Case Name: *Holystone Civil Engineering Ltd v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 1739 (Admin) (14 July 2023)

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Commentary: This was a successful challenge under section 288 of the Town and Country Planning Act 1990 ("the TCPA") which resulted in the quashing of an Inspector's decision to dismiss an appeal brought by the Claimant.

The Claimant had sought planning permission under section 73 of the TCPA. The original permission was granted in 2013 for the redevelopment of a quarry to provide an employment park. The section 73 application sought permission for the same without compliance with four of the conditions, the result of one proposed variation meaning that the construction of the development platform on which the employment park was to be constructed would be taller than previously approved by 12 metres. The local planning authority's officer had concluded that the revised scheme would not have a materially greater impact on openness compared to the original scheme and recommended permission, but the Planning Committee disagreed and refused permission on the basis that development would be inappropriate by reason of the impact on openness (the relevant exception being the redevelopment of previously developed land, subject to openness being preserved (NPPF 149g)i)). At appeal, the Inspector agreed and considered that the requisite very special circumstances to outweigh the harm did not exist, so the appeal was dismissed.

The challenge was brought on two grounds, the first of which had two parts. The Claimant first contended that the Inspector should have considered the amended scheme against the NPPF exceptions with the fallback position as the baseline. What the Inspector had done, the Claimant said, was to consider only the appropriateness of the amended scheme against the NPPF exceptions and insodoing, they had failed to consider the difference (if indeed there was any, contrary to the Claimant's case) between the approved and proposed schemes on openness. Lane J rejected this argument, finding that to accept it would be to re-write planning policy and to elevate the fallback position beyond a potential material consideration.

At appeal, the Claimant had argued that the proper exception was in fact NPPF 149d), which provides for the replacement of a building so long as the new building is in the same use and not materially larger than the one it replaces. This bold argument got short shrift from both the Inspector and the judge, the latter explaining that this exception could not refer to the replacement of a building which has not yet been built (regardless of there being a planning permission authorising its construction).

Additionally or alternatively, the Claimant argued that the Inspector misunderstood the Claimant's position on the impact of the development. At appeal, the Claimant said, its position had been that the revised scheme would have no greater impact on openness

than had already been approved. The judge found that the Inspector had simply disagreed and, although they had not said what weight they would have given the fallback position if they had agreed with the Claimant that there would be no greater impact on openness, they didn't need to because they had not made such a finding.

The Claimant was successful on the second ground, by which they argued that the Inspector had misunderstood the evidence before them on employment matters. The judge found that the Claimant had been clear that the amended proposal would safeguard 10 jobs, would generate a further 15 to 25 direct jobs and another 10 indirect jobs. The Inspector seemed not to have grasped that these numbers were distinct from any employment-related impacts of the employment park – they were in fact a direct result of the proposed variations to the conditions. Lane J concluded that the relevant paragraphs of the Inspector's decision were "with respect, entirely baffling" and as a consequence the court could not know whether the Inspector would have reached the same conclusions if they had properly understood the evidence. Counsel for the Defendant was apparently "heroic" in attempting to defend the Inspector's decision on this point, but his heroism was in vain and the decision was quashed.

Case summary prepared by Aline Hyde