IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 1356 (Admin)

No. CO/231/2023

Royal Courts of Justice

Wednesday, 10 May 2023

Before:

MR JUSTICE WAKSMAN

IN THE MATTER OF AN APPEAL

B E T W E E N :

LINK PARK HEATHROW LLP — Claimant/Appellant

- and -

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) BUCKINGHAMSHIRE COUNCIL
(3) HILLINGDON BOROUGH COUNCIL — Defendants/Respondents

MR R WARREN KC (instructed by Town Legal LLP) appeared on behalf of the Claimant/Appellant.

DR A BOWES (instructed by the Treasury Solicitor) appeared on behalf of the First Defendant/Respondent.

THE SECOND AND THIRD DEFENDANTS/RESPONDENTS did not appear and were not represented.

J U D G M E N T

MR JUSTICE WAKSMAN:

INTRODUCTION

1 This is an appeal against a decision of the Inspector dated 13 December 2022. The decision followed a 2-day hearing on 8 and 9 November and site visit. The decision was to refuse the application for planning permission made by the claimant, Link Park Heathrow LLP ("LP"), which arose out of LP's appeal against the non-determination by the two relevant local planning authorities ("LPAs") of the original application. The relevant LPAs are Buckinghamshire Council ("Buckinghamshire") and Hillingdon Borough Council ("Hillingdon") (collectively "the Councils"). There are two of them because the site ("the Site") for the proposed development (""the Development"), lay partly in the area in Hillingdon, though mainly in the former.

2 The Site is in the Green Belt. The Development was the construction of a new data centre in a location where there had already been a significant amount of development. LP is the freeholder of the Site but parts of it, including parts which would be involved in the Development, were the subject of leases granted by LP, or of which LP is now the lessor.

3 The Site itself lies within a large area of land owned by LP (see p.809 of the bundle). An indicative plan of the Development, the application here being for outline consent only, is at p.80A of the bundle. At the hearing before the Inspector, all parties and the Inspector proceeded on the basis that the likely dimensions and features of the Development were as in the Indicative Plan.

4 It is common ground that planning permission could only be granted in what are referred to as "very special circumstances" because the Site fell within the Green Belt and because it did not constitute an exception to the general rule requiring such circumstances to be shown.

5 Prior to and after the hearing, drafts of a s.106 unilateral undertaking ("the Undertaking") given by LP to each of the Councils, along with a proposed planning condition ("the Condition") were provided to the Inspector. Indeed, ultimately, he was sent a signed Undertaking.

6 There are three grounds of challenge to the Inspector's decision which were made by LP on 20 February 2023. Lang J granted permission for an appeal under s.288 of the Town and Country Planning Act 1990 ("the Act") on Ground 1, but rejected Grounds 2 and 3 as unarguable. Before me, LP renewed orally its application for permission to advance those grounds in addition and in the event Grounds 2 and 3 were fully argued before me. At this stage, all I need to say is that I consider that Grounds 2 and 3 are arguable and, therefore, permission to bring the claims in respect of them is granted.

7 The first defendant to this claim is the Secretary of State for Levelling Up, Housing and Communities ("the Secretary of State") by whom the Inspector was appointed. The Councils are the second and third defendants, but they took no part in the hearing before me.

8 As for the decision of the Inspector contained in his decision letter ("the DL"), para.9 to para.14 of LP's contain a useful summary as follows:

> "9. Due to the scale of the proposal, it was common ground that the appeal proposal represented so-called "inappropriate development" in the Green Belt.
>
> 10. As a result, the application of development plan and national planning policy required the Inspector to assess whether the harm that the Data Centre proposal would cause to the Green Belt and any other

harm, would be clearly outweighed by other considerations – the "Very Special Circumstances" policy test.

11. "Harm" in this case potentially arose from:

    The fact that the appeal proposal was 'inappropriate development' (often referred to as 'definitional harm')

    Harm to the openness of the Green Belt

    Harm to the purposes of the Green Belt

    Harm to landscape character and visual amenity

    Harm to residential amenity and local character through vehicular movement associated with the proposal

    Harm to Air Quality due to the emergency back-up generators

    Harm to the objective of reducing out-commuting for employment purposes.

12. "Other considerations" in this case potentially comprised:

    The fact that the Data Centre would meet part of a large unmet need, which was of national importance; and would do so without there being any clearly identified alternative.

    The large economic benefits that the scheme would bring in terms of jobs on and off site, investment and increase in GVA as well as business rates income for the local authorities.

    The agreed land-swap with adjacent owners Network Rail, enabling a more effective use of the railhead and aggregates uses (something which caused NR to support the grant of permission).

    The ability of the scheme to bring about a reduction in HGV movements due to the removal of the non-aggregates open uses which currently give rise to many of those movements.

    Improvements in biodiversity across the site and some landscaping improvements.

13. The Inspector made the following overall summary findings:

    The appeal proposals would be inappropriate development and cause harm to the openness of the Green Belt and to the Green Belt purpose of assisting 'in safeguarding the countryside from encroachment'.

    They would cause significant harm to the character and appearance of the immediate surroundings and some harm across a wider area.

They would cause harm (to which significant weight is given) by failing to mitigate the Air Quality and Employment Strategy effects of the scheme due to the failure to have a s.106 agreement which could be enforced (due to the fact that the lessees were not signatories to the s.106 obligations).

That the scheme would meet a local and national need for data centres.

There are relatively few alternative locations to meet the need whilst the appeal site has locational advantages in terms of power, fibre and proximity to networks.

There would be notable economic benefits to which significant weight is given.

Moderate weight is given to improvements to the railhead.
Limited weight is given to HGV reductions, biodiversity and landscape improvements, and the re-use of previously-developed land.

14. Overall the Inspector concluded that the other considerations did not clearly outweigh the harm to the Green Belt and other harms, and he dismissed the appeals."

THE PROPER APPROACH TO AN INSPECTOR'S DECISION ON A S.288 APPEAL

9 This is not in dispute and I can take it from para.7 of the Secretary of State's skeleton argument as follows:

"7. The general legal principles applicable to a planning statutory review under s.288 Town and Country Planning Act 190 are well established and are not in dispute with the Claimant. Amongst other things:

a. Decision Letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: …

b. Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was, see: South Bucks DC v Porter (No 2) [2004] 1 WLR 1953 [ICLR, 257] at [36]. The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why, see: R (CPRE Kent) v Dover District Council [2017] UKSC 79; [2018] 1 WLR 108 [ICLR, 460] at [42]. Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision maker's conclusions on the principal important controversial issues.

c. The interpretation of development plan policy is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract.

It must seek to discern from the language used in formulating the policy document the sensible meaning of the policies in question, in their full context, and thus their true effect.

d. The context includes the objectives to which the policies are directed and other relevant policies in the policy document, see: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; [2012] PTSR 983 [ICLR, 117] at [18]-[19]. Those principles apply to the interpretation of planning policy within the NPPF, … When the Court is called upon to interpret the NPPF, Lindblom LJ offered the following guidance in R(Asda Stores Ltd) v Leeds City Council [2021] EWCA Civ 32 at [35]:

"National planning policy is not the work of those who draft statutes or contracts, and does not always attain perfection. The language of policy is usually less precise, and interpretation relies less on linguistic rigour. When called upon – as often it is nowadays – to interpret a policy of the NPPF, the court should not have to engage in a painstaking construction of the relevant text. It will seek to draw from the words used the true, practical meaning and effect of the policy in its context. Bearing in mind that the purpose of planning policy is to achieve "reasonably predictable decision-making, consistent with the aims of the policy-maker", it will look for an interpretation that is "straightforward, without undue or elaborate exposition" (see Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314, at paragraph 41). Often it will be entitled to say that the policy simply means what it says, and that it is the job of the decision-maker to apply it with realism and good sense in the circumstances as they arise – which is what local planning authorities are well used to doing when making the decisions entrusted to them (see R. (on the application of Corbett) v The Cornwall Council [2020] EWCA Civ 508, at paragraphs 65 and 66)."

THE GROUNDS

10 Ground 1 argues that the Inspector's conclusions as to the lack of employment opportunities offered by LP were inconsistent and/or irrational. I refer to this point as "the employment opportunities point".

11 Ground 2 argues that the Inspector erred in law as to the effect of the proffered condition and/or he did not take it into account, although it was a material consideration. This issue arises in connection with the Inspector's conclusion that the Undertaking was, itself, unenforceable and he then accorded it negative weight. I refer to this as "the unenforceability point".

12 Ground 3 argues that the Inspector wrongly interpreted NPPF para.138(c) and so erred in law. I refer to this as "the encroachment on the countryside point".

13 The Secretary of State did not suggest in relation to any ground that even if made out, the Inspector's decision was highly likely to be the same or substantially the same. That is unsurprising, since they all related to significant elements of the planning balance exercise which the Inspector had to carry out. It is more logical for me to start my consideration of the claim by dealing with Ground 2 first. Grounds 1 and 3 will follow.

Ground 2: the unenforceability point.

14 The issue over the enforceability or otherwise of the offered Undertaking arose in this way. There was before the Inspector at the hearing a draft s106 Undertaking. Towards the end of the hearing, and after the substantive matters had been dealt with, one of the LPA's, probably Hillingdon, raised a query as to whether the Undertaking was enforceable, given that some of the Site consisted of leasehold land pursuant to leases granted by LP or in respect of which it was now lessor, as I have previously noted, but where the lessees themselves were not party to the Undertaking. Indeed, the documents supplied to me show that prior to the hearing, when a draft Undertaking was being circulated, Hillingdon said that it should be signed by all the interested parties, including the leaseholders.

15 Mr Warren KC, who was at the hearing before the Inspector, informed me (and this is not disputed by the Secretary of State) that there was a discussion about amending the Undertaking or, in any event, having an "Arsenal" planning condition. This is a negative condition, whereby a permitted development cannot commence until a planning obligation or other agreement has been entered into. This will usually take the form of a s.106 agreement. Again, a draft condition had actually been sent to the Inspector prior to the hearing.

16 Such conditions are dealt with in para.010 of PPG Use of Planning Conditions as follows:

> "Is it possible to use a condition to require an applicant to enter into a planning obligation or agreement under other powers? A positively worded condition requiring the applicant to enter into a planning obligation under s.106 or an agreement under other powers is unlikely to pass the test of enforceability. A negatively worded condition, limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases, ensuring that any planning obligation or other agreement is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency. However, in exceptional circumstances, a negatively worded condition requiring planning obligation or other agreement to be entered into before certain development can commence may be appropriate where there is clear evidence that the delivery of the Development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes). In such cases, these six tests should also be met. Where consideration is given to using a negatively worded condition of this sort it is important that the LPA discusses with the applicant before planning permission is granted the need for planning obligation or other agreement and the appropriateness of using a condition. The heads of terms or principal terms need to be agreed prior to planning permission being granted to ensure the test for necessity is met and in the interests of transparency."

17 At the hearing, the Arsenal condition was put forward as a way of solving the potential problem caused by the absence of the signature of the leaseholders as parties to the Undertaking. Mr Warren KC informed the Inspector that such a remedy would be appropriate here because the Development was a complex scheme, as referred to in the PPG, and would avoid any problem of unenforceability. This was because whether the leaseholders were parties or not, there could be no development anyway under such a condition until the leaseholders had entered into the Undertaking as well. If they attempted to commence any part of the Development beforehand, it would be a breach of planning and control and the LPAs could take enforcement action against them directly because of that breach pursuant to their normal enforcement powers.

18 Following the hearing, the parties liaised over points of difference in relation to the Undertaking. LP submitted again a proposed Arsenal condition which was in this form:

> "No work shall be carried out under this planning permission in the area shown hatched purple on the plan…
>
> a) until either all parties with any interest in the area shown hatched purple have entered into a s.106 unilateral undertaking on the same terms on which this permission is granted or
>
> b) such interests have come to an end and evidence of it having come to an end has been provided to the Council.
>
> Reason:
>
> The planning permission has been granted subject to a s.106 unilateral undertaking and at the time of this permission being issued the applicant is not able to bind all relevant parties and interests in the site to the terms of the planning obligations that it contains."

19 Buckinghamshire Council did not oppose the condition, but proposed some additional wording. Hillingdon, ultimately, agreed it. All such agreement, of course, being subject to the substantive points against permission which were being taken before the Inspector.

20 There was also to be some amended wording to the Undertaking and using the Undertaking to be given to Buckinghamshire as an example, what that said was that in the event that the Inspector allowed the appeal, the owner covenanted within 21 working days to make an application to the Land Registry to register this deed as a restriction against the title numbers, that is the leasehold interests, and provide to the Council evidence of registration. For the avoidance of doubt, the restriction may be removed in the event the leasehold interests are discharged. In the end, as the correspondence shows, the proposed condition and the revised under taking were agreed between the parties in the sense that and, as I say, subject to the substantive objections to permission, it was not suggested that either the condition or the revised Undertaking were themselves unacceptable or deficient in any way. The LPAs also agreed that there were no enforceability problems now.

21 I now need to refer to para.51 to 56 of the DL as follows:

> "51. The evidence before me was indicative that the area under jurisdiction of Buckinghamshire experiences residents migrating to other areas to undertake their employment. To mitigate this, the Council seeks the provision of employment and training opportunities on new developments in their area.

> 52. A planning obligation should run with the affected land. This means that should the land be transferred to a different owner the obligations within the agreement would be enforceable against the future owners. Therefore, a legal agreement should be signed by all parties with an interest in the land. The undertakings that have been submitted as part of the appeal proceedings have been signed by the landowner and the mortgagee, however, they have not been signed by leaseholders that occupy parts of the site. This means that not all of those who have an interest in the land are parties to the undertakings.
>
> 53. Therefore, in the event of these unilateral undertakings being breached, the Council cannot take enforcement action against the leaseholders. In consequence, I do not believe that the submitted unilateral undertakings provide me with sufficient certainty that the required mitigation would be provided.
>
> 54. I note that the unilateral undertakings have clauses that require that any leaseholds be surrendered prior to development commencing and that a planning condition could be imposed that would ensure that prior to development commencing the leasehold land was bound a legal agreement consistent with the submitted unilateral undertakings.
>
> 55. However, layout of the Development has been reserved for future consideration, therefore, at this juncture there is a possibility the land that is covered by the current leases might be the first to be developed. In consequence, if there is not an agreement in place at this point the respective councils would not be able to take enforcement actions against such a breach. Therefore, I must conclude the Development would not provide the required mitigation.
>
> 56. The appellant suggested this approach had been taken previously on another site outside the jurisdiction of the Councils involved in this appeal. I do not have full information regarding the planning circumstances of this, which means I can only give this matter a limited amount of weight. Nonetheless, I do not believe the circumstances of the appeal scheme, particularly given my previous conclusions, warrant diverging from the approach of having all the interested parties signing the unilateral undertaking."

22 LP contends that the Inspector did not really engage with the proposed condition at all and, in any event, gave no rational reason as to why it should be rejected as a solution to the problem. He obviously had notice of the proposed solutions because he correctly identified them at para.54. As to para.55, at first blush, this would appear to be an objection to a problem with the Undertaking's clauses requiring surrender of the leases. That is because until the leaseholders were party to the Undertaking if, for some reason, they started development enforcement action could not be taken against them under the Undertaking itself. But it is very hard to see how para.55 was also dealing with the proposed Condition. That is because the Condition formed part of the permission and the result would be that the grant of planning permission was conditional and if a leaseholder attempted to commence a development for any reason prior to entering into the Undertaking then, as already noted, it would be a breach of planning control and the LPAs could enforce directly against them. Indeed, the LPAs did not suggest otherwise to the Inspector and the Secretary of State does not suggest otherwise now. Yet on a fair reading of

para.55 it appears to have been written as an answer or an objection to both solutions, not just the undertakings. At one stage I thought that perhaps it was only dealing with the Undertaking but, on reflection, that does not square with how it reads in the context of paragraphs before and after it. On that basis, the Inspector seems to have misunderstood the effect of the proposed Condition as distinct from the Undertaking.

23 One then goes to para.56. What he says in the first part is not, itself, susceptible of challenge and, indeed, is not challenged. In fact, on the basis that he was under the impression that the condition would be ineffective in some way, one can understand why he would only give the limited weight he referred to in relation to the example of a condition being deployed elsewhere. One then comes to the second part of para.56. There appears to be an error because the second phrase did not need to be removed to make sense of it and I did remove it when reading it out earlier.

24 Dr Bowes argues that what the Inspector is doing here is weighing up the case for the proposed Condition by reference to the exceptional circumstances test in the PPGs, although the Inspector does not say so expressly. I would not take issue, nor does LP, with the suggestion that the general approach is to have all relevant parties sign the relevant s.106 agreement at the outset, or at least that this is "the best way" to quote the PPG. However, the problem is that the Inspector's reasoning for that conclusion must objectively have been based to a significant extent on his mistaken view as to the Condition as to a solution to the problem. So the fact that he also says he does not consider that the circumstances of the appeal scheme do not warrant a departure from the general approach does not save, as it were, his conclusion.

25 As LP contends, either the Inspector misunderstood the effect of this condition, which was an error of law, or if he did understand it he did not take it into account in reaching his conclusion, which was that he was not prepared to remedy the problem of the unenforceable Undertaking before him while it was a material consideration in that regard. Either way, this rendered his decision unlawful. Though not strictly necessary in the light of that conclusion, I shall deal with Ground 1 and then Ground 3, as they were fully argued.

Ground 1: employment opportunities

26 The Undertaking offered to the Councils had two elements relating to employment opportunities. Taking the one proffered to Buckinghamshire Council by way of an example, one of the elements was the employment and skills contribution which was a sum of money to be paid to Buckinghamshire and calculated in accordance with a formula to be found in Appendix 1 to Schedule 5 of the Undertaking and to be used by the Council towards training skills and business development and economic activity in the local area. The second element was the local labour, skills and employment strategy and management plan, which was a plan for the construction and operational phases to be submitted to set out how the owner (that is the developer) and its contractors and others would make arrangements for regular reporting and methodology for sharing job vacancies for the purpose of recruiting local residents and an approach to the forecasting of future job opportunities and skills to ensure an adequate pipeline of candidates. The former element included a direct financial contribution to Buckinghamshire.

27 The Inspector addressed the former element expressly in the section of the DL which begins at para.44 and is headed "Air Quality and Employment and Training Opportunities". It was in that context that he addressed also the enforceability or otherwise of the Undertaking in the passages to which I have already referred. I have already referred to para.51, referring to the problem of migrating residents out of Buckinghamshire and the provision of employment and training opportunities in their area.

28 Then, at para.57, having dealt with the general problem of unenforceability, if I can put it that way, the Inspector said this:

> "The submitted undertaking in respect of Appeal A includes an employment and skills contribution. At the hearing, Buckinghamshire Council confirmed they do not have a project on which this contribution would be utilised and there is no planning policy basis for seeking such a contribution. Given that there is a likelihood that the contribution would not be utilised for its intended function, I do not believe that this contribution is necessary or reasonable."

I then need to read what as said at the end of para.59.

> "I conclude the proposed development would give rise to adverse effects which would not be mitigated through the submitted legal agreements."

29 The next section begins "Other Considerations". At para.60 he says this:

> "The proposed development would result in the provision of a new data centre which would have a significant capacity. The evidence before me is indicative that there is a notable need for such data centres within the locality and also the country as a whole. In consequence, the proposed development would respond to this need, which would assist in the generation of economic benefits with the supporting of business activities. This is particularly apparent due to the nature of the appeal site's location and its accessibility to infrastructure."

30 Then at para.65:

> "The proposal would generate some economic benefits in the form of additional employment opportunities for workers in the data centre, for construction process and operation development and would also support other business elsewhere. These, in combination, would generate notable economic benefits. Even allowing for the loss of existing business facilities, in the result I give the economic benefits arising from the proposed development a significant amount of weight."

31 Then para.75 and para.76, which are within the section headed "Planning Balance and Conclusion":

> "75. Furthermore, given the absence of appropriate legal agreement to secure appropriate mitigation, the Development would also have an adverse effect upon the air quality levels in Buckinghamshire and Hillingdon and would not also provide appropriate employment opportunities for the occupiers of Buckinghamshire Council. This would also amount to a notable amount of harm, to which I ascribe a significant amount of weight.
>
> 76. The other consideration I have identified individually and collectively carry a limited to significant amount of weight in favour of the proposal. As such, the harm to the Green Belt is not clearly outweighed by the other considerations identified, either individually or

in accumulation, and therefore the very special circumstances necessary to justify the Development do not exist."

32 Let me deal with para.76 first. This, to my mind, as it states, addresses the "other considerations" and must be a reference, among other things, back to para.65, which was within the "Other Considerations" heading. So that general employment benefit is given some weight.

33 Paragraph 75 is, obviously, concerned with something else. It is, in my judgment, a reference back to the "Air Quality and Training Opportunities" section. That section included para.51, with its reference to the employment and training opportunities needed for Buckinghamshire residents in a new development in their area. The Undertaking had sought to deal with this in two ways, as has already been mentioned. The second element of the Undertaking, the Local Labour Plan, was about creating job opportunities for local residents as it states and, therefore, on its face, was seeking to address the concerns which had been set out by the Inspector in para.51. In fact, as Schedule 5 to the Undertaking shows, part of the second element concerning the apprenticeships and work placements and job opportunities was not giving a direct financial contribution in the way that the first was.

34 The question, then, is what para.75 is referring to, so far as employment opportunities are concerned. It must be addressing the second element of Schedule 5. That is because para.75 begins by referring to the absence of an appropriate legal agreement and the general problems of unenforceability which had been found by the Inspector, which is why the whole of Schedule 5 was not available. Had there not been para.57, it might then have been appropriate to assess weight to the harm caused by the lack of the employment opportunities in both elements. However, para.57 made clear that, in any event, the first part of Schedule 5, the direct financial contribution, was not necessary or reasonable and had to be disregarded, but the absence of the direct financial element of Schedule 5 for that reason surely meant that this factor was neutral going forward. It is very hard to see why its existence should be regarded as <u>harmful</u> when it was due to the Councils not having an appropriate project. That is why LP, under this ground, contends that there is a contradiction inherent in para.75 which was, on any view, irrational.

35 As against that, Dr Bowes says that if the employment opportunities are not there in the proposed scheme, it does not matter why they are not there and the Inspector was entitled, as a matter of planning judgment, to ascribe positive harm to their absence. But in relation to the financial contribution, I disagree, since this ignores why the contribution had to be excluded, as it were. In my judgment, it was irrational for the Inspector in para.75 to give specific weight to the supposed harm caused by the removal of the financial contribution. Accordingly, had it been necessary for me to say so, I would conclude that the Inspector's decision was unlawful for this reason also.

<u>Ground 3: the encroachment on the countryside point</u>

36 Again, although strictly unnecessary in the light of my finding on Ground 2, I will also deal with Ground 3 as it has been fully argued. The following factual matters are not in dispute. First, while, of course, the whole of the site is in the Green Belt, it is in or on previously developed land. Moreover, the majority of the site lies in an area of what has been designated as "settlement" being one of the landscape character types defined in the South Buckinghamshire Landscape Character Assessment as opposed to, for example, "rural landscape". In that sense, it is not immediately within the "countryside" element of the Green Belt. It is, in that sense, not, for example, a site which, though previously developed, consists of a single dwelling or a barn otherwise within the countryside. As implied by the Inspector in para.27 of the DL, there is an extent to which the site has already something of an urban appearance. Nonetheless, it can, of course, be seen from the surrounding area, including countryside, within the Green Belt.

The NPPF

37 I now need to turn to the 2021 version of the NPPF as it relates to Green Belt. Paragraphs 137 and 138 say as follows:

> "137. 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 Breen Belts are their openness and their permanence.
>
> 138. Green Belt serves five purposes:
>
> a) to check the unrestricted sprawl of large built-up areas;
>
> b) to prevent neighbouring towns merging into one another;
>
> c) to assist in safeguarding the countryside from encroachment;
>
> d) to preserve the setting and special character of historic towns; and
>
> e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

38 Paragraphs 139 to 146 are essentially about plan-making in relation to Green Belt and the designation of new or altered Green Belt land. Paragraphs 147 to 151 are in a section headed "Proposals Affecting the Green Belt" which set out the factors explicitly to be considered when determining an application for planning permission for sites which are already within the Green Belt. In most cases, proposed developments consisting of the construction of new buildings will be inappropriate (see para.149). If so, the very special circumstances to which I adverted earlier will be required for the approval of such a development.

39 It is common ground that although the NPPF does not specify this as a general proposition, in assessing whether there are very special circumstances, as the Inspector had to do here, first, account had to be taken of the effect on the openness of the relevant Green Belt of the proposed development. That is perhaps unsurprising, given the terms of para.137. Indeed, the Inspector here had a section of the DL headed "Effect on openness" and his ultimate conclusion here was that "the proposed development would have a significant adverse effect upon the overall level of openness of the Green Belt. This would conflict with the requirements of the Local Plan and the Framework. Among other matters, these seek to ensure that developments do not adversely affect the character of the Green Belt." However, and secondly, regard must be had as to whether the effect of the development would be to run counter to any of the purposes for having a Green Belt in the first place, as set out in para.138. Neither Dr Bowes nor Mr Warren KC was able to tell me exactly how that approach had arisen. It may be a reflection of the fact that there are express references to consideration of the purposes of the Green Belt in the NPPF in para.149(b) and 150, which deal with some of the cases where development is not, *per se*, inappropriate. In any event, there is no doubt that the approach is applicable here.

40 All of the above forms the context for the challenge behind Ground 3, which concerns but one paragraph of the Inspector's effect on openness" assessment. This is para.27; it reads thus:

> "In result, the proposed development would create a significantly more urbanised appearance which would erode the rural and less developed character of the surrounding area. Therefore, the proposed development would result in encroachment into the countryside. This

> means that the development would conflict with the purposes of including land in the Green Belt."

41 The deceptively short point taken by LP is that "encroachment" means physical incursion into the countryside, but there was no such incursion here. Rather, there was a change to and building up of the existing development, not itself situated in the countryside part of the Green Belt area. The Inspector therefore erred in law as treating the "more urbanised appearance" of the Development as an encroachment into the countryside because it would erode the rural character of the surrounding area. In other words, encroachment includes a visual as well as a physical incursion. LP accepts that had the proposed development been itself in the countryside, there could have been an encroachment on it by reference to its volumetric expansion, but as it was not there was no encroachment here. The finding that there was such an encroachment and therefore a factor going against one of the purposes for having a Green Belt set out in para.138(c) meant that the Inspector could, and seemingly did, treat this as another matter giving rise to negative weight against the Development.

42 LP contends that the ordinary meaning of "encroachment" is confined, as I have said, to some physical incursion. For its part, the Secretary of State says that it can include a visual impact on the countryside as well, irrespective of whether the development itself is in the countryside or not.

The Law

43 As a starting point, I think it important to recognise that there are two relevant concepts at play in this area. The first is the effect on openness of the already established Green Belt; the second is the preservation of countryside from encroachment. All except one of the authorities cited to me deal with the question of visual impact in the context of openness. Thus, in *Turner v SSLCLG* [2016] EWCA Civ 466, part of the challenged decision of the Inspector was that one of the exceptions to inappropriateness did not apply. This was where there was limited infilling or development on previous development sites "which did not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development". In making his decision, the Inspector there concluded that the proposed bungalow would "obstruct views into the site and appear as a dominant feature that would have a harmful impact on openness here". The issue was the relevance of visual impact or not to the question of openness. At para.15, Sales LJ said this:

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

> of the Green Belt is an important part of the point of designating land as Green Belt."

44 In fact, the Inspector in that case did not refer explicitly to the safeguarding of the countryside from encroachment purpose at all. In any event, the Secretary of State relies on this passage as support for the proposition that encroachment can include visual impact on the countryside from development outside it, albeit within the Green Belt. I disagree. Sales LJ was emphasising the overarching purpose of preserving openness in the Green Belt. He does refer to the safeguarding of the countryside from encroachment as reflecting that quality of openness. But, of course, any physical incursion into the countryside would or may adversely affect its quality of openness in visual terms, but that does not mean that the encroachment itself could be merely a visual impact from some other area.

45 The statement made by Sales LJ in *Turner*, which I have quoted, was approved by the Court of Appeal in *Samuel Smith v North Yorkshire County Council* [2018] EWCA 489 but, again, that was all in the context of visual impact in the context of preserving the openness of the Green Belt.

46 Following on from that, Jefford J, in *Euro Garages v SSCLG* [2018] EWHC 1753 said this at para.29:

> "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."

47 The only case which deals head-on or may be dealing head-on with what encroachment on the countryside means is in *Summers Poultry Ltd v SSCLG* [2009] EWHC 533. This concerned the development of an already developed site in the countryside within the Green Belt. A point was taken by the applicant that this was already developed land. As to that, the Inspector had said this at para.16 of his decision:

> "I consider that the proposal takes no real account of the importance of protecting the openness of the green belt, its most important attribute, or to (sic) the purposes of including land in it, particularly in safeguarding the countryside from encroachment. Although the site would be tidier, paragraph 1.7 of PPG2 makes it clear that the quality of the landscape is not relevant to the inclusion of land within the green belt. Furthermore, since it is no longer in agricultural use, enlargement of these industrial premises would not fulfil the objectives for the use of land in green belts. Overall, I consider that the proposed extension of the existing building would result in a very significant loss of openness of the green belt."

48 On appeal against the Inspector's refusal of planning permission, the applicant contended that encroachment is confined to physical encroachment. It could not, therefore, be said to be caused by development on what was already developed land. As to that, the Deputy Judge said this at para.27 of his judgment:

> "The driving force behind the policy and the purposes of the green belt… is the contribution that openness can make to the preservation of the countryside. It seems to me that loss of openness can take a number of forms leading to encroachment. The countryside contains a wide variety of features: open farmland, agricultural buildings, dwellings and other structures. The effect of development as encroachment on the countryside may be in the form of loss of openness or intrusion. An agricultural hard standing will be developed land, but still part of the countryside, and to that extent open. If I construct a building on the hard standing, there may well be loss of openness and, through the loss of openness, an intrusion or encroachment into the countryside. In the present case, where there is an industrial building, which was proposed to be substantially extended, albeit on to a hard standing, through its creation of additional bulk and loss of openness it is in my judgement clearly capable of constituting an encroachment into the countryside as a matter of planning judgement, but it is just that. It is quintessentially a matter of planning judgement for the decision-maker."

49 I follow all of that, but what para.27 makes clear is that development with which the learned judge was concerned was in the countryside which was to be protected from the encroachment. There could therefore be a loss of openness of that countryside where the development created an additional bulk. It that sense, it intruded upon the relevant openness. Or the Inspector was at least entitled so to find, as a matter of judgment. But that is not this case. It is common ground the site here is outside the relevant countryside. That being so, I fail to see how it is even capable of intruding upon the relevant countryside. It, of course, can still affect, and adversely so, the openness on the relevant Green Belt as a whole and that was, in fact, the principal finding of the Inspector here.

50 For my own part, I am not sure that encroachment really does connote visual intrusion unaccompanied by any physical intrusion since I consider the latter to be the true meaning of encroachment. But that observation does not matter. On any view, if the development is outside of instead of being in the midst of the relevant countryside, as it were, I cannot see how its own appearance can be capable of encroaching on or into the adjacent countryside of which it does not form part. I do not, for my part, see that this interpretation of encroachment has any adverse effect on the general highly restrictive approach to permitting development within the Green Belt. The whole question of visual impact is present, in any event, in the context of the question of the effect of openness of the Green Belt and, as the Inspector's decision shows here, that was the overarching point.

51 For these reasons, I consider that the Inspector made an error of law in his interpretation of "encroachment" in the context of para.138(c) of the NPPF. That would have provided, had it been necessary, a yet further basis for quashing his decision.

52 I would only add this by way merely of a postscript. I think it can be problematic as a consideration going to the exercise of planning judgment to have regard to the purpose for which Green Belts were so designated. If one was considering para.138 by itself and merely as what it purports to be, namely, the purposes served by Green Belts all in furtherance of the aim of openness, I doubt whether there would be any confusion over the meaning of para.138(c). All it would be saying is that one way of creating permanent open land is to prevent, or mainly prevent, the construction of buildings in the countryside. That purpose is achieved if that countryside is designated as Green Belt. It is the fact that regard has to be had to the purposes in the context of assessing the question of planning permission in relation to a particular development when it <u>is</u> within the Green Belt that has, in my judgment, added a degree of complexity to the exercise.

CONCLUSION

53 In the event, the Inspector's decision here must be quashed. I am very grateful to counsel for their very helpful oral and written submissions.

CERTIFICATE

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