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*33 Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government

Queen's Bench Division (Administrative Court)

25 July 2013

[2013] EWHC 2643 (Admin)

[2014] 1 P. & C.R. 3

Ouseley J.

25 July 2013

Development; Green belt; Minerals; Minerals policy statements; National Planning Policy Framework; Oil and gas production; Planning policy;

H1 *Mineral development—mineral exploration—appropriate development in the Green Belt—National Planning Policy Framework*

H2 The claimant applied to Surrey County Council ("the Council") for planning permission for the construction of an exploratory drill site to include plant, buildings and equipment; the use of the drill site for the drilling of one exploratory borehole and the subsequent short term testing for hydrocarbons; the erection of security fencing and the carrying out of associated works to an existing access for a temporary period of up to three years with restoration to forestry. The site was in the Metropolitan Green Belt and the Surrey Hills Area of Outstanding Natural Beauty. The Council refused permission and the claimant appealed. The Inspector dismissed the appeal. He stated that he did not consider that the development fell within the specific term "mineral extraction" cited in para.90 of the National Planning Policy Framework ("NPPF") as a category of development which was not inappropriate, subject to the effect on Green Belt openness and purposes. Nor did the development, when considered as a whole, fall into the category of "engineering operations", which was also referred to in para.90. He concluded that the development proposed was inappropriate development in the Green Belt and harmful to it by reason both of its inappropriateness and, although temporary and reversible, because of the actual harm it would do in the 18 weeks it would take to prepare the site, carry out the exploratory drilling and complete the works of site restoration. Paragraph 87 of the NPPF set out that inappropriate development was by definition harmful to the Green Belt and should not be approved except in very special circumstances. This requirement was also reflected in policy MC3 of the Surrey Minerals Plan Core Strategy ("MCS").

H3 The claimant challenged the Inspector's decision on the basis that it was beyond the Inspector's powers on the following grounds: (1) the Inspector had wrongly concluded that the development was neither mineral extraction nor engineering operations and so was not appropriate development in the Green Belt for the purpose of either the NPPF or the MCS; and (2) the Inspector had misunderstood the significance of the temporary nature of the development, for the purpose of judging *34 the presence of, and weight, to be given to any effect it had on the openness of the Green Belt or the purposes of the inclusion of the land in the Green Belt. He had also failed to give legally adequate reasons for his decision.

H4 **Held,** allowing the application:

H5 1. If the development was mineral extraction or an engineering operation it would be appropriate development in the Green Belt for the purposes of the NPPF. The question was one of interpretation. Did mineral extraction in para.90 of the NPPF and in policy MC3 of the MCS include or exclude mineral exploration? The parties accepted at the inquiry that if it was mineral extraction for the purposes of the NPPF, it was also mineral extraction for the purposes of the first limb of policy MC3. The phrase "mineral extraction" in the NPPF was not synonymous with and exclusively confined to "production", but also covered the inevitable precursor steps of exploration and appraisal where they were necessary. This was reinforced by the language of para.147 of the NPPF where mineral development planning had to distinguish between the three

phases of oil and gas development: namely exploration, appraisal and production. Extraction was not the word used in place of oil production. The three phases were treated as components of the overall process they naturally made up of extraction. The Inspector erred in failing to conclude that the proposal was one for mineral extraction within para.90 of the NPPF. On that basis, the Inspector erred in not finding equally that the development was also mineral extraction within the first limb of MC3which drew a clear distinction between mineral extraction in limb 1 and mineral development other than extraction in limb 2. It was the latter which on the face of policy MC3 was always assumed to be inappropriate, and it was on that which the Inspector focussed. The correct interpretation of mineral extraction in each planning policy document included exploration. This proposal was for mineral extraction within each policy document and the Inspector was in error.

H6 2. The court was not prepared to hold, however, that it was not open to the Inspector to conclude as a matter of fact and degree, of which he was the judge, that the combination of undoubted engineering works in site preparation, access and security was sufficient to make the development more than an engineering operation and make it either a building, mining or other operation. The Inspector did not make an error in his conclusion that it was not an engineering operation.

H7 3. Where an error of law was made the decision should be quashed, unless the court was satisfied that the error could have made no difference to the outcome. The court was not satisfied that without the error the decision would inevitably have been the same. It might have been but that was not enough and the reasoning which sustained such a decision would have had to be different. The premise of para.17 of the Inspector's decision letter was that mineral extraction including hydrocarbon exploration could not be appropriate in the Green Belt. Any correct analysis of the proviso to para.90 of the NPPF had to start from the different premise that such exploration or extraction could be appropriate. The premise therefore for a proper analysis was that there was nothing inherent in the works necessary, generally or commonly found for extraction, which would inevitably take it outside the scope of appropriate development in the Green Belt. Whether development, capable of being appropriate for the purposes of the proviso to NPPF, was in fact inappropriate, was a more complex question than the consideration of the effect on the Green Belt, where development had already been concluded to be ***35*** inappropriate. These considerations were absent from para.17 of the Inspector's decision letter.

H8 4. Once it was accepted that mineral extraction fell within para.90 of the NPPF and within the first limb of policy MC3, a whole array of different considerations arose, requiring a much closer analysis of the tests for appropriateness, and a consideration of factors which the Inspector could safely ignore in this decision letter because of his prior, but erroneous, conclusion that the development was, without more ado, inappropriate because it was not mineral extraction. The Inspector made a material error and the outcome of his decision without that error could well have been different.

Legislation referred to by the Court:

Town and Country Planning Act 1990

Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418)

H11 **Application** by the claimant, Europa Oil and Gas Ltd, under s.288 of the Town and Country Planning Act 1990 against the decision of the first defendant, the Secretary of State for Communities and Local Government dismissing the claimant's appeal against the refusal of planning permission by the second defendant, Surrey County Council. The facts are as stated in the judgment of Ouseley J.

H12 **Representation**

Andrew Newcombe QC and Mark Westmoreland Smith (instructed by Charles Russell) appeared on behalf of the claimant.

Charles Banner (instructed by the Treasury Solicitor) appeared on behalf of the first defendant.

The second defendant did not appear and was not represented.

Stephen Whale appeared on behalf of the third defendant.

Judgment

Ouseley J.:

1 The claimant, Europa Oil and Gas Ltd, applied in 2008 to Surrey County Council, the second defendant, for planning permission for development best described in the inspector's decision letter, para.2, as follows:

> "Construction of an exploratory drillsite to include plant, buildings and equipment; the use of the drillsite for the drilling of one exploratory borehole and the subsequent short term testing for hydrocarbons; the erection of security fencing and the carrying out of associated works to an existing access and track all on 0.79ha, for a temporary period of up to 3 years, with restoration to forestry."

2 That language is apt to cover both exploration and appraisal through testing. The purpose of the proposed development was described by the inspector in para.5 of his decision letter:

> "The purpose of the proposed development is to explore for hydrocarbons in the Holmwood Prospect, which is within UK Onshore Licence PEDL143. In broad terms, the Prospect is located beneath Coldharbour village and the proposal would involve offset drilling. There would be four phases: site ***36*** clearance and preparation; equipment assembly and drilling operations; testing and evaluation (if hydrocarbons are found) and site reinstatement. The appellants consider that these phases would take 6 weeks, 5 weeks, up to 4 days and 6 weeks respectively. Planning permission is sought for a temporary period of 3 years, with operations extending over an 18 week period. The principal elements of the development are set out more fully in the Statement of Common Ground at paragraph 2.2. The development would be for exploratory purposes only, to establish whether hydrocarbons are present. I approach this decision solely on that basis. If viable reserves were found, a separate planning application for a suitable location would be required."

3 Surrey County Council refused permission in 2011 contrary to its officer's recommendations. The site in question is near Leath Hill in the Metropolitan Green Belt and the Surrey Hills Area of Outstanding Natural Beauty (AONB). The development was, and is, a matter of considerable local controversy but the reasons for refusal did not include that the development was inappropriate development in the Green Belt.

4 The claimant appealed against the refusal. The inspector held a public inquiry into the appeal. He dismissed it in a decision letter of 26 September 2012. He concluded that the development proposed was inappropriate development in the Green Belt and harmful to it by reason both of its inappropriateness and, although temporary and reversible, because of the actual harm it would do in the 18 weeks it would take to prepare the site, carry out the exploratory drilling and complete the works of site restoration.

5 The inspector attached moderate weight to the visual harm and the effect on the tranquility of the AONB because the harm would be temporary and reversible. He concluded that exploration for oil and gas was consistent with national policies and there was no alternative site from which this prospect could be explored. The uncertainty over whether exploratory drilling could find any oil or gas and the relatively small scale of the estimated resource meant that the harm he had

identified to the Green Belt both by reason of inappropriateness and other harm, was not outweighed by the need for minerals. Accordingly, no very special circumstances existed to permit this inappropriate development in the Green Belt.

6 The claimant challenges that decision under s.228 of the Town and Country Planning Act 1990 on a variety of inter-related grounds. The decision was beyond the inspector's powers on grounds which I summarise as being:

> 1. He had wrongly concluded that the development was neither mineral extraction nor engineering operation; and so was not appropriate development in the Green Belt for the purposes of either the National Planning Policy Framework, NPPF, or the relevant development plan policy in the Surrey Minerals plan Core Strategy, MCS, 2011.
>
> 2. The inspector had misunderstood the significance of the temporary nature of the development, for the purpose of judging the presence of, and weight, to be given to any effect it had on the openness of the Green Belt or the purposes of the inclusion of the land in the Green Belt. He had also failed to give legally adequate reasons for his conclusions.

7 The day before this case came on for hearing before me, the first defendant the Secretary of State for Communities and Local Government changed his mind about ***37** certain aspects of the inspector's decision. In particular, he no longer supported the inspector's approach to whether this development was capable of being mineral extraction or an engineering operation, and so capable of being appropriate development in the Green Belt. He continued to support the decision on the grounds that that error, as he now saw it, would not alter the inspector's conclusion that the particular development in this case actually was inappropriate for the reasons which the inspector gave. The error, as it was now seen by the Secretary of State, could have no effect on the decision. Mr Banner, who appeared for him, adjusted his skeleton argument overnight accordingly.

8 Mr Whale, for the Leath Hill Action Group, the third defendant which had objected to the development at the enquiry, did not accept that the inspector had erred in the way now asserted by the Secretary of State but also maintained that if error he made, it could have had no effect on the outcome of the inquiry.

9 The County Council were not represented but had been alerted to the Secretary of State's last minute change of position.

The decision letter

10 The argument before me requires a certain amount of this to be set out. Paragraph 6 sets out the issues which the inspector then deals with in sequence in the decision letter. The first main issues were:

> "(i) Whether the proposal amounts to inappropriate development in the Green Belt; ii the effect on Green Belt openness and on the purposes of the Green Belt."

I note the separation of the two in that way.

11 Main issue (vii) is the overall balance between the harm to the Green Belt through inappropriate development — if it is inappropriate — and any very special circumstances which could outweigh that.

12 Paragraph 7 of the decision letter and on sets out development plan policies. I note that he sets out part only of policy MC3 (from the MCS) and does so in these terms:

> "Policy MC3 deals with mineral development in the Green Belt. Amongst other things it requires in respect of the development other than extraction and primary treatment, demonstration that very special circumstances exist to outweigh the harm by reason of inappropriateness and any other harm."

13 In para.11, the inspector turned to the NPPF as a material consideration saying that the relevant development plan policies were broadly consistent with it and were neither silent, absent, nor, on the relevant policies, out of date. That was a position common to the parties at the inquiry.

14 Paragraphs 15 and 16 are the two paragraphs largely disavowed recently by the Secretary of State. They comprise the inspector's views on main issue (i) and appear in the report section entitled: "Whether this would be inappropriate development in the Green Belt."

> "15. As I set out above, this proposal is for exploratory drilling rather than for the production of hydrocarbons. It is consistent with paragraph 147 of the Framework to clearly distinguish between the three phases of development (exploration, appraisal and production) when considering planning issues aris ***38*** ing from on-shore oil and gas development. I have considered the appellants' contention that this exploratory development should be regarded as part of mineral extraction. However, in the light of paragraph 147 of the Framework, this does not seem to me to be the correct approach. In that context, I do not consider that this development falls within the specific term 'mineral extraction', which is the production phase and is cited in paragraph 90 of the Framework as a category of development which is not inappropriate, subject to the effect on Green Belt openness and purposes. Nor does the development, when considered as a whole, fall into the category of 'engineering operations', which is also referred to in paragraph 90, although it includes elements of such operations. Moreover, the Framework does not exclude temporary development from amounting to inappropriate development.
>
> 16. Having regard to the above, I conclude that the development would amount to inappropriate development. Paragraph 87 of the Framework sets out that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. This requirement is also reflected in MCS policy MC3."

15 The Secretary of State did not disavow the last sentence of para.15 and supported para.16 provided it were read with para.17 rather than para.15, that is to say as if it started: "Having regard to the paragraph below", rather than having "regard to the above," and as if it were therefore part of the following section: "The effect on Green Belt openness and on Green Belt purposes", the inspector's main issue at (ii).

16 Under that heading is para.17, which reads as follows.

> "17. Paragraph 79 of the Framework explains that the essential characteristics of Green Belts are their openness and permanence. The purposes of Green Belts are set out in paragraph 80 of the Framework and include assisting in safeguarding the countryside from encroachment. The appeal site is within woodland, so that the site and the surrounding area are not of an open appearance. However, 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."

There are also some passages which, in the context of development in the AONB, also relate to visual impact. Mr Andrew Newcombe QC for the claimant emphasised, as he had done at the inquiry, that the period of actual development from start of work to completion of restoration works would only be 18 weeks.

17 There was, as the inspector agreed, no alternative place from which this prospect, already seismically surveyed, could be explored. The inspector also accepted the claimant's evidence that there was a 32 per cent probability of hydrocarbons being found in the main reservoir rocks which was "a high level of probability by industry standards." The estimated reserves, if found, amounted to two to four days of the enti ***39*** re UK's production. A further planning application

would be required for the production process which would be undertaken from a different location. Finally, the inspector came to his overall conclusions and balance.

"The Overall Balance

> 57. I have concluded that the development would amount to inappropriate development. Inappropriate development is, by definition, harmful to the Green Belt and there would also be harm to Green Belt openness and through encroachment into the countryside. Paragraph 88 of the Framework advises that substantial weight should be give to any harm to the Green Belt. I attach substantial weight to the harm through inappropriateness. In the particular circumstances of the case, where the development should be temporary and reversible, I consider that moderate weight should be given to the harm to Green Belt openness and by encroachment into the countryside. I have also found material harm to the AONB, with regard to visual impact and the effect on its character, including the quality of tranquility. I take into account the great weight given in the Framework to conserving landscape and scenic beauty in an AONB, which is also reflected in other relevant policies. However, only moderate weight should attach to it in the particular circumstances of this case. Other matters, including the effect of traffic movements on local residents and highway users, do not weigh materially against the development.
>
> 58. As I set out above, the exploration of energy and mineral resources is, in principle, consistent with national policies. In this case, the absence of another site from which the Holmwood prospect could be explored adds to the weight to be attached to the need for the development. On the other hand, that weight is tempered by the uncertainty of whether hydrocarbons would be discovered and the relatively small scale of the estimated resource. Nevertheless, I attach considerable weight to the need for the development in the context of the absence of any alternative site. I have taken into account the temporary and reversible nature of the development as mitigating factors in weighing the harm, rather than as distinct 'other considerations' to weigh in the Green Belt balance in the appellants' favour. My overall conclusion is that there are not other considerations which would clearly outweigh the harm to the Green Belt and the other harm I have found. In the light of that conclusion, very special circumstances to justify the granting of planning permission do not exist and the development would conflict with MCS policy MC3. The development would not be in the public interest as referred to in policy MC2. Planning permission should not be granted."

18 The argument before me is centred on the NPPF and MCS policies. It is necessary to set them out. The NPPF contains Green Belt policies in familiar terms in paras 79 and 80; the third purpose being served by the Green Belt, and of particular relevance here, was to assist in safeguarding the countryside from encroachment. Paragraph 87 in well known terms says that:

> "Inappropriate development is by definition harmful to the Green Belt and should not be approved except in very special circumstances."

19 Paragraph 88 says that substantial weight should be given to any harm to the Green Belt: ***40**

> "Very special circumstances would not exist unless the potential harm to the Green Belt, by reason of inappropriateness and any other harm is clearly outweighed by other considerations."

That language is clearly reflected in the inspector's decision.

20 Paragraphs 89 and 90 deal with what is, or may be, appropriate development in the Green Belt. Paragraph 89 makes it clear that the construction of new buildings is inappropriate in the Green Belt but there are exceptions. These include, for example, buildings for agriculture and forestry, and the provision of appropriate facilities for outdoor sport and recreation, but in this latter case with the added qualification:

> "… as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it."

Paragraph 90, so far as material provides as follows:

> "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."

21 Paragraphs 89 and 90 are instructive on the interpretation of Green Belt policy because of the variety of concepts they reveal. A building is generally inappropriate; but a building of the same size as one which is inappropriate, and in the same location may be appropriate depending upon the purpose to which it is put. Others may be appropriate subject to the effect which they have. Paragraph 90 is central. It is clear that mineral extraction and engineering operations may be appropriate, subject to the meaning and effect of the proviso.

22 I should also mention in the light of Mr Whale's submissions, para.143, which says that in preparing local plans, local planning authorities should:

> "Identify and include policies for extraction of mineral resource of local and national importance in their area (…)"

23 Mr Whale contrasted this with parts of para.144, which says that when determining planning applications the local planning authorities should:

> "Give great weight to the benefits of the mineral extraction including to the economy."

but it also says that they should ensure "in granting planning permission for mineral development" that there are no unacceptable adverse impacts. He contrasted "erection" with "development". Paragraph 147 says:

> "The Mineral planning authorities should also,
>
> when planning for onshore oil and gas, development including unconventional hydrocarbons clearing distinguish between the three phrases of development (exploration, appraisal and production) and address constraints on production and processing within areas that are licenced for oil and gas exploration or production."

24 As para.11 of the decision letter made clear it was not at issue at the inquiry but that the MCS was consistent with the NPPF. Nonetheless, the development of the argum ***41*** ent particularly on the consequences were this development to be mineral extraction as the claimant and the Secretary of State contend, contrary to what the inspector concluded, brings the MCS policies and their meaning into sharper focus.

25 MC3 deals with mineral development in the Green Belt. It says:

> "Policy MC3 — Spatial strategy — mineral development in the Green Belt.
>
> Mineral extraction in the Green Belt will only be permitted where the highest environmental standards of operation are maintained and the land restored to beneficial after-uses consistent with Green Belt objectives within agreed time limits.
>
> Proposals in the Green Belt for mineral development other than extraction and primary treatment, will only be permitted where the applicant has demonstrated that very special circumstances exist to outweigh the harm by reason of its inappropriateness and any other harm."

26 The supporting text includes this at paras 3.45 and 3.46:

> "3.45 Almost all workable mineral deposits in Surrey are within the MGB. However, PPG2 Green Belts states that mineral extraction need not be inappropriate in Green Belts as it is a temporary operation that can be carried out without compromising openness.
>
> 3.46 Proposals for other forms of mineral development within the MGB will need to identify very special circumstances sufficient to outweigh any potential harm to the Green Belt or the reasons for keeping it open."

PPG2 is the clear progenitor of MC3. Paragraph 3.11 of PPG2 says as follows:

> "Mining Operations and Other Development
>
> 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.
>
> Relevant advice is in MPG2 and MPG7. Paragraph 3.13 below is also relevant to mineral extraction."

27 Paragraph 3.12 contrasts that with engineering and other operations and material changes of use which are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the Green Belt.

28 I note that it would appear that the PPG2 policy which underlies the development plan takes a different approach to mineral extraction from that which it takes to engineering and other operations, and material changes of use, in terms of what is appropriate or capable of being appropriate and what makes it appropriate. That is a different approach from the NPPF.

29 The terms used in the MCS are defined in its definition section which says that:

> "The plan applies to all types of mineral development and minerals in Surrey.
>
> 1.5 'Mineral development' applies to any development primarily involving the extraction, processing, storage, transportation or manufacture of mineral. It al ****42*** so includes development such as rail aggregate depots and the provision of facilities for aggregate recycling. Policies on these latter facilities are included in the Surrey Waste Plan 2008 as well as this plan and proposals for new facilities will be made in the Aggregates Recycling DPD, a joint DPD.
>
> 1.6 'Mineral working' or 'mineral extraction' refer to the quarrying of minerals and ancillary development (such as processing plants, site offices and weighbridges)."

Oil and gas are described as primary minerals listed under the heading of "aggregates". Policy MC12 deals specifically with oil and gas development. Sub-paragraph 1 provides:

> "Planning applications for drilling boreholes for the exploration appraisal or production of oil or gas will be permitted only where the mineral planning authority is satisfied that, in the context of the geological structure being investigated, the proposed site has been selected to minimise adverse impacts on the environment. The use of directional drilling to reduce potential environmental impacts should be assessed."

30 There was no suggestion — in the inspector's decision letter at least — that those requirements were not met. Paragraphs 5.36 and 5.37 of the supporting text are also relevant.

> "Conventional oil and gas development."

5.36 Conventional oil and gas development differs from other mineral development. It involves continuous periods of working with most disturbance at the exploration and appraisal stage, although these are usually of relatively short duration, and may, or may not, be followed by production. Oil and gas can be transported by pipeline rather than by road, and gathering stations need not be closely tied to the pint of extraction, considerations which give the opportunity to reduce environmental impacts associated with production.

5.37 Three separate phases of development are recognised, exploration, appraisal and production, each of which requires a separate planning permission. Applications for exploratory wells will be considered on their individual merits in accordance with all levels of policy guidance. Key considerations are locating sites to minimise intrusion, controlling vehicular activity and vehicle routeing, and controlling noise and light emissions from drilling rigs especially during night-time operations. Proposals will be expected to address all these issues."

Mineral Extraction

31 As the argument evolved before me, it became apparent that the first and crucial point concerned whether the development proposed was for mineral extraction, or, as the claimant put it, as a fallback, an engineering operation. The inspector concluded that it was neither and must have concluded that was for a building, mining or other operation, since operational development it undoubtedly is. I rather doubt that he thought that it was a mining operation yet not mineral extraction, and the contrary was not suggested.

32 If it were mineral extraction or engineering operation it would potentially be appropriate development in the Green Belt for the purposes of the NPPF. The way the i ***43*** nspector dealt with it as inappropriate development is significant for his approach to consequential issues and so requires this matter to be considered very carefully. The claimant says he made an error which would lead to the quashing of the decision. The first defendant and the Action Group say that it was of no consequence, whilst differing as between themselves on whether it was or was not a proposal for mineral extraction or engineering operation.

33 The reason for the Secretary of State reconsidering the position which the inspector had adopted, which until the night before he came to court was to be supported by Mr Banner in his skeleton argument, was that the claimant sent him a copy of his own new policy document, Planning Policy Guidance for Onshore Oil and Gas, together with an addendum skeleton argument. I accept Mr Whale's submission that this document, however much it came as a revelation and inspiration to the Secretary of State, cannot assist me because it was not in existence at the time of the inquiry, nor could it be produced to the inspector before his decision. It was not said to show how the NPPF was to be interpreted as at the time of the decision, even if otherwise admissible. If there is an error of law by the inspector it has to be shown by relevant and admissible material and not by reference to this document, whatever effect reading his own policy document may have had on the Secretary of State.

34 Mr Banner did not really seek to deploy it impermissibly, nor did the Treasury Solicitor in his letter to the court alerting the court to the change of stance. There is no doubt that the issue of whether the development was mineral extraction, and indeed whether it was in the alternative an engineering operation, was before the inspector, and he considered it. There was a difference about it before him between the Action Group and the claimant.

35 Evidence about how the claimant's witnesses described it does not go very far, since the error, if error it is, is one of interpretation of planning policy, an issue in the first place for the inspector and then for the court. Evidence may be of little value in that context, however forensically appealing it may be to extract it, at the level of assertion as opposed to analysis of the development of or the rationale of policy.

36 I note that Surrey County Council was of the view, at officer and member level, and even though the officer recommendation for grant of permission was rejected, that this was not inappropriate development in the Green Belt. It maintained this view after the Action Group had said at the pre-inquiry meeting that the Action Group wished to raise the issue of whether the

development was inappropriate in the Green Belt and so it became an issue for the enquiry.

37 The County Council's view, as expressed by Atkins Ltd acting as its independent consultant, was that the temporary and reversible nature of the development meant that the openness and the purposes of the Green Belt would be maintained in the longer term both for the purposes of NPPF para.90, and for the satisfaction of the relevant first limb of MC3. Thus, it was not inappropriate development. For those purposes, it has to have been in their view either mineral extraction or engineering operation.

38 The issue, as I say, is one of interpretation. Does mineral extraction in para.90 of NPPF and in MC3 include or exclude mineral exploration? The inspector held that it did not include exploration. The parties accepted at the inquiry that if it was mineral extraction for the purposes of NPPF 90, it was also mineral extraction for the purposes of the first limb of policy MC3. Whatever may be the scope for a diffe ***44*** rence in approach as between the two policy documents, to which I shall come, for these purposes the approach of the parties to the inspector and before me was that the development is, or is not, mineral extraction in both or neither.

39 I start with NPPF para.90, as that is where the focus of the argument at the inquiry was, notwithstanding that it is not part of the development plan and there was said to be up to date relevant development plan policy.

40 Paragraph 90 of the NPPF deals with certain classes of development which may be appropriate in the Green Belt. Mineral extraction is one form. It is not contrasted with "other mineral development." Paragraph 90 deals generally with mineral extraction and it is not confined to particular types of mineral, whether oil and gas, or sand and gravel.

41 The inspector and Mr Whale's approach depends on the proposition that whilst extraction may be appropriate development in the Green Belt, the necessary prior work of exploration and appraisal never can be, and that actual extraction may involve no harm to the Green Belt while exploration and appraisal always will. The former will not require or may not require the demonstration of very special circumstances, the latter always will. That is a distinctly odd interpretation of NPPF by para.144 planning authorities are enjoined to give great weight to the benefits of what is referred to as mineral extraction. Again, that is referred to in general terms, covering all minerals. Yet, on the inspector's interpretation, no such weight at all would be given to works essential before any production took place. That interpretation would, on its face, be likely to undermine the scope for great weight to be given to the benefit of mineral extraction. What might be very valuable reserves if extracted, and the extraction of which would require no very special circumstances to be shown, could not be explored or appraised without very special circumstances being shown.

42 Mr Whale asked why a planning authority should give weight to trying to find something that is probably not there. But it is obvious why one would give great weight to trying to explore for a valuable resource although it might, in the end, never be found; and especially so, as was evidenced, it is always more likely than not that this mineral will not be found or exploration of a seismically surveyed prospect and where the resource is at the high end of the likelihood of being found. There is obvious potential on Mr Whale's approach to undermine the aim of benefiting the economy through extracting the mineral. In general, his would be a policy that involves straining at the gnat only to swallow the elephant. If oil exploration may be more intrusive than oil production — the reverse of the usual position in mineral extraction — that does not mean that a general mineral policy such as para.90 should be interpreted differently. Mr Whale made something of the use of the phrase "mineral development" in 144 to show that mineral extraction was different from mineral development. It is rather a form of mineral development, of which there are many, quite apart from the immediate processes of exploration, appraisal and production.

43 Mr Whale also suggested that the development could not be mineral extraction "because although the probability of finding a viable resource was high by industry standards at 32 per cent for the main prospect, it was more probable than not that none would be found accordingly, the purpose at the end would not be described by the man in the street as mineral "extraction" if none were found. If some were found, extracted and tested as the developer hoped, it could still not be said to be mineral extraction. I do not find that persuasive. The nature of the development is clear ***45*** ly to carry out works to drill for and remove a testing sample of any hydrocarbons found. This fits quite comfortably within the concept of extraction, even though it is the consequence of exploration for the purposes of establishing the extent and nature of the reserve

with a view to full extraction later.

44 My conclusion that the phrase “mineral extraction” in the NPPF is not synonymous with and exclusively confined to “production”, but also covers the inevitable precursor steps of exploration and appraisal where they are necessary, is reinforced by the language of para.147, where mineral development planning should distinguish between the three phrases of oil and gas development: namely exploration, appraisal, and production. Extraction is not the word used in place of oil production. The three phrases are treated as components of the one process, the one process they naturally make up is the overall process of extraction. The need to distinguish them derives from the need to address constraints on production in licenced areas, not to increase constraints on necessary parts of the process. Accordingly, I conclude that the inspector erred in failing to conclude that the proposal was one for mineral extraction within para.90. I add he does not appear to have had argument as focused as I have had. On that basis, the inspector erred in not finding equally that the development was also mineral extraction within the first limb of MC3.

45 If mineral extraction in NPPF 90 is therefore potentially development in the Green Belt, so, too, is mineral extraction in MC3 potentially appropriate development at least in the Green Belt for development plan purposes.

46 MC3 reinforces that conclusion. It draws a clear contrast between mineral extraction in limb 1 and mineral development other than extraction in limb 2. It is the latter which on the face of MC3 is assumed always to be inappropriate, and it is on that which the inspector focused, as para.8 of his decision makes clear.

47 Mineral development in the definition section of the MCS includes extraction and processing and other specifically identified forms of mineral development. It applies to all types of minerals and mineral development. It does not expressly refer to exploration and appraisal, yet one word or another used in the definition must be given broad enough scope for exploration to be included within it. Were it otherwise, exploration would fall outside the scope of MC3 altogether. No one has suggested that. The consequence, therefore, is that a word must be found within the definition section which encompasses exploration. The obvious word to encompass it is “extraction”. It cannot be “processing, storage, transportation or manufacture”. It is not within the same broad categories as rail depots and recycling. It is closer to what 1.6 envisages.

48 The fact that oil and gas exploration then falls within mineral extraction, which refers, so the definition section tells us, to quarrying of minerals, is indeed odd language. It is, however, rendered rather less odd by the fact that oil and gas are treated as aggregates, to which the notion of quarrying aptly fits. But that linguistic oddity makes better practical sense that the only alternative approach to the scope of mineral development would mean that hydrocarbon exploration falls outside MC3 all together.

49 There is no need to read into the MCS definition other general words because it is self evidently an all-embracing definition.

50 I derive no assistance from the fact that the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418) grants permission for certain mineral exploration activities without reference to extraction. It suggests that non-p ***46*** etroleum exploration is at the lower end of the impact and treats “exploration” as a proper word to cover pre-production activities for minerals. It is thus consistent with a broad scope being given to the concept of mineral extraction and with the view to which I have come on para.144 of the NPPF. It also better fits the language and thinking of para.3.45 of the MCS and its progenitor in para.3.11 of PPG2.

51 Accordingly, I am satisfied that the correct interpretation of mineral extraction in each planning policy document includes exploration and that this proposal was for mineral extraction within each policy document. The inspector was in error.

Engineering operation

52 The inspector also concluded that it was not an engineering operation. It was the claimant’s fall-back position at the inquiry that the development was an engineering operation. The nature of the error alleged by the claimant is an error of interpretation of the relevant policy or an irrational conclusion.

53 Development in the Town and Country Planning Act 1990 is defined as: “Building, engineering, mining or other operation, or making any material change of use in land,” see s.55 . The language of the policy documents using the phrase “engineering operation” is clearly drawing on that concept. So the alleged error of interpretation is an error of interpretation of the statute rather than policy.

54 There is plainly scope for overlap between the various limbs of the concept of operational development. I see no error in approach which can be called an error of interpretation and none was clearly identified. If the approach is correct, the decision as to whether the development was engineering operation is one of fact and degree.

55 It would have been open to the inspector to conclude that the totality of the operational development was an engineering operation, if not a mining operation. I am not prepared to hold, however, that it was not open to the inspector to conclude as a matter of fact and degree, of which he was the judge, that the combination of undoubted engineering works in site preparation, access and security with the tanks, pits, 35 metre high drill rig and Portakabins, was sufficient to make development more than an engineering operation and make it either a building, mining or other operation. Mr Banner gave no reason for saying that the inspector had erred. In my judgment, he did not make an error in his conclusion that it was not an engineering operation.

Temporary duration

56 There was no issue with what the inspector said in the last sentence of para.15 to the effect that temporary development in the Green Belt could still be inappropriate. It is plain that temporary development can be inappropriate. Equally, it will not always be inappropriate. That is what the inspector in substance says. If he had said that the temporary nature of a development was irrelevant to its inappropriateness he would have been in error, as I shall come to.

The effect of the inspector’s error on the interpretation of para.60

57 Mr Newcombe submitted that the inspector had erred in consequence of his error in relation to mineral extraction in then treating the development without more ado as ****47*** inappropriate development; and therefore, by definition, harmful to the Green Belt.

58 Mr Banner submitted that the inspector should have been treated as reaching his conclusion about harm to the Green Belt, not by reference to para.15, as the inspector actually said, but by reference to para.17, which is not what the inspector said. That submission involves re-writing the letter. I reject it.

59 Mr Whale was right to accept that para.16 was also wrong since the relevant policies required further matters to be considered before the conclusion was reached that the development which may be appropriate was in fact inappropriate. That, of course, is on the premise that his submission in relation to mineral extraction is wrong, as I have found it to be.

60 Would the decision still have been the same without that error? Where an error of law of this sort is made the decision should be quashed, unless the court is satisfied that the error could have made no difference to the outcome. If so, the court exercises its discretion not to quash the decision. That is the contention of the Secretary of State and the Action Group as to what should happen here. They submit that the inspector would have had to consider whether mineral extraction, as he ought to have found it to be, would preserve the openness of the Green Belt and not conflict with the purposes of including land within it, as required by the proviso to para.90 of NPPF.

61 If the proviso is not satisfied in respect of either of those points, the development, although potentially appropriate, would be inappropriate. If so, the inspector was right to treat it as harmful for that reason and also to take account of the additional harm it caused, as he did in para.56.

62 They say the inspector reached conclusions on each of those parts of the proviso under the heading to para.17. He was entitled in law, they say, to reach the conclusion he did. Mr Whale submitted that if one read paras 15 to 17 shorn of the headings, as one sequence of reasoning, it is clear that the outcome would obviously have been the same. Mr Newcombe submits that

para.17 proceeds on a false basis, on analysis of the relevant policies and a double counting of harm, in this instance in para.56.

63 I am not satisfied that without the error the decision would inevitably have been the same. It might have been, indeed it might very well have been the same, but that is not enough and the reasoning which sustain such a decision would have had to be different. My reasons are as follows.

64 First, the premise of para.17, incorrectly, is that mineral extraction including hydrocarbon exploration cannot be appropriate in the Green Belt. However, any correct analysis of the proviso to NPPF 90, which is not what para.17 purports to provide at all, has to start from the different premise that such exploration or extraction can be appropriate. The premise therefore for a proper analysis is that there is nothing inherent in the works necessary, generally or commonly found for extraction, which would inevitably take it outside the scope of appropriate development in the Green Belt.

65 As Mr Banner accepted, some level of operational development for mineral extraction, sufficiently significant as operational development to require planning permission has to be appropriate and necessarily in the Green Belt without compromising the two objectives. Were it otherwise, the proviso would always negate the appropriateness of any mineral extraction in the Green Belt and simply make the policy pointless. Extraction is generally not devoid of structures, ***48** engineering works and associated buildings. The policy was not designed to cater for fanciful situations but for those generally encountered in mineral extraction.

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.

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. Both those reasons are reflected in the supporting text to MC3, in para.3.45, itself drawing on PPG2, para.3.11.

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. Whether development, capable of being appropriate for the purposes of the proviso to NPPF 90, is in fact inappropriate, is a more complex question than the consideration of the effect on the Green Belt, where development has already been concluded to be inappropriate. Those considerations are necessarily absent from para.17. It does not address the effect on the Green Belt for the purposes of appropriateness in the proper policy context.

69 Thirdly, the point I have referred to from para.3.45 of the supporting text at MC3 has further consequences for how policy MC3 should be interpreted. MC3 is part of the development plan. Decisions must be made in accord with it, unless material considerations indicate otherwise. If the NPPF indicates otherwise, it may outweigh the development plan but that would require explanation.

70 It is at least for contemplation by an inspector that if para.17 is a proper application of NPPF 90 to the question of how the effect on the Green Belt applies to the question of appropriateness, MC3 is different in its terms.

71 In my judgment it is clear from PPG2, the progenitor of MC3, that limb 1 of MC3, the relevant policy, spells out factors of direct relevance to appropriateness: the temporary nature of the activity, the environmental standards maintained during operation and the restoration of land to beneficial after use consistent with Green Belt objectives within an agreed time limit, are all

relevant to issues of appropriateness. That is an inescapable conclusion from para.3.11 of PPG2 and the supporting text to MC3 which states that it is the temporary nature, ie the duration of the development, which means that it may not compromise openness. The same development might compromise openness and be inappropriate if permanent, but unjust not do so if it is temporary. Obviously, there are issues of degree here.

72 It is ***49*** not necessary for me to say that those are of themselves the development plan tests for appropriateness. It is enough that they are relevant to appropriateness for the development plan policy and therefore require specific consideration in that context. In other words, the temporary nature of the development, the maintenance of high environmental standards during operation, and restoration to beneficial Green Belt use, all of which were treated as satisfied here, may well be important to the judgment of openness and conflict with Green Belt purposes.

73 If the development plan and the NPPF are wholly consistent, those factors, not just the temporary nature of development, but also the specific provisos in MC3, would be relevant to NPPF appropriateness. If they are not relevant to NPPF appropriateness but relevant to MC3 appropriateness, the policies are inconsistent. Either way, once it is accepted that mineral extraction falls within NPPF para.90 and within the first limb of policy MC3, a whole array of different considerations arrieve, requiring a much closer analysis of the tests for appropriateness, and a consideration of factors which the inspector could safely ignore in this decision letter, because of his prior (but erroneous) conclusion that the development was, without more ado, inappropriate because it was not mineral extraction.

74 It distorts his reasoning to give the decision letter a structure it does not have and risks treating as considered that which was ignored, and, on his reasoning, legitimately ignored. I appreciate that in the decision letter the inspector contemplates the duration of development at para.17, but that is far from sufficient to demonstrate that the outcome would inevitably be the same. The significance he attaches to the duration of development is not as a factor relevant to appropriateness,to which it is relevant, but simply as a factor showing that for the duration of inappropriate development there would be an impact. It is clear from para.8 that the inspector's focus on MC3 was essentially on limb 2, that is to say the development control policy for inappropriate development; and not on limb 1, which deals with whether development is appropriate and what makes it appropriate. I reject, however, in general terms Mr Newcombe's submission that the inspector erred in para.17 in treating Green Belt openness in terms of absence of development. That is well established to be the correct approach to inappropriate development.

75 That said, I am surprised that the inspector saw the temporary nature and reversibility of the development as wholly irrelevant to the effect on openness and even more so to conflict with the purposes of Green Belt. In any event, that is not the same as the approach to the assessment appropriateness. If para.90 NPPF is of any purpose, the mere fact of the presence of the common structural paraphernalia for mineral extraction cannot cause development to be inappropriate. It does not depend for its purpose on fanciful notions of drilling rigs at the bottom of a large quarry. For MC3 purposes, the temporary nature of development underlies the policy on appropriateness and its reversibility is crucial to it. That does not feature in para.17's consideration of the significance of development.

76 Finally, I am not persuaded that the judgments in paras 57 and 58 would be inevitably the same without the error he made in the understanding of mineral exploration as mineral extraction, and therefore potentially appropriate. Paragraph 57 contains the conventional approach to assessing harm done by inappropriate development added to the particular harm through specific effects. It is notable that the former was treated as "substantial" as required by policy.

77 The actual harm, in addition, was treated as moderate because of its duration and reversibility. Those factors limited the weight the inspector gave to that specific harm. ***50*** It did not affect the weight he gave to harm through inappropriateness. I am not sure that such a conventional approach is applicable by these circumstances and issues would arise for consideration if mineral extraction has to be considered as it does for appropriateness.

78 What turns potentially appropriate development for the purposes of NPPF 90 and potentially, on one view, MC3, is the specific harm which the development does. It is not inappropriate development without those specific harms being present. Specific harm may not be capable of

being added to the harm done through inappropriateness without double counting harms. The harm for inappropriateness only arises because of the specific harm. Whether it is the harm through inappropriateness instead which should be discounted may also be for debate since, as I have said, it is only inappropriate because of the specific harm. It may be that giving substantial weight to harm through inappropriateness created only by harm to which moderate weight can be given is the wrong approach in cases where the type of development is not of itself intrinsically inappropriate. Those are issues which I do not resolve but a correct approach would have brought to the fore and which have not been considered, whatever their outcome may be, because of the inspector's error.

79 For those reasons, I am satisfied that the inspector made a material error and the outcome of his decision without that error may very well have been different. It is not necessary for me to consider any of the variant points raised by Mr Newcombe. For the reasons I have given, this decision must be quashed.

Paragraphs [80]–[147], which concern costs and permission to appeal, have been omitted.

Janet Briscoe, Solicitor.