Neutral Citation Number: [2023] EWHC 1739 (Admin)

Case No: CO/2446/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Leeds Combined Court Centre
1 Oxford Road
Leeds LS1 3BG

Date: 14/07/2023

Before :

MR JUSTICE LANE

- -

Between :

HOLYSTONE CIVIL ENGINEERING LIMITED	**Claimant**
- and –	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
- and –	
SUNDERLAND CITY COUNCIL	**Interested Party**

Mr J Litton KC (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Mr G Williams KC, Mr R Calzavara (instructed by **the Government Legal Department**) for the **Defendant**
The Interested Party was not represented

Hearing date: 17 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane :

1. The claimant seeks the quashing of the decision of the defendant, taken by an inspector on 30 May 2022, to dismiss the claimant's appeal against the refusal by the interested party to grant planning permission under section 73 of the Town and Country Planning Act 1990 to develop land at Houghton Quarry, Houghton-le-Spring, without complying with certain conditions subject to which a previous planning permission was granted in respect of the land.

A. BACKGROUND

2. The land in question comprises a former quarry located in the Green Belt. The quarry was in operation for over 150 years until extraction activities ceased in the mid-1990s.

3. In May 1996, the interested party granted planning permission to fill the quarry void with domestic and non-toxic waste. That waste disposal activity ceased, however, when the interested party granted planning permission in October 2013 for the redevelopment of the quarry landfill site, comprising a revision to the final landfill restoration contours; development of an employment park consisting of offices and buildings for general industrial distribution and storage with ancillary trade counter units; associated ancillary infrastructure, access, car parking and landscaping. The 2013 Permission was subject to certain conditions.

4. In January 2019, the claimant applied to the interested party to develop the land without complying with four of the conditions imposed in 2013. In broad terms, the claimant proposed a variation of the conditions so as to facilitate an increase in the amount of inert waste deposited in the former quarry and an extension of the time for depositing it by a further five years. The increase in waste and extension of time would mean that the development platform, upon which the employment park[1] would be built, would rise in height by 12 metres. The 2019 application also sought a revised restoration programme, temporary construction of an aggregate wash plant, the realignment of an access road and amendments to the on-site landscaping scheme. There was no proposal to alter the layout, height or scale of the employment park buildings permitted by the 2013 Permission.

5. The interested party's planning officer recommended approval of the application. He considered that the revised proposals would not have a materially greater impact on the openness of the Green Belt, compared with the development approved in 2013. Accordingly, the proposed development would not, in his view, represent inappropriate development in the Green Belt.

B. REFUSAL OF PERMISSION AND APPEAL

6. The interested party's planning committee did not accept the planning officer's recommendation. On 6 March 2020, it refused the application for the following reason:-

> "The proposed development constitutes inappropriate development within the Green Belt given the level of impact of the proposed development on the openness of the Green Belt in

[1] Also described as a business park.

> comparison to the existing development approved under planning permission ref: 12/03178/FUL, and there are no very special circumstances to justify the proposed development contrary to paragraphs 143, 144, 145 and 146 of the NPPF and policy NE6 of the Core Strategy and Development Plan."

7. The claimant appealed to the defendant against the refusal of planning permission. In its Statement of Case, the claimant identified what it saw as the issues raised by the appeal as being (1) whether the development constituted inappropriate development in the Green Belt by virtue of the level of impact on openness on the Green Belt in comparison with development approved by the 2013 Permission; and (2) in the event the development was found to constitute inappropriate development, whether very special circumstances existed to justify the proposed development in the Green Belt. The claimant had prepared a Green Belt Assessment, which was put before the inspector. This document (produced by the Pegasus Group) pointed out that the site benefited from an extant consent. The quarry void was previously developed land and as such formed the baseline against which the refused scheme should be addressed. Overall, the Assessment concluded that the proposed scheme would not have a greater impact on the openness of the Green Belt than the extant scheme. The proposal would not conflict with the NPPF or the interested party's policy NE6, in that it would not harm the openness of the Green Belt or the purposes of the Green Belt, when compared to the extant planning permission.

8. The claimant also identified several material circumstances which meant, in its submission, that if the proposed development was to be regarded as inappropriate development, there were very special circumstances justifying the grant of planning permission.

9. At paragraph 10.11 of its Statement of Case, the claimant said that the continued works of the quarry would safeguard existing jobs. It would contribute to retaining the existing workforce on the site (10 jobs), and the workforce connected with the wider operation such as HGV drivers. The development would provide enhanced economic benefits in terms of new direct and indirect employment opportunities, comprising 15-25 jobs, together with an additional 10 jobs created by further expansion of the associated transport operation.

10. The interested party produced a Statement of Case (prepared by Fairhurst). At paragraph 2.5, the Statement said that, if planning permission were granted for the development, "the outcome would be a fresh grant of planning permission for the development described in planning permission 12/03178/FUL". Although the interested party accepted that the planning history of the site could constitute a material consideration, the interested party regarded the proposed development as contrary to the development plan and that material considerations did not justify a decision contrary to it: section 38(6) of the Planning and Compulsory Purchase Act 2004.

11. At paragraph 4.8, the interested party's Statement of Case said that, although the 2013 Permission "does provide a full-back position, it is evident that providing a higher development platform created by landfill that the proposed development does result in a greater impact on the Green Belt and the extant planning permission". In this regard, the inspector was invited to review one of the drawings that accompanied the planning application, showing screening by landscaping of the employment park. The interested

party considered that it was wrong for the claimant to say that, because the buildings would be screened by landscaping, there would be no impact on the openness of the Green Belt: "Should such an opinion be accepted then it is difficult to see how any building could ever be considered inappropriate in the Green Belt if it was screened by landscaping from selected viewpoints only".

12. The claimant submitted a Rebuttal Statement in response to the Statement of Case of the interested party. At paragraph 2.7, the Rebuttal Statement contended that the "simple proposition" - the proposed development was inappropriate because it involved the construction of new buildings in the Green Belt - failed to take into account the existence of the already consented scheme. It was noted that the interested party's Statement of Case at paragraph 4.8 accepted that "the existing planning permission is a material baseline for the assessment of the impact of the proposed development on the Green Belt". So far as landscaping was concerned, it was said to be evident that the earth profile and the woodland block would visually contain and screen the business park on the original development platform. It was said that these would still have the same screening effect in terms of providing visual containment. It would screen both the business park on the original platform and the proposed business park on the raised platform. There would, accordingly, be no greater visual effect caused by the proposed development, compared with the originally consented scheme.

C. GREEN BELT POLICY

13. Paragraph 147 of the NPPF (2021) provides that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. Paragraph 148 provides that "very special circumstances" will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

14. Paragraph 149 states that a local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Certain exceptions are then specified. For present purposes, we are concerned with paragraph 149(d) and (g). So far as relevant, these provide as follows:-

> "(d) the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
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> …
>
> (g) … 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
>
> …"

15. Also relevant is paragraph 150 which, so far as material, provides as follows:-

> "150. Certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. These are:
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> …
>
> (b) engineering operations;
>
> …"

16. The Glossary at Annex 2 to the NPPF defines "previously developed land" as:-

> "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...".

D. FALLBACK

17. A fallback development is, in essence, what might be done with the land in question if consent for the development which is being sought were not to be granted.

18. Having reviewed the authorities on fallback; namely, Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government [2009] EWCA Civ 333 and Simpson v Secretary of State [2011] EWHC 283 (Admin), Ian Dove QC (as he then was) summarised the position as follows in Gambone v Secretary of State for Communities and Local Government [2014] EWHC 952 (Admin):-

> "26. The fallback argument is in truth no more or less than an approach to material considerations in circumstances where there are, or may be, the opportunity to use land in a particular way, the effects of which will need to be taken into account by the decisionmaker. That involves a two-stage approach. The first stage of that approach is to decide whether or not the way in which the land may be developed is a matter which amounts to a material consideration. It will amount to a material consideration on the authorities, in my view, where there is a greater than theoretical possibility that that development might take place. It could be development for which there is already planning permission, or it could be development that is already in situ. It can also be development which by virtue of the operation of legal entitlements, such as the General Permitted Development Order, could take place.
>
> 27. Once the question of whether or not it is material to the decision has been concluded, applying that threshold of theoretical possibility, the question which then arises for the decision-maker is as to what weight should be attached to it. The

> weight which might be attached to it will vary materially from case to case and will be particularly fact sensitive. Issues that the decision-maker will wish no doubt to bear in mind are as set out in the authorities I have alluded to above such as the extent of the prospect that that use will occur. Allied to that will be a consideration of the scale of the harm which would arise. Those factors will all then form part of the overall judgment as to whether or not permission should be granted. It may be the case that development that has less harm than that which is being contemplated by the application is material applying the first threshold, and then needs to be taken into account and weight given to it.
>
> 28. However, the question of whether or not there is more or less harm applies at the second stage of the assessment and not at the first stage when deciding whether or not such existing land use entitlements, as may exist in the case, should be regarded as material. In short, there is nothing magical about a fallback argument, it is simply the application of sensible legal principles to a consideration of what may amount to a material consideration, and then the application of weight to that in context in order to arrive at the appropriate weight to be afforded to it as an ingredient in the planning balance."

19. In R (Mansell) v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314, Lindblom LJ summarised the principles regarding fallback development as follows:-

> "27. The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:
>
> (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.
>
> (2) The relevant law as to a "real prospect" of a fallback development being implemented was applied by this court in *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan L.J.'s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council* [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As Sullivan L.J. said in his judgment in *Samuel Smith Old Brewery*, in this context a "real" prospect is the antithesis of one that is "merely theoretical" (paragraph 20). The basic principle is that "… for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice" (paragraph 21). Previous decisions at first instance, including *Ahern* and *Brentwood Borough Council v Secretary of*

> *State for the Environment* [1996] 72 P. & C.R. 61 must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, "… "fall back" cases tend to be very fact-specific" (ibid.). The role of planning judgment is vital. And "[it] is important … not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court" (paragraph 22).
>
> (3) Therefore, when the court is considering whether a decision-maker has properly identified a "real prospect" of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand.

E. SECTION 73 PERMISSION

20. Section 73 of the 1990 Act concerns an application for planning permission in order to develop land without complying with conditions subject to which a previous planning permission was granted. On such an application, the local planning authority must consider only the question of the conditions subject to which planning permission should be granted. If the authority decides that planning permission should be granted subject to conditions that are different from those subject to which the previous permission was granted, or that permission should be granted unconditionally, the authority must grant planning permission accordingly. If, on the other hand, the authority decides that planning permission should be granted subject to the same conditions as those imposed previously, the authority must refuse the section 73 application.

21. In Pye v Secretary of State for the Environment and North Cornwall District Council [1998] PLCR 28, Sullivan J held that an application made under section 73 is an application for planning permission although section 73 applications were commonly referred to as applications to "amend" conditions attached to an earlier planning permission. Sullivan J explained that a decision under section 73(2) leaves the original planning permission intact and unamended. That is so, whether the decision is to grant planning permission unconditionally or subject to different conditions; or to refuse the application because planning permission should be granted subject to the same conditions.

22. In broad terms, the consideration by the local planning authority of the condition subject to which planning permission should be granted will vary in scope, depending on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation, consideration will be confined within a very narrow compass. The position will, however, be different where, as in the case before Sullivan J, the application under section 73 is to alter a condition so as to extend the period for submission of reserved matters, at a time when the original planning permission was no longer capable of implementation because time for submission of reserved matters had expired. In such a case, Sullivan J held that the local planning authority should not be required to "shut its eyes" to the practical consequences of granting section 73 permission, which would be to enable the development to be carried out, whereas refusing the application would mean that the original planning permission could not be implemented.

23. In R v Leicester City Council ex parte Powergen UK Ltd (2001) 81 P & CR5, the Court of Appeal endorsed what Sullivan J had said in Pye.

24. In R (Stefanou) v Westminster City Council [2017] EWCA 908 (Admin), the defendant authority had earlier granted the interested party permission to excavate a two-storey basement. In 2016, it approved a section 73 application, permitting a three storey basement. A neighbour of the interested party challenged the defendant's failure on the later application to consider the newly adopted development plan, which materially altered the defendant's basement policy. The claimant asserted that the earlier permission was a material consideration but that did not result in the defendant being relieved of its duty to consider the whole of the new proposed development against the present development plan and all other material considerations.

25. Gilbart J agreed. At paragraph 90, he held that the "duty of WCC was to assess this application against the Development Plan as it stood in 2016 and all material considerations as at that date." He continued:-

> "91. One such consideration, and no doubt one to which WCC might have wanted to ascribe great weight, was the fact that there was a permitted scheme in existence, which if it went ahead would include the restoration of the listed building. It may be that, on applying s 70(2) *TCPA 1990* and s38(6) *PCPA 2004* that fallback position would have outweighed the clear objective of CM 28.1 of preventing a development with basements such as these from being built, with the consequent disruption of the street scene and of neighbours for an extended period. But assessment of the weight to be given to the fallback position must have looked at the likelihood of it going ahead without the proposed 2016 amendments, and of the likelihood of a scheme not going ahead which would not have included basements of the scale proposed here."

F. THE INSPECTOR'S DECISION

26. At paragraph 6 of the decision letter, the inspector identified the main issues in the appeal as being:-

> - "whether the proposal would represent inappropriate development in the Green Belt having regard to the national planning policy framework (the Framework) and any relevant Development Plan policies; and
>
> - if the proposed development is inappropriate, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify the proposal".

27. At paragraph 7, the inspector noted the terms of paragraph 147 of the NPPF. He also had regard to policy NE6, which aims to protect the openness of the Green Belt by ensuring that proposals are consistent with the exception list in national policy which broadly aligns with the Framework. The inspector afforded this policy "significant weight".

28. At paragraph 8, the inspector noted that there were specified exceptions in NPPF paragraph 149 to the broad policy that the construction of new buildings is to be regarded as inappropriate in the Green Belt. One such exception included limited infilling of the partial or complete redevelopment of previously developed land.

29. At paragraph 10, the inspector rejected the interested party's arguments that the appeal site was not previously developed land.

30. At paragraph 11, the inspector noted that, even though the proposal would be within the quarry void, the business park buildings would still be visible from certain vantage points. It would also take several years for the landscaping to reach full maturity, meaning that the development would be visible for a period of time, in any event.

31. At paragraph 12, the inspector noted the claimant's landscape and visual impact assessment, which concluded that the zone of theoretical visibility of the proposal would be considerably reduced when compared with the consented scheme. The inspector held, however, that this was "not the same as the proposal not being visible at all". Indeed, the Green Belt Assessment submitted by the claimant acknowledged that from a few locations there would be the opportunity to gain views southward towards the proposed development. Furthermore, limited elements of the proposed business park buildings would be visible from the western side of the park.

32. At paragraph 13, the inspector also noted that the proposed business park buildings would be in essence 12 metres higher than the permitted scheme and would be at least partly visible, meaning they would have a visual impact, albeit limited. The proposal would not be fully screened when viewed from all directions. It would therefore have a visual impact on the openness of the Green Belt, albeit to a limited degree.

33. The decision letter continued as follows:-

> "15. The appellant has also argued that the proposed business park buildings would not be inappropriate development under the exception set out by paragraph 149 d) of the Framework. However, as the consented business park buildings have not yet

> been built meaning that the proposed relocated buildings would not spatially replace them even though they would not be materially larger. Similarly, as the proposal overall would have both a spatial and visual impact on the openness of the Green Belt, I also consider that the exception under paragraph 150 b) would not be met in this case.
>
> 16. Therefore, in the context of the above I consider that the amount of new built development the proposal would provide would be more than is currently at the appeal site, I consider that it would have a greater spatial and visual impact on the openness of the Green Belt than the existing development thereby not preserving this openness in these regards.
>
> 17. In terms of the purposes of the Green Belt I acknowledge that the proposal would not conflict with purposes a), b) and d) as set by paragraph 138 of the Framework. I also acknowledge that the proposal would help meet purpose e). However, given its location and the fact that it would bring about built development where there is presently none, I consider that the proposal would represent an encroachment into the countryside.
>
> 18. The proposal would therefore fall outside the exceptions set out in paragraphs 149 and 150 of the Framework and should be considered inappropriate development in the Green Belt. The proposed variation of the disputed conditions would therefore conflict with policy NE6 of the CSDP which aims to ensure that development proposals are not inappropriate in the Green Belt.

34. Paragraphs 19 to 22 of the decision letter fall under the heading "Other considerations". Paragraphs 19 and 20 contain the inspector's findings in respect of economic benefits arising from employment, with a scheme to be approved:-

> "19. In support of the appeal proposal the appellant has stated that the proposed development would provide enhanced economic benefits in terms of new direct and indirect employment opportunities, comprising approximately 15 – 25 jobs (plus an 1 See appendix 5 136 Appeal Decision APP/J4525/W/20/3257868 https://www.gov.uk/planning-inspectorate 5 additional 10 jobs created by further expansion of the associated transport operation). However, according to the appellant's statement there is currently no demand to develop the approved employment park due to the current economic climate. As a result, it is not certain that the proposal would provide the anticipated number of jobs. I therefore afford this consideration limited weight.
>
> 20. The appellant has also argued that the proposal would also contribute to retaining the existing work force on the site and also the work force connected with the wider operations such as HGV drivers. However, according to the evidence this would not

> represent a significant increase in current levels of employment at the site and as a result I afford this consideration limited weight."

35. At paragraph 21, the decision letter considered the recognised local demand for the sustainable management of inert wastes at an appropriate location, minimising the transport distances of those materials. The proposal would also provide additional environmental benefits in contributing to meeting the identified capacity shortfall for inert waste management and recycling in Sunderland. There would be wider climate change benefits by driving waste management up the waste hierarchy. The provision of a state-of-the-art aggregate wash plant would also further increase recycling rates. The inspector concluded that these consideration should carry "moderate weight in favour of the proposal".

36. At paragraph 22, the decision letter addresses the issue of fallback:-

> "22. In support of the proposal the appellant has advanced a fallback position relating to the full implementation of the extant planning permission including the employment park element. However, while this option could be pursued, for the reasons set out above I am not convinced that this would be more harmful than if the appeal scheme itself were permitted in conflict with policy NE6. Accordingly, I afford this consideration limited weight."

37. At paragraph 23, under the heading "Planning balance and conclusion", the inspector concluded that the proposed variation of the disputed conditions would not preserve the openness of the Green Belt. It would accordingly result in inappropriate development. At paragraph 24, the inspector said that he had given "limited or moderate weight to the other considerations cited in favour of the proposal. In my view, these would not clearly outweigh the substantial harm to the Green Belt. The very special circumstances necessary to justify the development do not therefore exist". The inspector therefore found that there would be conflict with policy NE6 and paragraph 147 of the NPPF. He concluded that the appeal should be dismissed.

G. THE GROUNDS OF CHALLENGE

38. There are two grounds of challenge. Ground 1 contends that the inspector mischaracterized the main issue and/or that he wrongly excluded it when considering whether the proposed development was inappropriate development in the Green Belt. Further or in the alternative, the inspector misunderstood the claimant's case on the impact of the proposed development on the Green Belt, compared to the fallback position.

39. The claimant submits that the correct assessment of the impact of the proposed development on the openness of the Green Belt required a comparison between (1) the impact the permitted development (including the business park buildings) authorised by the 2013 Permission would have on openness; and (2) the impact the proposed development (including exactly the same employment park buildings, albeit on a 12 metre higher development platform) would have on openness.

40. Accordingly, the inspector erred in characterising the first issue as being "whether the proposal would represent inappropriate development in the Green Belt having regard to the [NPPF] and [the interested party's policies]", without any reference to the fallback position.

41. The claimant submits that the fallback was not, as the inspector appears to have thought, what was only presently on the land but included what could lawfully be built pursuant to the 2013 Permission. This is said to be evident from paragraph 14 of the decision letter, where the inspector found that the proposed introduction of the employment park buildings was not "existing development". It is also apparent from paragraph 16, where the inspector held that the amount of new built development will be more than "is currently at the appeal site" and would have a greater "impact on the openness …than the existing development". In the same vein, at paragraph 17, the inspector noted that the proposed development "would bring about development where there presently is none".

42. Thus, it is said, the inspector wrongly compared the proposed development only against what the land was currently being used for; that is to say, restoration and infilling activities, excluding any consideration of what impact the employment park buildings permitted by the 2013 Permission would have on openness.

43. The claimant submits that the exceptions in paragraph 149 of the NPPF, which the inspector was considering, themselves required an assessment of what impact the proposed development would have on the openness of the Green Belt. That could be done only against the fallback of what was permitted by the 2013 Permission. In limiting his consideration of whether the exceptions applied to an assessment against local and national policy only, the inspector was excluding any assessment of what impact the proposed development would have on openness, taking into account the fallback.

44. Further or alternatively, the claimant says the inspector misunderstood its case. The claimant's evidence was that the business park on the proposed higher development platform would have no greater impact on the openness of the Green Belt, compared to the business park, as permitted to be constructed. However, at paragraph 22 of the decision letter, the inspector concluded that he was not convinced that the full implementation of the 2013 Permission "would be more harmful than if the appeal scheme itself were permitted". The claimant says this constitutes a misunderstanding of the evidence. It was not that the employment park would have a greater impact than if it were on the proposed higher development platform. In misunderstanding the claimant's case, the inspector failed to take into account a relevant consideration.

45. Ground 2 submits that the claimant's case to the inspector was that the appeal proposal would result in existing jobs being retained and new jobs being created. These new jobs have nothing to do with any jobs that would be created by the proposed development park. The inspector's misunderstanding of this is said to be plain from paragraph 19 of the decision letter. Paragraph 20 is also criticised as being incoherent.

H. DECIDING THE CLAIM

Ground 1

46. I agree with Mr Litton KC that the cases relied upon by the defendant, concerning the correct approach to applications under section 73 of the 1990 Act, have no direct light to shed upon the issue raised by ground 1. This concerns the relationship between the fallback principle and the policies in the NPPF and the interested party's development plan for the protection of the Green Belt. Mr Litton accepted (and I find to be the case) that a section 73 application falls to be determined by reference to current national and local policies.

47. As can be seen, in Stefanou, this did not happen. That did not, however, in any sense mean that fallback had no part to play in deciding the section 73 application. On the contrary, as Gilbart J held at paragraph 91, fallback would be a material consideration, to which the council "might have wanted to ascribe great weight".

48. I respectfully adopt the analysis of fallback contained in paragraph 26 of Gambone. Fallback is capable of amounting to a material consideration. Whether it is material depends upon there being a real (as opposed to a fanciful) prospect that the development already permitted will take place. If it will, then the weight to be given to that material consideration will be for the decision maker, challengeable only on a *Wednesbury* basis.

49. How is fallback, as a material consideration, to apply in the context of the provisions of the NPPF regarding the Green Belt? The first part of the claimant's case under ground 1 is that fallback must be treated by the decision maker as having a part to play in answering the primary question; namely, whether the proposed development is "inappropriate".

50. In support of this proposition, the claimant points to the fact that both the interested party's planning officer and its planning committee approached the issue in that way.

51. As a general proposition, this has serious difficulties. A fallback position is only a material consideration within the overall planning determination. It cannot rewrite the policies against which that determination must be made. That, however, would be precisely the effect of finding that the inspector should have framed the first of the main issues as being whether the proposed development would represent inappropriate development in the Green Belt, when judged against the baseline of what could be built pursuant to the 2013 Permission. If the claimant were right, there would be no real room for the attribution of weight to be left to the decision maker. The baseline comparator would in practice drive the outcome.

52. Take the following example. Permission is granted for the construction of a building in the Green Belt to accommodate essential emergency staff. Permission is granted because the requirement for the staff constitutes "very special circumstances". Permission is then sought to vary the condition concerning occupation by such staff, so as to permit occupation by anyone. It cannot be right for the decision maker to be driven to the conclusion that the building will not, in these circumstances, constitute inappropriate development.

53. Although the defendant argues that this conclusion is mandated by the case law on section 73, I consider that it is better viewed as deriving from the identification of the nature of fallback as no more or less than a potentially material consideration.

54. The claimant seeks to achieve the same result through the medium of paragraph 149 of the NPPF. This provides that the construction of new buildings will not be inappropriate if one or more conditions applies. The claimant says that these exceptions themselves required an assessment of what impact the proposed development would have on the openness of the Green Belt, which could only be done against the fallback of what was permitted by the 2013 Permission.

55. So far as concerns paragraph 149(d), the inspector found at paragraph 15 of the decision letter that, as the business park buildings have not yet been built, the proposed relocated buildings would not spatially replace them even though they would not be materially larger. On the same basis, the inspector concluded that paragraph 150(b) would not be met.

56. I agree with the defendant that, as matter of ordinary language, paragraph 149(d) cannot be construed as referring to the replacement of a building which does not, in fact, exist, albeit that there is planning permission to construct it. To depart from the ordinary meaning of the language, in order to require the decision maker to take account of fallback, would, again, distort that principle. It would compel the decision maker to find that the exception was met, thereby elevating fallback beyond the position it has as a potential or actual material consideration.

57. A similar point arises in respect of paragraph 150(b). The defendant submits that the words "existing development" in paragraph 149(g) must, by the same token, mean development which is actually existing. I agree. I observe, however, that on this issue the inspector appears at paragraphs 10 to 14 to have approached the matter by comparing the proposal, with its higher platform base, with the position of the employment park buildings, as permitted under the 2013 Permission. The inspector reached the conclusion that there would be a greater impact in respect of the current proposal. That is, however, not a conclusion which assists the claimant. It is also possible to read these paragraphs as acknowledging the fact that the 2013 Permission had resulted in infilling so as to create a base for the (as yet unbuilt) employment park. Again, this does not assist the claimant.

58. For these reasons, I find that the inspector has not been shown to have committed any public law error in declining to address the issue of fallback, so as to conclude that the proposal would not amount to inappropriate development in the Green Belt. Importantly, this did not mean that the inspector left fallback out of the planning equation. On the contrary, at paragraph 22, under the heading "Other considerations", he had express regard to it.

59. Addressing fallback in this way enables the principle to play its proper role in the determination process. Either alone or in combination with other factors, it is capable of constituting very special circumstances, so as to permit development which is inappropriate in the Green Belt.

60. The claimant submits, however, that, in saying what he did at paragraph 22 of the decision letter, the inspector did not have lawful regard to fallback. The inspector considered that the claimant's fallback position depended upon a finding that the implementation of the 2013 Permission must be more harmful than the proposal being considered by the inspector, on appeal. As Mr Litton pointed out, however, that was not the claimant's case.

61. Mr Williams KC submitted that there was no public law error in paragraph 22 of the decision letter. It was for the Inspector to decide what weight to give to the fallback. The paragraph should, he said, be given a "fair reading".

62. I bear in mind the summary of the relevant legal principles to be applied to decision letters, set out in the judgment of Lindblom J (as he then was) in Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin). Such letters are to be construed in a reasonably flexible way. They are written principally for parties who know what the issues are between them and what evidence and argument have been deployed. The reasons for a decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was. The weight to be attached to any material consideration is not for the court (absent any irrationality).

63. I accept that the claimant's case before the inspector was that there would be no difference between the proposal and the 2013 Permission, as regards the effect on the openness of the Green Belt. Crucially, however, the inspector had explained in the earlier paragraphs of the decision letter why he had come to the conclusion that the proposal would have a greater impact than the 2013 Permission. The platform base for the employment park would be 12 metres higher and the inspector did not accept that the screening would have the full effects for which the claimant contended, let alone that screening would be entirely comprehensive.

64. Accordingly, whilst I accept the inspector did not say in terms what weight he would have accorded to the fallback if he had found there to be no difference between the proposal and the 2013 Permission, the point was immaterial because it is clear he had made no such finding.

65. This leaves the criticism that, having found that the proposal would amount to inappropriate development, the inspector failed to have any regard to the undoubted fact that there was a greater difference in terms of openness between, on the one hand, the proposal and the site without any buildings comprising the employment park; and, on the other, between the proposal and the employment park permitted by the 2013 Permission. As is clear, however, from the claimant's Statement of Case and the Green Belt assessment, this was not, in fact, the claimant's stance on the appeal. The claimant's case was that the proposal would not be inappropriate development. Having regard to the Bloor principles, the inspector was therefore under no obligation to address this issue.

66. For these reasons, ground 1 fails.

Ground 2

67. I am entirely satisfied that the evidence regarding employment was set out for the inspector by the claimant in sufficiently clear terms. The proposal, if approved, would safeguard 10 existing jobs. It would be likely to generate 15 to 25 additional direct jobs and a further 10 indirect jobs involving haulage to and from the site.

68. I agree with the claimant that the second and third sentences in paragraph 19 of the decision letter represent a fundamental misunderstanding of the claimant's evidence. It

was plain that these jobs had nothing to do with the creation of the employment park. They were to do with the expansion in time and volume of the waste facility.

69. Despite Mr Williams' heroic efforts to breathe meaning into paragraph 19 by suggesting that the inspector was in some way having regard to the "whole scheme"; and despite having full regard to the Bloor principles, I have concluded that paragraph 19 constitutes a significant error. We simply do not know what weight the inspector would have accorded this aspect of the claimant's case, had the error not occurred.

70. The matter is compounded by paragraph 20. The first sentence may be a reference to the 10 existing and 15-35 new jobs, both direct and indirect. The second sentence of paragraph 20, however, is deeply problematic. Even if one takes the benign view that the inspector was aware of the 10 existing jobs, which would be safeguarded, and was comparing them against the new direct jobs, the increase was at least 150% (i.e. 10 current jobs would become at least 25). In no sense can such an increase be regarded as anything other than significant.

71. Read together, paragraphs 19 and 20 are, with respect, entirely baffling.

72. Faced with this difficulty, the defendant seeks to invoke Simplex GE (Holdings) Ltd v Secretary of State for the Environment [2017] PTSR 1041. The Simplex test is whether the inspector would have come to the same conclusion if the error in question had been excluded altogether.

73. I am entirely satisfied that the Simplex test is not met. The employment issue was relied upon by the claimant as a material consideration, going to the issue of whether there were very special circumstances, were the inspector to find that the proposal represented inappropriate development in the Green Belt. The fact that the numbers of jobs are, in absolute terms, small, is nothing to the point. As was explained at paragraph 6.29 of the claimant's Statement of Case, "every existing job retained in what is an area of higher than average unemployment is important". If, therefore, the inspector was thinking in absolute terms in saying what he did at paragraph 20, he failed to have regard to this relevant matter.

74. For these reasons, ground 2 succeeds.

75. I invite the parties to endeavour to agree a draft order which gives effect to this judgment.