-maker, effect will not be given to the policy. This will amount to a misunderstanding of the policy, and thus its misapplication, which is a failure to have regard to a material consideration, and an error of law.”*

29. It does not seem to me that this decision defines the meaning of “greater impact” or even of “preserving” the openness of the Green Belt but it supports the view, firstly, that a mere change in the current build is not sufficient to establish that there is a greater impact on the openness of the Green Belt. Put another way, whether the openness of the Green Belt is preserved, or conversely harmed, is not simply a question of whether something, which by definition has a spatial impact, is to be built. Further, the question of whether the openness of the Green Belt is preserved will generally involve an assessment of the visual or perceived impact. That is a matter of planning judgment but it is a matter that needs to be considered.
30. Mr Parker submitted that the decision in *Turner* should not be regarded as providing a check list of matters that must be considered by the decision-maker in order for there to be a lawful decision. I agree that there is not a check list and the mere fact that the decision maker does not recite a check list and his decisions on each item does not, in itself, invalidate the decision. However, I take Lindblom LJ in the *Samuel Smith* case to say that where the issue of openness of the Green Belt arises, the visual impact of a development will generally require consideration, and that should be the case whether there is likely to be a visual impact or there is no visual impact. On the facts of the *Samuel Smith* case, the court was concerned with a scenario in which the development was likely to have visual effects which had not been considered in the context of the issue of preserving the openness of the Green Belt but, in my view, if there is no visual

impact that ought also to be a material consideration for the obvious reason that it is the less likely that the openness of the Green Belt will be harmed. That seems to me to be consistent with the references in the judgment of the Court of Appeal to the perceived effect on openness “if any” and to cases where the proposed development will have no, or no additional, effect on the openness of the Green Belt. This interpretation of the policy seems to me to be equally applicable to the issue of “greater impact” on openness under paragraph 89.

31. Pulling these points together, the policy requires the decision maker to consider and make an assessment, under bullet point [6], of whether the openness of the Green Belt is impacted or harmed by the proposals to a greater extent than that openness has already been impacted. That is an open-textured assessment and there is no check list to be gone through but, where openness of the Green Belt is in issue, visual impact, as well as spatial impact, requires consideration, subject to a margin of appreciation.

The approach of the Inspector

32. It is entirely clear from the Inspector’s decision letter, as set out above, that she properly identified the test that she should apply as to whether the limited infill in this case fell within the exception at bullet point [6] of paragraph 89. She properly identified that she should consider both whether the development was in conflict with the purposes of including land in Green Belt and whether the development had any greater impact on the openness of the Green Belt. She further, entirely properly, framed the issue of greater impact on openness in terms of harm and she rightly identified that whether there was harm might depend on a variety of factors including the scale of the development, its locational context and its spatial and/or visual implications (paragraph 13). The Inspector made no further reference to the scale of the development (other than in terms of its volume) or its locational context. That was entirely proper: there is no check list. She did, however, address both spatial and visual impact, exercising her judgment as to the relevant considerations.
33. So far as the spatial impact was concerned, the Inspector concluded that the scale and mass of the container was greater than the LPG tanks, although not as high, and the scale and mass of the extension was slightly greater than the previous container. Overall, she concluded that the scale and mass of the resulting building would be greater than at present, although there were relatively small increases.
34. Those conclusions appear in turn to have led to the conclusion in paragraph 17 of the decision letter that “*the scale and mass of the proposals have a slightly greater impact on the openness of the Green Belt than the site did previously.*” The decision letter discloses no reasoning as to why these “relatively small” increases had a slightly greater impact on the openness of the Green Belt.
35. As I have indicated, Mr Parker reminded me that I should give the letter a “benevolent” reading rather than subject it to a close textual analysis and that I should bear in mind that it was written against the background of the parties’ written representations and that it should be sufficient to allow the appellant to understand the Inspector’s reasoning when read in that context. That does not, however, seem to me to assist the Secretary of State here because the written representations put squarely in issue Euro Garages’ argument that the relatively small increase in floor area and volume did not

have a greater impact on the openness of the Green Belt. Euro Garages identified the percentage increases in floor area and volume and argued that “*such an increase would not be regarded as having a material impact on the open character of the Green Belt ...*”. The Decision Letter provides no reasoning as to why the Inspector decided that it did.

36. It seems to me that the only basis on which the Inspector could have reached that conclusion was if she considered that the greater floor area and/or volume necessarily meant that there was a greater impact. The flaw in that reasoning is that any infill (however limited) would necessarily result in greater floor area or volume and it involves the assumption that any change would have a greater impact. As I have said, the concept of greater impact involves something more than that.
37. So far as visual impact of the development is concerned, this was expressly raised in the appellant’s written representations. Visual impact was, at the very least, in the mind of the Inspector and referred to in the Decision Letter. However, the consideration that the Inspector gave to visual impact was less than clear.
38. Firstly, in paragraph 14 of the Decision Letter there is reference to the timber fencing around the new container not being as open as the previous palisade fencing. It is not at all clear whether that was a factor that the Inspector took into account but, if she did, then, looked at on its own, it seems to me that that involved a misinterpretation of the policy, in that it was concerned with the openness of the site and not of the Green Belt. There may, of course, be circumstances in which the replacement of an open fence with a solid structure could impact the openness of the Green Belt but here the open fence surrounded tanks and the solid fence surrounds a container (of lesser height) and it is difficult to see how there could be an impact on the openness of the Green Belt as distinct from the site itself.
39. Secondly, paragraph 17 of the Decision Letter also referred to visual impact. The Inspector referred to the fact that the development is, to some extent, screened and not visible. That implies that she considered there to be some visual impact. Despite that, the Inspector then said “a lack of visibility does not, in itself, mean that there would be no loss of openness.” Read in context, that is a statement of principle and simply does not address the question of whether, in this particular case, the development (to some extent screened but to some extent visible) does or would have an impact on openness. If the sentence is to be read as meaning that the Inspector has concluded that the development has no visual impact, then the only matter she took into account was the spatial impact, which, as I have said, she appears to have approached on the erroneous basis that any change had a greater impact on the openness of the Green Belt.
40. The final sentence of this paragraph which reads “... *even a limited adverse impact on openness means that openness is not preserved*” might, on a benevolent reading, be taken to mean that the Inspector concluded that the development does have such a limited adverse impact visually but if that is what the sentence means, then it amounts to no more than a decision that because the development is visible, it has a greater impact on openness. That seems to me to disclose the same error of assuming that any change has a greater impact on openness.

41. That the decision was reached in the flawed manner I have set out seems to me to be further evidenced by the Inspector's conclusion in paragraph 23 of the Decision Letter that the development would "not adversely affect the character and appearance of the site or this part of the Green Belt". The Inspector regarded the absence of harm in this respect as a neutral factor but that only makes sense if the Inspector regarded some other harm as necessarily flowing from any alteration to the existing site.

Conclusion

42. In my judgment, therefore, what the Inspector in fact did was treat any change as having a greater impact on the openness of the Green Belt, rather than considering the impact or harm, if any, wrought by the change. Although the Inspector appeared to set out the right test, she then either went wrong in her interpretation of the policy or failed to apply the policy. For these reasons, I would grant Euro Garages the relief sought and quash the decision of the Inspector.
43. For completeness, I should add that Euro Garages advanced, before the Inspector and before me, an alternative argument that the development fell within bullet point [3] under paragraph 90 as "local transport infrastructure which can demonstrate a requirement for a Green Belt location." It is not necessary for me to consider this alternative case or express any view, as counsel for Euro Garages invited me to do, as to whether a petrol filling station fell within the definition of "local transport infrastructure".