CO/4218/2015

Neutral Citation Number: [2016] EWHC 595 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand
London WC2A 2LL
Monday, 15 February 2016

B e f o r e:

DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

Between:
THE LONDON BOROUGH OF BROMLEY

Claimant

v

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) ROOKERY ESTATES COMPANY

Defendants

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WordWave International Limited
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8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Miss R Grogan (instructed by the London Borough of Bromley) appeared on behalf of the Claimant

Mr R Kimblin (**Mr H Mohamed** for judgment) (instructed by Treasury Solicitor) appeared on behalf of the Defendant

Mr J Clay (**Mr M Paget** for judgment) (instructed by Brachers LLP) appeared on behalf of the Second Defendant

J U D G M E N T
(As approved by the Court)

THE DEPUTY JUDGE (DAVID ELVIN QC):

Introduction

1. The Claimant, the London Borough of Bromley, applies under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash a decision of the First Defendant's Inspector, Mr Tim Wood, given by decision letter dated 27 July 2015. The issue on this application is the proper interpretation of paragraph 89 of the National Planning Policy Framework ("the NPPF") published in March 2012.

2. The planning appeal concerned an application for planning permission for the "redevelopment of previously developed land at Bromley Common Liveries, Bromley Common, to provide 9 no. mews houses and retention of part of the livery business with a new barn and associated workers dwellings". The proposed development therefore comprised two elements: the introduction of a residential use in the form of 9 mews houses, and the construction of the new barn and associated workers dwellings for the livery business.

3. The Claimant refused planning permission on 14 January 2015 and the first reason for refusal asserted a conflict with local and national Green Belt policy:

> "The proposed development constitutes inappropriate development within the Green Belt and no special circumstances exist which might justify the grant of planning permission as an exception to established policy G1 of the Unitary Development Plan and the National Planning Policy Framework 2012."

4. The officer's delegated decision report, which preceded the decision, approached the redevelopment of the livery business as including a material change of use although this was in the context of out of date UDP policy G1 which allowed appropriate development to include material changes of use which preserved the openness of the Green Belt, no longer found in national policy in the form of the NPPF which post-dated the UDP although it had formed part of earlier national policy in PPG2 paragraph 3.12, cancelled in 2012.

5. The outcome of this application turns not on the out-of-date UDP policy but on the construction of the sixth and final indent in paragraph 89 of the NPPF and the correct approach to the exceptions in paragraph 89 to the general policy that new buildings are inappropriate development in the Green Belt.

6. The Inspector identified at paragraph 3 of his decision the issues, the first of which was:

> "Whether the proposal constitutes inappropriate development in the Green Belt."

7. He considered that the proposal (which comprised new buildings) was appropriate development and he concluded that, applying the requirements of paragraph 89 indent 6, those new buildings would not impact adversely either on the openness of the Green Belt or the purposes for designation of the Green Belt. It was a common position of the parties before the Inspector that the appeal should be determined by reference to the most up-to-date version of Green Belt policy in the NPPF.

8. The relevant passages in the decision letter are found at paragraphs 4 to 6:

> "4. Policy G1 of the Bromley Unitary Development Plan of July 2006 (UDP) states that new buildings or extensions to buildings in the Green Belt will be inappropriate development unless it falls within specified categories, none of which cover the proposed development. The National Planning Policy Framework (the Framework) states at paragraph 89 that new buildings in the Green Belt should be viewed as inappropriate and then specifies exceptions, which includes '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'. There is clearly a degree of inconsistency between the UDP and the more recent Framework in this respect and I consider the Framework to be an important material consideration in this respect; one which outweighs the UDP on this particular point.
>
> 5. The appellants set out within their submissions that the proposal would bring about a reduction in the footprint of buildings on the site of around 41% and a reduction in the volume of buildings of around 17%. Whilst it is important to keep in mind that the proposal is in outline form and all matters except access are to be determined at a later stage, the illustrative scheme is indicative of one way in which the site may be redeveloped.
>
> 6. The illustrative scheme shows 9 houses facing onto a central court, with car parking and garaging; the houses are shown with associated garden areas. The workers dwelling and livery would be sited on the opposite side of the internal road way. It is acknowledged that part of the site forms previously developed land and the 9 dwellings would not extend beyond that part of the site in question. The houses indicated would be of 2 storeys but with a large amount of the first floor accommodation contained within the roof. Even though the proposal would bring a different use of part of the site, I consider that its effect on openness would be no greater than the existing buildings. In terms of consideration of the purposes of including land within the Green Belt, I consider that the proposal would not lead to encroachment of the countryside as the proposal would bring about a reduction in building volume (for the illustrative scheme) and would not extend beyond what is previously developed land. The other purposes of including land in the Green Belt, as set out in paragraph 80 of the Framework would not be interfered with. Therefore,

> I find that the proposal is not inappropriate development in the Green Belt and, as this category of development relies on an assessment of the effects on openness, there are no other unacceptable effects on the Green Belt."

9. No issue was taken by the Claimant with regard to the planning judgments applied with regard to openness and the purposes of the Green Belt at paragraph 6. Issue was only taken with the application in principle of the exception for new buildings proposed here because, it is submitted by Miss Grogan on behalf of the Claimant, the exceptions either do not allow material changes of use or, in the alternative, do not do so unless the uses are specified by the exception in paragraph 89. She submits that in the light of the Court of Appeal's decision in R (Timmins) v Gedling Borough Council [2015] PTSR 837, applications that involve material changes of use (see section 55 of the 1990 Act) cannot be appropriate development.

Statutory context

10. The statutory context in which this application and the NPPF fall to be considered was set out by Richards LJ in Timmins at paragraphs 6 and 7, namely the inclusion of material change of use as a category of development in section 55 of the 1990 Act and the definition of "building" in section 336(1).

11. Section 75(2) and (3) of the 1990 Act make provision for the permitted use when planning permission is granted for operational development:

> "**75 Effect of planning permission**
>
> ...
>
> (2) Where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used.
>
> (3) If no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed."

12. It follows that permission for new buildings will always carry with it permission for the use of the building, whether that specified in the permission or, in the absence of specification, for the use for the purpose for which the building was designed. The significance of section 75 is that paragraph 89 was drafted in the context of the legal position that an application for permission to develop new buildings will inevitably, if granted, carry with it permission for the use of the building or for a change of use, in appropriate cases.

13. It appears to me that that is, in part, why a number of the paragraph 89 categories of appropriate development in the form of new buildings include a stipulation as to the use of

the buildings as part of the definition of the category. For example, indent 1 refers to new buildings "for agriculture and forestry", indent 2 to "outdoor sport, outdoor recreation and for cemeteries" and, notably indent 4 refers to new buildings "in the same use" as "the one it replaces".

14. Mr Kimblin, for the Secretary of State, and Mr Clay, for the Second Defendant, both rely on this provision to show that all new buildings have a permitted use and permission for operational development may also effect a material change of use. Miss Grogan, on the other hand, submits that the existence of section 75 does not detract from her point, which is that if an application involves a material change of use, whether or not it is expressly referred to in the application, it is of necessity inappropriate development.

NPPF Green Belt policies

15. The current national Green Belt policies are found in section 9 of the NPPF, of which the most relevant paragraphs appear as follows:

> "**9. Protecting Green Belt land**
>
> 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.
>
> 80. Green Belt serves five purposes:
>
> • to check the unrestricted sprawl of large built up areas;
>
> • to prevent neighbouring towns merging into one another;
>
> • to assist in safeguarding the countryside from encroachment;
>
> • to preserve the setting and special character of historic towns; and
>
> • to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.
>
> 81. Once Green Belts have been defined, local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land.
>
> ...
>
> 87. 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.

88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. '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.

89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:

- buildings for agriculture and forestry;

- 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;

- the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;

- the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;

- limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or

- 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.

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:

- mineral extraction;

- engineering operations;

- local transport infrastructure which can demonstrate a requirement for a Green Belt location;

- the re-use of buildings provided that the buildings are of permanent and substantial construction; and

- development brought forward under a Community Right to Build Order."

16. The sixth exception under paragraph 89 relates to "previously developed land", which is defined by the Glossary to the NPPF as follows:

> "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. This excludes: land that is or has been occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill purposes where provision for restoration has been made through development control procedures; land in built up areas such as private residential gardens, parks, recreation grounds and allotments; and land that was previously developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time."

17. An adverse finding on appropriateness would not necessarily lead to the refusal of a planning application but such an application would then have to surmount the hurdle of demonstrating "very special circumstances" in order to obtain permission. See NPPF paragraph 87 and Fordent Holdings Ltd v Secretary of State [2014] 2 P & CR 12 at paragraph 28.

18. As paragraph 4 of the Inspector's decision made clear, the applicable UDP policy G1 was out of date and inconsistent with the NPPF so he proceed to determine the issue of appropriateness by reference to the NPPF alone. No one has criticised that approach. It is therefore unnecessary for me to consider further the provisions of the development plan.

Recent Green Belt authority

19. The correct approach to Green Belt policy in the NPPF as compared to earlier versions of the policy, particularly in PPG2, has being considered recently by the Court of Appeal in both Redhill Aerodrome Limited v Secretary of State for Communities & Local Government [2015] PTSR 274 and Timmins, above. In Timmins, Richards LJ made an observation of general application at paragraph 24:

> "24. There is no dispute as to the correct general approach towards the interpretation of the NPPF. Policy statements of this kind should be interpreted objectively in accordance with the language used, read as always in its proper context, which is not to say that such statements should be construed as if they were statutory or contractual provisions (see per Lord Reed JSC in Tesco Stores Ltd v Dundee City Council [2012] UKSC 13, [2012] PTSR 83, at paragraphs 18 19). The NPPF is on the face of it a stand-alone document which should be interpreted within its own terms and is in certain respects more than a simple carry across of the language in the guidance it replaced (see Europa Oil and Gas Limited v Secretary of State for Communities and Local

> Government and Others [2014] EWCA Civ 825, [2014] JPL 1259, in particular at paragraphs 15 and 32). But the previous guidance, in this case the guidance on Green Belt policy in PPG2, remains relevant. In Secretary of State for Communities and Local Government and Others v Redhill Aerodrome Limited [2014] EWCA Civ 1386 the Court of Appeal rejected a submission that 'any other harm' in paragraph 88 of the NPPF had a narrower meaning than in paragraph 3.2 of PPG2, which would have made it less difficult than under PPG2 to establish the existence of very special circumstances justifying a development."

20. I do not need to repeat the well-established principles of law which apply to the consideration of decision letters and whether they reveal an error of law; see for example the recent distillation of the applicable principles by 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) at 19. Other than paragraph 19(4) they are of limited relevance here since the only issue is the construction of the NPPF.

21. The interpretation of policy is a matter for the court, as noted by Richards LJ in Timmins, but the application of policy properly understood to the facts remains a matter for the judgment of the decision maker, subject to the court's supervision on Wednesbury grounds: see Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 per Lord Reed JSC, especially at paragraphs 17 to 19. In this respect, in Bloor Homes at paragraph 19(4), Lindblom J held:

> "(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] PTSR 983, at paragraphs 17 to 22)."

22. Here the question is whether the exception in the sixth indent in paragraph 89 (and thus some of the other exceptions) should be understood as being confined only to operational development comprising new buildings but not permitting any material change of use.

23. It is well-established that what is appropriate development is to be determined by reference to the NPPF and the categories of appropriate development set out in that document are closed. In Fordent Holdings, approved in Timmins, His Honour Judge Pelling QC (sitting as a Deputy High Court Judge) held at paragraphs 24 to 25:

> "24. ... the structure of the Green Belt policy has changed from that which formerly applied. There is no general exception for changes of use that maintain openness and do not conflict with the purposes of the Green Belt. The current policy is contained in Chapter 9 of the NPPF and as I have said already Paragraphs 87, 89 and 90 have to be read together. Paragraph 90 contains a closed list of classes of development that are capable of being not inappropriate and Paragraph 89 contains a closed list of classes of new building construction not falling within Paragraph 90 that are or are capable of being not inappropriate by way of exception to the general rule that the construction of new buildings is to be regarded as inappropriate in the Green Belt ...
>
> 25. Paragraph 89 is a closed list on its face. This is apparent from a comparison of the first sentence with the second. The first contains a general policy statement to the effect that the construction of new buildings in Green Belt is inappropriate. The second creates a list of exceptions and potential exceptions to that general rule. The opening three lines of Paragraph 90, and in particular the phrase "[t]hese are", shows that the list in that paragraph is also a closed list. The paragraph is of no application to development other than the construction of new buildings."

24. I therefore approach the sixth indent of paragraph 89, and its role as an exception to the general principle that new buildings are inappropriate development in the Green Belt, in the context of the NPPF as a whole and of the purposes of the Green Belt policies in particular: see Richards LJ in Timmins above at paragraph 24. Paragraph 79 and 80 of the NPPF (above) set out the long standing purposes of the Green Belt.

25. Miss Grogan, who presented her submissions with clarity and economy, submitted as follows:

> (1) Timmins established that there was no general category of appropriate development comprising a material change of use which did not adversely impact on the openness of the Green Belt;
>
> (2) the exceptions in paragraph 89 only apply to new buildings;
>
> (3) the categories of appropriate development are those set out in the NPPF and are closed; and
>
> (4) Paragraph 89 should be interpreted in the light of Timmins to mean that development which was not only operational development for new buildings, but also involved a material change in use for those buildings, did not fall within the categories of appropriate development.

26. Therefore, she submitted, for the Inspector to treat the proposal as appropriate development, amounted to an error of law since the construction of the new houses also involved a material change of use to residential or mixed residential and equestrian use.

27. Propositions (1) to (3) appear to be accepted by all parties and in any event are supported by Timmins and Fordent. It is the fourth proposition that is the focus of the dispute in these proceedings. Mr Kimblin, for the Secretary of State, supported by Mr Clay, for the Second Defendant, submitted that within paragraph 89 the permission for new buildings could include an appropriate material change of use according to which exception was applicable and providing it fell within the terms of that exception.

28. Miss Grogan, recognising the potential difficulties inherent in proposition (4), also argued in the alternative that only the uses for buildings expressly stipulated in the exceptions (e.g. agriculture and forestry) should amount to appropriate development and that since the sixth exception listed no uses, it had be read as not including buildings where there was a material change of use. She submitted that paragraph 89 had to be considered in context including the judgment of the Court of Appeal in Timmins that a material change of use that did not adversely affect openness was not one of the categories of appropriate development under the NPPF.

29. It is necessary therefore to consider what the Court of Appeal decided in Timmins with some care since it is apparent that there are important aspects of the case, and of others relied upon by Miss Grogan (Fordent Holdings, above, Gill v Secretary of State for Communities and Local Government & Anor [2015] EWHC 2660 (Admin) and Turner v Secretary of State for Communities & Local Government & Anor [2015] EWHC 2728 (Admin)) which are distinguishable from the present case since they all included development which involved simply the material change of use of land though in some cases there was additionally some operational development. In Timmins, there was the material change of land for cemetery use (with some operational development for a crematorium and other facilities) and in Turner there was a material change of use from mobile home and storage yard to a new house, though this would not have taken up all the former storage yard. In Gill, no new buildings were proposed at all. I note that Turner has been given permission to appeal by Lindblom LJ and the appeal is due to be heard this summer. The Court earlier refused an adjournment of the current application to await the outcome of the Turner appeal.

30. In Timmins, Richards LJ rejected the proposition that there was a category of appropriate development not expressly set out in the NPPF, namely a material change of use where there was no adverse effect on the openness of the Green Belt. Rejecting Mr Kimblin's submissions (who there appeared for the local planning authority), Richards LJ held:

"30 Mr Kimblin's first way of putting the case is plainly unsustainable. The second bullet point of para 89 of the NPPF cannot be read as covering a material change of use of land to use as a cemetery. Para 89, as its opening sentence makes clear, lays down a general rule that the construction of new buildings in the Green Belt is inappropriate development: 'building' for this purpose has the wide meaning given by section 336 of the Town and Country Planning Act 1990 (see para 7 above). The various bullet points are exceptions to that general rule and are therefore likewise concerned only with the construction of new buildings. Thus the second bullet point covers the construction of a building (for example, a café) as an appropriate facility for an existing cemetery, but it does not cover a material change in the use of land so as to create a new cemetery. To the extent that it is relevant to look back at the position under PPG2, there is no reason to believe that the equivalent provision (the second bullet point of para 3.4) was to be read in any different way: any general understanding that a new cemetery fell to be treated under PPG2 as appropriate development was attributable to the 'material change of use' provision in para 3.12, not to the terms of para 3.4.

31 ... The drafting of the NPPF could have been clearer but it seems to me that paras 89 and 90 are properly to be read as closed lists. Para 89 states the general rule that the construction of new buildings is inappropriate development and sets out the only exceptions to that general rule. Para 90 sets out other forms of development (mineral extraction, engineering operations, etc) that are appropriate provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. It is not stated expressly but is implicit that other forms of development apart from those listed in para 90 are inappropriate. I do not think that the NPPF gives any scope to local planning authorities to treat development as appropriate if it does not fall within para 89 or para 90. In particular, there is no general test that development is appropriate provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Had such a general test been intended, in my view it would have been spelled out in express terms and would also have affected the way in which the specific exceptions were expressed.

32 I acknowledge that para 81 of the NPPF, which places an obligation on local planning authorities to plan positively to enhance the beneficial use of the Green Belt by means such as the provision of opportunities for outdoor sport and recreation, gives a degree of support for a wider interpretation. It might be said, for example, to support the view that development in the form of a material change of use of land to use for outdoor sport or recreation is appropriate development, on the basis that it cannot have been intended to categorise as inappropriate a form of development that local planning authorities are required to promote. For my part, however, I consider that such an approach places too much weight on para 81. The fact that a development represents a use of land that local planning authorities are required to promote may help to establish the existence of very special circumstances justifying the

> development, but when considered in conjunction with paras 89 and 90 it does not warrant treating the development as appropriate rather than inappropriate; it does not provide a satisfactory basis for reading paras 89 and 90 otherwise than as closed lists of appropriate development. In any event para 81 could not assist the local authority and the interested party in the present case since the obligation it places on local planning authorities does not extend to the provision of cemeteries."

31. Miss Grogan submitted that it followed that where the proposal sought permission for more than buildings but also sought (expressly or by implication) a change of use then the logic of Timmins required that it be considered inappropriate development.

32. She submitted that each of the exceptions under paragraph 89 was for buildings only and her primary case was that if the application for new buildings required a change of use, even in the case of the first two exceptions, then the development would be inappropriate. In other words, even new buildings "for agriculture and forestry" or "for outdoor sport, outdoor recreation and for cemeteries" would have to be constructed on land already in the particular use to which the building would be put. Miss Grogan placed some weight on Richards LJ's reference to “existing” in the paragraph 30 reference to "existing cemetery" when considering the second bullet point to support her contention.

33. In my judgment, there are significant difficulties with that approach, which I will deal with shortly, not least that some of the exceptions appear to be predicated on particular uses. As a result of recognising those issues, Miss Grogan formulated her case in the alternative, as I have mentioned, which is that certain exceptions include changes of use for the buildings within the categories of appropriate development if those uses were specified by the relevant exception.

34. The categories of new buildings set out in paragraph 89 involve wholly new buildings, or extensions to existing buildings, or replacement buildings. The exceptions are plainly intended to be restrictive and although they have antecedents in previous policy, must be construed as they now appear and in the context of the NPPF, as Timmins makes clear. Each has its own separate form of restriction, including by use, as I will consider below.

35. There is a danger of over-analysing these paragraphs, having regard to Lord Reed's view in Tesco, and it is striking that in only one case does the exception limit the new building to the existing use, namely the fourth

> "The replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces."

36. In my judgment, it is unnecessary to gloss the paragraph 89 exceptions and they should be

read naturally and in the context that it is part of the statutory planning code that permission for new buildings always carries with it permission for the use of the buildings. The paragraph 89 exceptions can only be concerned with the use of new buildings, since the exceptions must all involve new buildings of some description. To include changes of use with respect to those new buildings does not involve contradicting the judgment of Timmins since it was concerned with whether there was a unstated general category of appropriate development comprising a material change of use of land. That is clear from the judgment of Richards LJ throughout and from, in particular the following paragraphs:

> "6 ... In so far as the interested party's application related to a cemetery, the development for which permission was sought consisted in a material change of use of land, as distinct from the carrying out of building or other operations on land."
>
> "19. An important part of that reasoning, at paragraph 31 of the judgment, was that the proposed development constituted a material change of use from agricultural land to a cemetery ... "
>
> 30. ... The various bullet points are exceptions to that general rule and are therefore likewise concerned only with the construction of new buildings. Thus the second bullet point covers the construction of a building (for example, a café) as an appropriate facility for an existing cemetery, but it does not cover a material change in the use of land so as to create a new cemetery."
>
> 31. ... I do not think that the NPPF gives any scope to local planning authorities to treat development as appropriate if it does not fall within paragraph 89 or paragraph 90. In particular, there is no general test that development is appropriate provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Had such a general test been intended, in my view it would have been spelled out in express terms and would also have affected the way in which the specific exceptions were expressed."

37. It goes too far to extend the reasoning of the Court of Appeal in Timmins, concerned as it was with whether material changes of use comprised a category of appropriate development, to apply it to the paragraph 89 exceptions when the Court's reasoning was closely based on the fact that what was appropriate development was what was set out in the NPPF and the NPPF made no provision for a material change of use as a freestanding category of appropriate development. There was nothing inherent in the concept of a material change of use which led the Court in Timmins to consider that it was not suitable in principle to be appropriate development. Indeed given that there had been such a category in the former PPG2 demonstrates otherwise. The point was, put at its simplest, that what is appropriate development is what is set out in the NPPF and the NPPF does not make provision for a general category of material change of use which preserves openness.

38. Here the Court is concerned with the interpretation of the express categories of appropriate development in paragraph 89 construed, as in Timmins, in the context of the statutory planning code including, here, section 75 of the 1990 Act and the nature of a planning permission for new operational development. In approaching those categories, it is important to consider them in context and not to construe them as if they were statutory or contractual provisions.

39. The relative complexity of the categories of appropriate development was pointed out in Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1471 by Richards LJ at paragraph 37:

> "The judge's second reason was that considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of buildings or structures but include their purpose. For example, paragraph 89 of the NPPF treats a house differently from a sports pavilion: the Green Belt is necessarily harmed by one but is not necessarily harmed by the other."

40. That reference was to Ouseley J's judgment at first instance [2014] 1 P & CR 3 at paragraph 66:

> "Secondly, as Green Belt policies NPPF 89 and 90 demonstrate, considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of building or structures but include their purpose. The same building, as I have said, or two materially similar buildings; one a house and one a sports pavilion, are treated differently in terms of actual or potential appropriateness. The Green Belt may not be harmed necessarily by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness, and the other it is not harmed by because of its effect on openness. These concepts are to be applied, in the light of the nature of a particular type of development."

41. In my judgment, reading paragraph 89 according to its language and purpose, the new buildings set in the six indents of the paragraph are all concerned with new buildings but new buildings which are defined in an individual manner according to the category in which they fall, whether in terms of use or other considerations. As new buildings, it appears clear to me that the Government must have had in mind the use of the buildings (set in the context of section 75) given the clear language of the paragraph and its frequent reference, where intend, to the use of the new buildings. In one case only, namely indent four, does the policy seek to restrict the new buildings to their current use. In the other categories other uses are stipulated or, where no uses are stipulated, there is some other form of words used as a mechanism to control the extent of the exception and to preserve the key features of the Green Belt.

42. At indent 3, the extension or alteration of a building must not result in a disproportionate addition in comparison with the existing building. Indent 5 requires that infilling in villages must be "limited" and is (like the limited affordable housing also permitted) to be set out in a local plan. Finally, in indent 6, as well as the restriction inherent in "limited infilling" and previously developed land, the new buildings must not have a greater impact than the existing development on the openness of the Green Belt of the purposes for its inclusion within it.

43. It is reasonable to treat these considerations, as well as the others within paragraph 89, as being indicative of the narrow limits of what policy regards as appropriate but that the purpose of each of those restrictions is to control its impact or significance for the Greet Belt. In some cases that is explicit (for example the references to openness and purposes in indents 2 and 6), in others less so (for example indent 4 "not materially larger", see Tandridge District Council v Secretary of State for Communities and Local Government [2015] EWHC 2503 (Admin) at paragraphs 47 to 56 and 61). In other cases, primarily indent 1, there is a continuation of the acceptance in earlier versions of the policy (e.g. PPG2 paragraph 3.4, see Timmins paragraph 13) that development for the purposes of agriculture and forestry is of its nature appropriate - albeit with revised wording and confined to new buildings. The same is broadly true of indent 2 where the buildings are "for outdoor sport, outdoor recreation and for cemeteries" although in that case there is the additional requirement to consider impact on openness. The use of "for" in both these indents is a clear direction both as to purpose and planning use, in my judgment.

44. I do not consider that Miss Grogan can obtain much, if any, assistance from the reference to "existing cemetery" in paragraph 30 of Timmins since there Richards LJ was seeking to contrast what might be an appropriate use, i.e. a new building within paragraph 89, with a material change of use of land and not to construe or confine the scope of paragraph 89 itself.

45. Finally, I consider that there is a danger of equating a category of appropriate development of "new buildings" as meaning that an application for permission can only be appropriate if it is for operational planning permission only. It is perhaps of relevance, against the background of sections 55 and 75 of the 1990 Act that paragraph 89 focuses on the construction of new buildings and not on the nature of the planning permission required for those buildings.

46. I have not found it appropriate to consider the meaning of the NPPF in the light of the Government's consultation paper on proposed changes to the NPPF published in December 2015, as Mr Clay suggested I should do. First, it is not yet Government policy but merely a consultation paper and secondly it is plainly untenable to construe the NPPF by reference

to a document which was published over three and a half years later.

47. It follows that, in my judgment, providing the new buildings fall within the use and other restrictions of the applicable indent of paragraph 89 the mere fact that permission for a new building may also involve a material change of use does not mean that it ceases to be appropriate development. This is a matter of the construction of language and purpose of the paragraph and that to interpret it according to that meaning and purpose appears to me to be consistent with a straightforward reading of it. Contrary to Miss Grogan's submission, it simply does not bring in via the back door the general material change of use of land category rejected in Timmins. The only changes of use permitted in paragraph 89 are those arising from the new buildings defined as appropriate under it and in accordance with the conditions there set out.

48. Indeed, it is difficult to see what purpose a restrictive approach such as that suggested by Miss Grogan would serve other than to render even narrower, and possibly impractical, the categories in paragraph 89 and to read into the whole of the paragraph an additional restriction which is not present. Not only would that additional restriction to operational development be contrary to the ordinary language of paragraph 89 (e.g. the use of "for" in indents 1 and 2) but run contrary to the purpose of the policy, which only restricts the use of the new buildings to the existing use in the case of indent 4.

49. Finally, I note that the categories of appropriate development at paragraph 90 include one clear example of a material change of use, namely "the re-use of buildings provided that the buildings are of permanent and substantial construction". This must refer to a material change of use since it only refers to "re-use" and not operational development and there would be no need for planning permission if there were no material change of use. Whilst this is not directly relevant to the construction of paragraph 89, it does lend support to the point that the Court of Appeal in Timmins, in dealing with material changes of use of land in general, was not seeking to construe or confine the meaning of the specific categories of appropriate development in paragraphs 89 and 90 which may include specific material changes of use.

50. I can deal shortly with Miss Grogan's alternative submission that if Timmins does not preclude all material changes of use, the only changes of use permitted under paragraph 89 are those where the uses are specifically mentioned such as 1 and 2 but not in those case where no use it specified, which would include the sixth indent. I do not consider that this approach is consistent with the meaning or purpose of paragraph 89 as I have explained it. The partial recognition of changes of use would make less sense than precluding changes altogether since it presupposes that the principle argument based on Timmins is inapplicable yet the argument seeks to restrict those categories of appropriate development

where the policy does not seek to restrict the use of the new building itself but imposes some other means of preventing an adverse impact on the Green Belt. Rather than do as Timmins stated, to confine the categories of appropriate development to that which appears in the NPPF, the alternative submission would substantially rewrite paragraph 89.

51. While this is sufficient to dispose of the Claimant's challenge, in my judgment the approach urged by the Claimant would also produce absurd results as was demonstrated by the examples Miss Grogan gave during argument. The limited infilling or limited affordable housing in villages in indent 5 would have little, if any, utility if it was confined to existing residential sites (or other uses appropriate if the infilling was for another use, e.g. a community facility). To suggest, as Miss Grogan did, that the housing could be permitted on former "bomb sites" (which appeared to me to be a bizarre example) or sites of existing derelict houses merely served to underline the lack of reality produced by her construction of the policy. Infilling development of its nature involves the filling in of gaps in existing development not merely gaps created by former, now derelict uses.

52. The suggested limitation would also severely limit the scope of the sixth indent since that is plainly directed to encouraging the reuse or improved use of brownfield land and regeneration (see paragraph 81 of the NPPF) where the prospect of a change of use a highly likely.

53. Indeed, there is nothing in the policy purpose or context to support the restriction suggested and it would require the Court to read into paragraph 89 a significant qualification which is not present in the language of the NPPF. Thus the argument itself runs contrary to the principle in Fordent and Timmins that the categories of appropriate development are confined to what is expressly set out in the NPPF, considered in context.

54. In conclusion, I do not consider that the Inspector erred in law in concluding that the development under appeal was appropriate in the Green Belt. The application is therefore dismissed.

MISS GROGAN: My Lord, there is the matter of costs and also permission to appeal. On the first issue, the Secretary of State and the local authority have agreed costs. Those are the Secretary of State's costs as the application has been unsuccessful. Those costs are agreed in the sum of £8,582. I understand there is also an application for costs from the Second Defendant. I will leave the Second Defendant to make that application before I respond, if that is acceptable. On the issue of permission to appeal, as this has been an oral judgment, I would request some time to consider and reflect on it, before seeking permission to appeal,

with my client. So if you could adjourn for our submissions to be put in writing.

THE DEPUTY JUDGE: No, I am prepared to rise for 5 minutes but the reasons I gave were perfectly clear and although it is an oral judgment, I do not think it takes much to digest what I have just said. What I have found is that paragraph 89 should be read as it stands.

MISS GROGAN: In that case, my Lord, we will seek permission direct to the Court of Appeal if we consider that is what we want to do.

THE DEPUTY JUDGE: Are you going to apply to me at all then?

MISS GROGAN: Let me take instructions very briefly.

THE DEPUTY JUDGE: Yes.

(A short pause)

MISS GROGAN: Yes, my Lord, I would like to seek permission to appeal. The test, as you know, is whether or not there is a real prospect of success and, secondly, whether or not there is some other compelling reason. On the issue of a real prospect of success, in my submission your interpretation of Timmins is incorrect. It is intended to be a broad statement of principle on the application of paragraph 89 and paragraph 30. It is important that Richards LJ there refers to existing cemeteries. He had in mind that paragraph 2 was limited to the construction of buildings on existing cemeteries and not the construction of buildings which brought with them a change of use to a new cemetery. In practical terms, you can see that because if you were constructing a café, for example, for a cemetery, how could it be that the land adjoining it, which could be quite extensive, be permitted to become a cemetery? Simply because you have built a café, it does not make sense on the application

THE DEPUTY JUDGE: That is not what I have held, Miss Grogan. What I have held is that in the case of new buildings under paragraph 89 that may carry with it a change of use. I have made no ruling that there would be the right to use the cemetery as a cemetery if it was only a material change of use. I have dealt simply with the NPPF where it is dealing with new buildings which may be appropriate development.

MISS GROGAN: Secondly, our second ground of appeal is that on a natural and ordinary interpretation of paragraph 89 indent 6 it is intended to be limited to very specific circumstances of redevelopment of existing sites or existing use and that is because either it is my first submission before you in my application that it is limited to all buildings are limited to their existing use or, secondly, that they are limited where a use is specified, no use is specified beyond brownfield site, perfectly workable for the policy to be read so that it allows

for reconfiguration of buildings within an existing use and that is consistent with the general intention of having limited and specific extensions. If you are not with me on those points, it is also a matter of general public importance and there is some other compelling reason, which is that apart from your judgment today the sixth indent to paragraph 89 has not been considered by the courts to date, it is to be considered indirectly in the case of Turner but this specific point is not likely be considered in Turner and therefore it is important that the Court of Appeal gives judgment on this important issue of the interpretation of planning policy. Those are my submissions on permission to appeal.

THE DEPUTY JUDGE: I do not need to trouble you on the issue of permission and we will deal with costs in a moment.

RULING ON PERMISSION TO APPEAL

> Miss Grogan, I am afraid I am against you on the application for permission. I do not think there is a substantial prospect of success. With regard to the point of principle, it seems to me perfectly clear, for the reasons I have given in the judgment, that you have over construed Timmins, which dealt with whether there was a separate category of appropriate development comprising a material change of use of land even though it did not appear in the NPPF and you have sought to apply the reasoning there to construe the express categories in paragraph 89. It seems to me it is perfectly clear from Timmins in the paragraphs of the judgment at 6, 19, 30 and 31 that that is what Timmins was dealing with and your submissions run contrary, for the reasons I have given, to the principle applied in Timmins, which is that the categories of appropriate development are those actually set out in 89. In my judgment, the position is sufficiently clear from Timmins and the propositions which you advance, for the reasons I have given, appear to me to stand little prospect of success, nor do they raise points which are new. It is clear from Europa Oil and Gas and from Timmins itself that 89 should be construed in its context and according to its words rather than to construe it in the way in which you sought to do. You must therefore ask the Court of Appeal for permission.

On the issue of costs, that is right, is it, those costs are agreed with the Claimant, Mr Mohamed?

MR MOHAMED: My Lord, that is right. My learned friend has given you the correct figures. I would wish to respond once the Interested Party says what they want to say.

THE DEPUTY JUDGE: Thank you. Mr Paget?

MR PAGET: My Lord, I appear in Mr Clay's stead for the Second Defendant and I ask for an order of our costs up until 3 February 2016, following Bolton v Secretary of State, for this

reason, that the adjournment application that you touched on in your judgment was one that was unsuccessful, that was resisted by the Second Defendant because, quite rightly, Turner does not really have any impact at all on the issue that you were going to be determining under paragraph 89(6). The Secretary of State had not at that stage put in their skeleton argument, so, effectively, what the Second Defendant was doing was resisting this appeal and standing in the shoes of the Secretary of State until they got their house in order and then took over from thereafter and successfully defended the appeal before you previously. So we ask for our costs up until that stage. We were the only party that was resisting the adjournment application, the Claimants were accepting it as well and so in those circumstances it is a situation where Bolton v Secretary of State does apply and we should have our costs up until then.

THE DEPUTY JUDGE: Miss Grogan?

MISS GROGAN: My Lord, the division of the costs between the Secretary of State and the Second Defendant is in part a matter for the Secretary of State, although given that the Second Defendant's costs are higher, I would resist the application. The position in Bolton is clear: the Claimant should only be paid one set of costs unless the Interested Party has a new and distinct point for which they were entitled to representation. That is not the case here, it was very clear from the grounds of claim that this was an issue of interpretation of the NPPF. The Second Defendant chose to resist the claim on the basis that it was an application of planning judgment until the hearing, when those submissions were not pursued and therefore the Claimant should not be put to the costs of paying any part of the Second Defendant's costs.

THE DEPUTY JUDGE: What about the distinct issue of the adjournment? Because that was a position which the Secretary of State was prepared to go along with, that application, until the court officer ruled against it.

MISS GROGAN: So that was the Secretary of State's application to adjourn, which the Claimant was minded to agree with. The order that came out of the court did not provide for any order as to costs and therefore the order would ordinarily be that the parties bear their own costs of that application. If the Second Defendant wishes to have its costs of that application, then they should properly be sought against the First Defendant because they are the ones who pursued that application and not the Claimant, although we did agree to it. Even so, that is something that the First Defendant arriving at agreed costs with the Claimant has agreed that they will bear the costs of, so the claimant is not paying those costs of the First Defendant. If you are with the Second Defendant in principle, I do have some submissions to make about the amount of costs. But I see from your indication that I will leave that there.

THE DEPUTY JUDGE: Mr Paget, you are facing an uphill struggle in persuading me, that

your party has added anything of significance to the case. Mr Clay simply adopted Mr Kimblin's submissions and the only additional point he raised was one which I have found to be misconceived, which is the consultation document of December 2015.

MR PAGET: My Lord, yes, my submissions are more nuanced than that. We do not say that we added anything once the Secretary of State became involved.

THE DEPUTY JUDGE: But why should you have your costs up to that date in any event?

MR PAGET: For this reason: that the only documentation that was before the court in determining the adjournment application was the Second Respondent's skeleton argument, which was forcefully putting the point that the court has now held that 89(6) should be read as a closed category and not import what the Claimant says and so it was us that was acting in the stead of the Secretary of State, so we should be entitled to costs. Whether the court then disallows the Secretary of State's costs up until that point is, of course, a matter for the court.

THE DEPUTY JUDGE: But Miss Grogan's point is that, in fact, it was the Secretary of State's own application, not her client's.

MR PAGET: Yes, it was.

THE DEPUTY JUDGE: So why should you have your costs against her client?

MR PAGET: There is force in that and we accept that the Claimant should not bear any additional costs beyond the totality. So those costs should be divided on this basis: that the Second Defendant gets their costs up until 3 February and the Secretary of State gets their costs thereafter, so the Claimant does not suffer any prejudice by that because, as she says, it was the Secretary of State's application.

THE DEPUTY JUDGE: I just do not understand this costs up until 3 February. I mean, the hearing was only last week, which is only a few days after 3 February. There was no suggestion that the Secretary of State was going to submit to judgment and the Secretary of State was merely submitting that this issue, or something similar to it, was going to be ventilated before the Court of Appeal which, as it happens, was rejected. But there was no suggestion at any stage that the Secretary of State was going to do anything else other than shoulder the burden of argument in this case. So I just do not understand the basis on which you seek costs up to 3 February.

MR PAGET: Let me explain it on this basis, that the adjournment application could only be determined on the material that was before the court at that stage, the only material that was before the court, because the Secretary of State's skeleton argument was late, was the Second

Defendant's skeleton argument. So it was only on the basis of what the Second Defendant was saying that the court could understand that Turner was not relevant and that the application should go ahead and the court recognised when making that order that there would be substantial prejudice to the Second Defendant if it was kicked off into the long grass pending Turner. The order was made by a court officer rather than a court order and so those costs are live for this court to determine.

THE DEPUTY JUDGE: What were the costs of the skeleton argument to resist the adjournment? Did you make specific submissions on the adjournment?

MR PAGET: Yes, we did.

THE DEPUTY JUDGE: What were the costs of those specific submissions on the adjournment?

MR PAGET: Those costs on the specific adjournment were £2,500.

THE DEPUTY JUDGE: Mr Mohamed?

MR MOHAMED: My Lord, I think you have made my points for me in the questions that you have asked. All I would add is just three very simple points. Miss Grogan is correct to say that as far as that application was concerned each party were expected to bear their own costs. Now, under Bolton's principles, technically you have to ask yourself what difference did the Interested Party make in this case, and in your judgment, your clear judgment, the Interested Party need not have been here at all. Finally, there was never any indication whatsoever right from the start, whether you look at the acknowledgement of service or Mr Kimblin's skeleton argument, there was never any indication whatsoever that the Secretary of State was not going to appear or indeed was not interested in defending this claim and at one point in your judgment, from memory, you say Mr Kimblin submitted and the Interested Party supported, and that is exactly what has happened.

THE DEPUTY JUDGE: Mr Clay was only on his feet for about 5 or 10 minutes.

MR PAGET: Well, I was not there. If I take away from your judgment what you have said, that is what has happened. We have agreed the figures with the Claimant and I will be inviting my Lord to make the summary judgment on that basis with the Interested Party having nothing in terms of their costs.

THE DEPUTY JUDGE: Mr Paget, no application was made to the court for the costs of resisting the adjournment at the time, was it, as far as I am aware?

MR PAGET: Let me look at the letter that was given in resisting the application. But the

general point I make in relation to that is that it was by way of an administrative order, so those costs are live until determined by this court.

THE DEPUTY JUDGE: It was not a judicial order.

MR PAGET: Yes, and so those costs are still live, and we do not say in that letter we should have our costs of the application but we say those costs are still live. Mr Mohamed referenced the skeleton argument but, as I said, that was not before the court at that stage. I completely accept everything he says once the Secretary of State was active, we fall away under Bolton, but it was only us that was resisting the adjournment application and it was on the basis of our arguments that it was dismissed.

THE DEPUTY JUDGE: The £2,000 odd that you referred to, is that the cost of your skeleton argument?

MR PAGET: No, it is the costs of considering the application and drafting the resisting letter to it.

THE DEPUTY JUDGE: Anything else?

MR PAGET: My Lord, no.

RULING ON COSTS

THE DEPUTY JUDGE: I think in the context that summary assessments are meant to be a broad approach to the question of costs, it seems to me that it is inappropriate that the Second Defendant be awarded its costs, as it applies for, up to 3 February because the assumption in Mr Paget's submissions is that the Secretary of State had not done anything by then other than to apply for an adjournment and it is write wrong and contrary to the principle in Bolton that that should be assumed unless the Secretary of State has somehow indicated that he is minded to submit to judgment or not resist the application. There was no indication prior to 3 February that the Secretary of State was not going to defend and it was quite clear that the Secretary of State defended the decision vigorously at the hearing before me and the Second Defendant played an understandable wholly supporting role. As for the question of the costs of resisting the adjournment, they are not to properly be made against the Claimant at all because it was not the Claimant's application.

It seems to me, doing the best I can and applying the principles in Bolton, the costs of the adjournment application should lie where they fall and that I refuse the Second Defendant's application for the costs up to 3 February because the reality is that the Secretary of State was going to defend and that the Second Defendant has not added substantially to dealing

with the issues in the proceedings having merely played the role of supporting the Secretary of State. Adopting a broad approach, therefore, what I will do is I will order the Claimant to pay the costs of this application to the First Defendant, assessed at the agreed sum of £8,582, I will refuse Second Defendant's application for costs and for the reasons I gave earlier I refuse permission to appeal to the Claimant.

Thank you all for your assistance.