United Kingdom Supreme Court

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Summary

Hilary Term
[2020] UKSC 3
On appeal from: [2018] EWCA Civ 489

JUDGMENT

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

before

Lady Hale
Lord Carnwath
Lord Hodge
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

5 February 2020

Heard on 3 December 2019

Appellant
Daniel Kolinsky QC
Hannah Gibbs

(Instructed by North Yorkshire County Council Legal Services)

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

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

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

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

Introduction

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

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

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

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

Green Belt policy

History and aims

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

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

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
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> 80. Green Belt serves five purposes:
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> Ÿ to check the unrestricted sprawl of large built-up areas;
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> Ÿ to prevent neighbouring towns merging into one another;
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> Ÿ to assist in safeguarding the countryside from encroachment;

Ÿ to preserve the setting and special character of historic towns; and

Ÿ to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

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

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

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

Control of development in Green Belts

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

> "18. A fundamental principle in national policy for the Green Belt, unchanged from PPG2 to the NPPF, is that the construction of new buildings in the Green Belt is 'inappropriate' development and should not be approved except in 'very special circumstances', unless the proposal is within one of the specified categories of exception in the 'closed lists' in paras 89 and 90. … The distinction between development that is 'inappropriate' in the Green Belt and

> development that is not 'inappropriate' (ie appropriate) governs the approach a decision-maker must take in determining an application for planning permission. 'Inappropriate development' in the Green Belt is development 'by definition, harmful' to the Green Belt - harmful because it is there - whereas development in the excepted categories in paras 89 and 90 of the NPPF is not. …"

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

> "As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> … 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations." (paras 87-88)

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

> "- provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
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> - limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development."

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

> "90. Certain other forms of development are also not inappropriate in Green Belt *provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt*. These are:
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> - mineral extraction;
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> - engineering operations;
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> - local transport infrastructure which can demonstrate a requirement for a Green Belt location;
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> - the re-use of buildings provided that the buildings are of permanent and substantial construction; and
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> - development brought forward under a Community Right to Build Order." (Emphasis added. I shall refer to the words so emphasised as "the openness proviso")

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

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

> 3.12 The statutory definition of development includes engineering and other operations, and the making of any material change in the use of land. The carrying out of such operations and the making of material changes in the use of land are inappropriate development *unless they maintain openness and do not conflict with the purposes of including land in the Green Belt* …" (Emphasis added)

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

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

Other relevant policies

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

14. *Local plan policies* The proposal was also subject to Green Belt and other policies in the local plan (the Selby District Core Strategy Local Plan). These are summarised by Lindblom LJ (para 9). It is not suggested by either party that these materially affect the legal issues arising in the present appeal.

The application and the officer's report

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

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

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

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

> "… the application site falling within the Green Belt is critical in the determination of the proposal and added that '*mineral extraction remains inappropriate development in*

the Green Belt unless it can be demonstrated that the proposal both preserves the openness of the Green Belt and doesn't conflict with the purposes of including land within the Green Belt'. The objector also stated that one of the aims of the Green Belt, in '*assisting in urban regeneration will be materially harmed by the development*'…" (her italics)

19. The officer commented:

> "7.121 When considering applications within the Green Belt, in accordance with the NPPF, it is necessary to consider whether the proposed development will firstly preserve the openness of the Green Belt and secondly ensure that it does not conflict with the purposes of including land within the Green Belt.
>
> 7.122 It is considered that the proposed development preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Openness is not defined, but it is commonly taken to be the absence of built development. Although the proposed development would be on existing agricultural land, it is considered that because the application site immediately abuts the existing operational quarry, it would not introduce development into this area of a scale considered to conflict with the aims of preserving the openness of the Green Belt.
>
> 7.123 In terms of whether the proposed development does not conflict with the purposes of including land within the Green Belt, the proposed quarrying operations are not considered to conflict with the purposes of including land within the Green Belt. Equally, it is not considered that the proposed development would undermine the objective of safeguarding the countryside from encroachment as it should be considered that the site is in conjunction with an operational quarry which will be restored. The proposed development is a temporary use of land and would also be restored upon completion of the mining operations through an agreed [restoration plan].
>
> 7.124 The purposes of including land within the Green Belt to prevent the merging of neighbouring towns and impacts upon historic towns are not relevant to this site as it is

considered the site is adequately detached from the settlements of Stutton, Towton and Tadcaster. It is also important to note that the A64 road to the north severs the application site from Tadcaster.

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

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

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

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

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

Legal principles

21. Much time was taken up in the judgments below, as in the submissions in this court, on discussion of previous court authorities on the relevance of visual impact under Green Belt policy. The respective roles of the planning authorities

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

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

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

> "expressed in much broader terms [which] may not require, nor lend themselves to, the same level of legal analysis …"

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

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

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

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

> "The concept of 'openness' here means the state of being free from built development, the absence of buildings - as distinct from the absence of visual impact." (para 7, cited by him in his present judgment at para 19)

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

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

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

> "The concept of 'openness of the Green Belt' is not narrowly limited to the volumetric approach suggested by [counsel]. The word 'openness' is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs … and factors relevant to the visual impact on the aspect of openness which the Green Belt presents." (para 14)

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

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

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

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

27. It was held that he had erred in failing to treat the proposal as one for mineral extraction, and therefore potentially within the exception in NPPF para

90. Ouseley J noted the special status of mineral extraction under Green Belt policy. As he said:

> "67. One factor which affects appropriateness, the preservation of openness and conflict with Green Belt purposes, is the duration of development and the reversibility of its effects. Those are of particular importance to the thinking which makes mineral extraction potentially appropriate in the Green Belt. Another is the fact that extraction, including exploration, can only take place where those operations achieve what is required in relation to the minerals. Minerals can only be extracted where they are found …
>
> 68. Green Belt is not harmed by such a development because the fact that the use has to take place there, and its duration and reversibility are relevant to its appropriateness and to the effect on the Green Belt ..."

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

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

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

Material considerations

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

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

> "17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it …
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> 18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."

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

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

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

He continued:

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

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

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

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

32. Mutatis mutandis, similar considerations apply in the present case. The question therefore is whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", or alternatively whether, on the facts of the case, they were "so obviously material" as to require direct consideration.

The reasoning of the courts below

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

> "64. I stress that we are here concerned with differential impact, ie the potential adverse visual impact over and above the adverse spatial impact. On the facts of this case … it is difficult to see what the potential visual impact of the development would be over and above the spatial impact, which, as Mr Village concedes, was taken into account. In any event, even if there were some such impact, that does not mean that openness would be adversely affected; because, in assessing openness, the officers would still have been entitled to take into account factors such as the purpose of the development, its duration and reversibility, and would have been entitled to conclude that, despite the adverse spatial and visual impact, the development would nevertheless not harm but preserve the openness of the Green Belt.
>
> 65. In this case, the potential visual impact of the development falls very far short of being an obvious material factor in respect of this issue. In my judgment, in the circumstances of this case, the report did not err in not taking into consideration any potential visual impact from the development. Indeed, on the facts of this case, I understand why the officers would have come to the view that consideration of visual impact would not have materially added to the overarching consideration of whether the development would adversely impact the openness of the Green Belt."

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

> "42. The proposed development was a substantial extension to a large existing quarry, with a lengthy period of working and restoration. As the Principal Landscape Architect recognized in her response to consultation, and the officer acknowledged without dissent in her report, there would be permanent change to the character of the landscape (paras 4.109 and 4.115 of the report). The 'quality of the Locally Important Landscape Area as a whole would be compromised' (para 7.41). *The exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so* (paras 4.111 and 7.42). *Long distance views could be cut off by the proposed bunding and planting*. Agricultural land would ultimately be replaced by a 'deep lower level landscape' of grassland (para 4.113). The 'character and quality' of the landscape would be 'permanently changed' and the 'impact cannot be described as neutral' (paras 4.115 and 7.44). Concluding her assessment of 'Landscape Impact', the officer was satisfied that the 'proposed screening could protect the environment and residential receptors from potential landscape and visual impacts', and that with the proposed mitigation measures the development would comply with national and local policy (paras 7.47 and 8.4).
>
> 43. That assessment did not deal with the likely effects of the development on the openness of the Green Belt as such, either spatial or visual. *It does show, however, that there would likely be - or at least could be - effects on openness in both respects, including the closing-off of long distance views by the bunding and planting that would screen the working* (para 4.111 of the officer's report). The officer's conclusion overall (in para 7.47) was, in effect, that the proposed screening would be effective mitigation, without which the development would not be acceptable. But this was not followed with any discussion of the harmful effects that the screening measures themselves might have on the openness of the Green Belt." (Emphasis added)

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

"45. So it is to para 7.122 that one must look, at least in the first place, to see whether the officer considered the relevance of visual impact to the effect of this development on the openness of the Green Belt. Did she confront this question, and bring the committee's attention to it? I do not think she did. *She neither considered, in substance, the likely visual impact of the development on the openness of the Green Belt nor, it seems, did she ask herself whether this was a case in which an assessment of visual impact was, or might be, relevant to the question of whether the openness of the Green Belt would be preserved.* Indeed, *her observation that openness is 'commonly taken to be the absence of built development' seems deliberately to draw the assessment away from visual impact, and narrow it down to a consideration of spatial impact alone*. And the burden of the assessment, as I read it, is that because the further extraction of limestone would take place next to the existing quarry, the 'scale' of the development would not fail to preserve the openness of the Green Belt. This seems a somewhat surprising conclusion. But what matters here is that it is a consideration only of spatial impact. Of the visual impact of the quarry extension on the openness of the Green Belt, nothing is said at all. *That was, it seems to me, a significant omission, which betrays a misunderstanding of the policy in para 90 of the NPPF.*

46. One must not divorce para 7.122 from its context. The report must be read fairly as a whole. The question arises, therefore: did the officer address the visual impact of the development on the openness of the Green Belt in the remaining paragraphs of this part of her report, or elsewhere? I do not think she did. *Her consideration of the effects of the development on the 'purposes of including land in the Green Belt', in paras 7.123 to 7.125, is unexceptionable in itself. However, she did not, in these three paragraphs, revisit the question of harm to the openness of the Green Belt, either in spatial or in visual terms*. The conclusion to this part of the report, in para 7.126, is that the 'character and openness of the Green Belt' would not be materially harmed by the development - a conclusion repeated in para 8.5 - and that the proposal would therefore comply with Policy SP3 and Policy SP13 of the local plan and the NPPF. But I cannot accept that this conclusion overcomes the lack of consideration of visual impacts on 'openness' in the preceding paragraphs. It seems to treat 'character' as a concept distinct from 'openness'.

> Even if these two concepts can be seen as related to each other, and however wide the concept of 'character' may be, there is no suggestion here that the officer was now providing a conclusion different from that in para 7.122, or additional to it.
>
> 47. The same may also be said of the officer's earlier discussion of 'Landscape Impact' in paras 7.41 to 7.47. Her assessment and conclusions in that part of her report are not imported into para 7.122, or cross-referred to as lending support to her conclusion there ..." (Emphasis added)

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

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

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

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

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

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

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

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

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

Discussion

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

40. Lindblom LJ criticised the officer's comment that openness is "commonly" equated with "absence of built development". I find that a little surprising, since it was very similar to Lindblom LJ's own observation in the *Lee Valley* case (para 23 above). It is also consistent with the contrast drawn by the NPPF between openness and "urban sprawl", and with the distinction between buildings, on the one hand, which are "inappropriate" subject only to certain closely defined exceptions, and other categories of development which are potentially appropriate. I do not read the officer as saying that visual impact can never be relevant to openness.

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

Conclusion

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