Case Name: *Samuel Smith Old Brewery (Tadcaster) & Ors, R (on the application of) v North Yorkshire County Council* [2020] UKSC 3 (5 February 2020)

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Commentary:
Planning permission had been granted for the extension of a quarry in the Green Belt. The claimant contended that the planning officer's report recommending approval of the planning application was defective in failing to make clear to members that the government's policy for mineral extraction in the Green Belt, as expressed in paragraph 90 of the National Planning Policy Framework, allowed that visual impact was a potentially relevant factor when considering whether proposed development would have an impact on the "openness" of the Green Belt.

The planning permission was upheld by Hickinbottom J in the High Court, but quashed on appeal by the Court of Appeal, with Lindblom LJ giving the lead judgment.

In the Supreme Court, Lord Carnwath, with whom the other justices agreed, concurred with Lindblom LJ (and the claimant) in his conclusion that visual impact was a potentially relevant factor when considering the question of openness of the Green Belt. However, the fact that it was a potentially relevant factor did not imply that it was a matter which was required to be explicitly addressed by a decision-maker. On the facts of the particular case, Lord Carnwath held that the "relatively limited visual impact which the development would have fell far short of being so obviously material a factor that failure to address it expressly was an error of law".

The appeal was therefore allowed and the planning permission upheld.

The Court of Appeal overturned a decision of the High Court quashing a Planning Inspector's decision to uphold the refusal of a planning application for a housing development.

The planning application was refused on the basis that the proposed development of 80-100 homes would result in a loss of existing open space identified as play space without making provision for the replacement of such space or making adequate on-site play-space provision. As such, it was noted that the proposal was contrary to policy which provided, in broad terms, that planning permission would not be granted for development resulting in a loss of open space unless (in a scenario where there was not over-provision of open space in the particular community) it was replaced by acceptable alternative provision within the vicinity of the development or within the same community.

The Inspector concluded that the development was contrary to policy on the basis that it would result in the loss of informal open space in a community where there was already an overall deficit in open space provision. The Inspector's decision was quashed in the High Court on the basis that the Inspector did not adequately explain how it could be that a

development which was acceptable in principle under policies in favour of residential development on suitable sites within urban areas could be rendered unacceptable on account of a policy for the preservation of open spaces in circumstances where the Inspector accepted that the landowner could and would fence off the relevant land (and hence remove it from the stock of available open space) if the development was not permitted.

The appeal to the Court of Appeal was on the principal grounds (1) that it was not irrational for the Inspector to conclude that the proposal breached the relevant open space policy, not least because the parties agreed that the proposal would lead to a loss of open space and (2) that the judge adopted an erroneous approach to the fall-back position (i.e. the landowner fencing off the informal open space if the development was not permitted as the site was on land in private ownership).

On the first ground, the Court held that the Inspector was entitled to proceed on the basis of the parties' common ground that the relevant land was open space notwithstanding the fact that the landowner had the power to exclude the public from it at will. It was neither an error of law nor irrational for her to proceed on this basis without pursuing further enquiries or for her to find that the open space policy was engaged.

On the second ground, the Court held that the open space policy formed part of the development plan and the fall-back position was a material consideration; as such, the Inspector had taken the correct approach (per s38(6) of the Planning and Compulsory Purchase Act 2004) of deciding first, whether there would be a loss of open space in breach of the policy and, second, if so, whether the fall-back position was to be given such weight as to justify the grant of planning permission notwithstanding the conflict with the development plan. It could not be said that it was irrational for the Inspector to conclude that the fall-back position did not outweigh breach of the development plan (this was a matter of planning judgment for the Inspector) and, as such, the judge had erred in his reasoning of the fall-back position. A further ground relating to procedural unfairness was not upheld.

Case summary prepared by Ricardo Gama