Neutral Citation Number: [2025] EWHC 2127 (Admin)

Case Nos: AC-2025-LON-000913
AC-2025-LON-000915

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 August 2025

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY

- -

Between

MOLE VALLEY DISTRICT COUNCIL	**Claimant / Appellant**
- and –	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant/ Respondent**
and	
MARGARET MELONEY	**Second Defendant/ Respondent**

- -

Alex Goodman KC & Dr Ashley Bowes (instructed by Mole Valley District Council) for the Claimant / Appellant
Richard Moules KC & Nick Grant (instructed by the Government Legal Department) for the First Defendant / Respondent
Stephen Whale (instructed under Public Access) for the Second Defendant /Respondent

Hearing date: 4 June 2025

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JUDGMENT

MR JUSTICE CHOUDHURY:

Introduction

1. This is the judgment of the Court following a rolled-up hearing to determine whether the Claimant, Mole Valley District Council ("the Council"), should be granted permission, and if so, the relief claimed, in respect of a planning statutory review under s.288 *Town and Country Planning Act 1990* ("the 1990 Act") and an appeal under s.289 of that Act. The decisions which are the subject of these applications are those of the Secretary of State, the First Defendant, such decisions having been made by one of her inspectors.

2. The decisions both concerned the making of a material change in the use of land at Cidermill Hatch, Partridge Lane, Newdigate, Dorking, Surrey RH5 5BP ("the Site") without planning permission for the stationing of residential caravans and touring caravans for residential purposes together with ancillary operational development ("the development"). The land belongs to the Second Defendant, Margaret Meloney. The Claimant issued an enforcement notice and decision notice refusing planning permission in respect of the development on the Site. Ms Meloney appealed against the enforcement notice and the decision notice. Those appeals were determined by the Inspector with his decision set out in the decision letter ("DL") dated 18 February 2025. The Inspector quashed the enforcement notice and granted planning permission. The Claimant authority now seeks to challenge the Inspector's decisions.

Factual Background

3. The Site comprises an area of rural land located within the Green Belt. It was previously a greenfield site. Ms Meloney, who is part of the traveller

community, installed two caravans, drainage, hardstanding and a sewerage treatment plant on the Site without first seeking planning permission. On 5 April 2024, the Claimant issued a temporary stop notice requiring the cessation of development. On 15 April 2024, Ms Meloney sought retrospective planning permission for a two-pitch Gypsy accommodation including widening of the existing access to the Site.

4. On 10 June 2024, the Claimant refused planning permission for three principal reasons, among them being the "visual and spatial impact to the openness of the Green Belt". On 17 June 2024, Ms Meloney filed an appeal against the Claimant's decision to refuse planning permission. A couple of days later the Claimant issued an enforcement notice requiring the land not to be used for the stationing of caravans for residential occupation and the removal of ancillary development and paraphernalia. The period for compliance with the notice was six months after the taking of effect of the notice.

5. On 11 July 2024, Ms Meloney lodged an appeal against the enforcement notice with the Secretary of State pursuant to S.174(2)(a) and (g) of the 1990 Act.

6. In parallel with this planning history, the Claimant was developing its local plan in accordance with the versions of the National Planning Policy Framework ("NPPF") then in existence. The Claimant completed a Gypsy and Traveller Accommodation Assessment (2021) ("GTAA 2021"). The Mole Valley Local Plan ("the Local Plan") was adopted on 15 October 2024.

7. On 12 December 2024, the Secretary of State promulgated new versions of the NPPF ("NPPF 2024") and Planning Policy for Traveller Sites ("PPTS"). In broad terms, the NPPF 2024 established a new exception whereby development

in the Green Belt should not be regarded as "inappropriate". This is set out at NPPF 2024 [155] which provides

> "155. The development of homes, commercial and other development in the Green Belt should also not be regarded as inappropriate where all the following apply:
>
> a. The development would utilise grey belt land and would not fundamentally undermine the purposes (taken together) of the remaining Green Belt across the area of the plan;
>
> b. There is a demonstrable unmet need for the type of development proposed [F/N 56];
>
> c. The development would be in a sustainable location, with particular reference to paragraphs 110 and 115 of this Framework; and
>
> d. Where applicable the development proposed meets the 'Golden Rules' requirements set out in paragraphs 156-157 below."

8. Footnote 56 explains what is meant by "demonstrable unmet need" for the purposes of [155(b)] of the NPPF 2024, and provides that, in the case of traveller sites, it means the lack of a five-year supply of deliverable traveller sites assessed in line with the PPTS.

9. Further, the NPPF 2024 also introduced a slight amendment to NPPF [153] with the addition of the following underlined words and new Footnote 55:

> "153. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt, <u>including harm to its openness [F/N 55]</u> […]

10. Footnote 55, provides:

> "55 Other than in the case of development on previously developed land or grey belt land, where development is not inappropriate."

11. The hearing before the Inspector was held on 15 January 2025. The Claimant was represented by its planning officers and Ms Meloney was represented by Counsel, Mr Whale, who also appears before me. It was submitted on behalf of Ms Meloney that the Site would now be considered to be grey belt within the meaning of NPPF 2024 and therefore not inappropriate development. The Claimant opposed that submission and submitted, amongst other matters, that in its view there was an oversupply of gypsy and traveller pitches and that the development would not be in a sustainable location. On that basis, the Claimant submitted before the Inspector that the proposal remained inappropriate development.

The Decision

12. The Inspector allowed both appeals. He identified the main issues as follows:

    i) whether the development was inappropriate within the Green Belt having regard to inter alia the NPPF 2024;

    ii) the effect of the development on Green Belt openness;

    iii) whether the development accords with local and national policies concerning the location of gypsy and traveller accommodation;

    iv) the effect on the character and appearance of the area;

    v) the sustainability of location; and

    vi) if the development is inappropriate within the Green Belt, whether it is justified by Very Special Circumstances ("VSC").

13. On the first and second of those issues, the Inspector held that although policy EN1 of the Local Plan sets out the general approach to the Green Belt, and H5 deals with gypsy and traveller accommodation, recent changes to national policy meant that the question of inappropriateness would be considered with particular regard to the NPPF 2024.

14. Applying the NPPF 2024, the Inspector concluded that the Site was grey belt land and satisfied the requirements set out in Policy EN1 and NPPF 2024 [155]. He went on then to consider openness at DL [16], stating that openness:

> "…is one of the essential characteristics of Green Belts and, as a matter of policy, the aim of preserving the openness of the Green Belt cannot be compromised by development that is 'not inappropriate'. Moreover, footnote 55 of the Framework establishes that substantial weight need not be given to any harm to openness on a grey belt site where the development is 'not inappropriate'." (Emphasis added)

15. He went on to conclude that the Green Belt was not harmed and the need for VSC did not therefore arise.

16. In relation to "Character and Appearance", the Inspector concluded that:

> "The overall effect of these works is that the rural character of the site has been fundamentally altered, creating a far more developed appearance. The changing character of the site is very obvious from the road and the mobile homes are easily seen through the site entrance. Thus, there is clear harm to the rural character and appearance of the site and locality. The harm is limited to a degree by the hedgerow that has been retained along most of the site frontage, and this could be supplemented by further planting to reduce the impact of the development. Nevertheless, harm I have found leads to conflict with the aims for character, design and the landscape in local plan policies EN 4, EN 8 and H5."

17. In respect of the third issue identified by the Inspector, i.e. that of the supply of Gypsy and Traveller accommodation, the Inspector outlined that whether the

Council could demonstrate a 5-year supply of deliverable pitches was "critical" to the application of national policy. He outlined the need arising from GTAA 2021 and the Council's most recent assessment of the need/supply of Gypsy and Traveller sites, and accepted the Council's assessment that 36 pitches are needed for this period. He concluded as follows (at DL [30-31]):

> "30 Turning to the question of supply, it is important to note that sites must be deliverable. Footnote 4 of the PPTS advises that 'To be considered deliverable, sites should be available now, offer a suitable location for development, and be achievable with a realistic prospect that development will be delivered on the site within five years. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within 5 years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans'.
>
> 31 The Council claims a total of 69 pitches. However, more than half of this figure – 35 pitches – is made up of current planning applications. As the Council accepted at the hearing, it is unable to say if planning permission will be granted for these. Consequently, these sites do not meet the definition of 'deliverable' in footnote 4."

18. He noted that of the 19 pitches approved since 2020, 3 were occupied by non-travellers and so were not available as gypsy or traveller pitches. The remainder of the supply came from 15 pitches which were site allocations. However, the Inspector's view was that there was "no specific evidence regarding the prospect of any of these sites coming forward". The Council's figures indicated that 6 pitches at 2 sites would come forward within 5 years from 2024, but given the lack of information on the remaining 9 they could not be considered part of the supply. Accordingly, even if all site allocations could come forward, the total supply from 2020-2029 was 22 (16 approvals plus 6 allocations), which fell short of the required 36 pitches.

19. The Council also relied on the possibility of 'windfalls' producing an average of 3 pitches per year to date and suggested that 15 might be so produced over the next five years, but again the Inspector considered there was:

> "minimal evidence to support any assumption about the likely outcome of the current applications or future windfalls." (DL/35).

20. On the basis of that evidence, the Inspector concluded that the Council could not demonstrate a deliverable 5-year supply of Gypsy and Traveller accommodation.

21. Overall, the Inspector concluded on the planning balance that permission should be granted:

> "46. Viewed as a whole, the adverse impacts of the development do not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole, as described in Paragraph 11(d) of the Framework. Accordingly, the presumption in favour of sustainable development applies. This is a material consideration that leads me to conclude that, notwithstanding the conflict with the development plan, planning permission should be granted."

Grounds for seeking review / appeal

22. The Claimant's grounds for seeking review under s.288 and for an appeal under s.289 of the 1990 Act are identical. There are three grounds:

    i) Ground 1 – The Inspector erred in law in misinterpreting the meaning and effect of Green Belt policy in the NPPF 2024, particularly [142], [153], [155] and footnote 55 thereof, in excluding from consideration harm to the openness of the Green Belt having found that the development was not inappropriate.

ii) Ground 2 – the Inspector misinterpreted PPTS as meaning that the sites for which a planning application has been made but not decided are not "deliverable" within the meaning of footnote 4 of the PPTS.

iii) Ground 3 – the Inspector failed to supply legally adequate reasons, and/or reach a rational conclusion on the evidence, for the conclusion that the Claimant could not demonstrate a five-year supply of deliverable traveller pitches. This error is said to stem primarily from the Inspector's failure to take account of the Examining Inspector's Report on the Local Plan ("EI Report") notwithstanding the fact that the EI Report was not drawn to his attention at the hearing.

23. The Secretary of State and Ms Meloney submit that each of these grounds is unarguable. They say, in summary:

i) Ground 1 depends on an interpretation of Green Belt policy expressly rejected by Lindblom LJ in *R (Lee Valley Regional Park Authority) v Epping Forest DC* [2016] JPL 1009 at [18] to [26] ("*Lee Valley*").

ii) Ground 2 is based on a misreading of the DL and amounts in substance to a challenge to the Inspector's judgement and application of the policy, not his interpretation of its terms.

iii) Ground 3 seeks to elevate mere supporting text in a development plan and the EI Report to mandatory material considerations.

24. I shall deal with each ground in turn.

Ground 1 - Misinterpreting Green Belt Policy

Ground 1 - Submissions

25. The Claimant submits that the critical error in the Inspector's analysis is encapsulated in the following passage in the DL:

> "16 I have had regard to the matters raised regarding the effect of the development in terms of openness. However, openness is one of the essential characteristics of Green Belts and, as a matter of policy, the aim of preserving the openness of the Green Belt cannot be compromised by development that is 'not inappropriate'" (Emphasis added)

26. The Claimant contends this amounts to misinterpretation of [153] and Footnote 55 of NPPF 2024.

27. NPPF 2024 [153] provides:

> "When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt, including harm to its openness".

28. That passage is subject to Footnote 55, which provides:

> "Other than in the case of development on previously developed land or grey belt land, where development is not inappropriate".

29. The Claimant's submission is that the footnote merely removes the requirement to accord 'substantial weight' to any harm to openness and does not extend to excluding any consideration of harm to openness altogether. By stating that the "openness of the Green Belt cannot be compromised by development that is not inappropriate", the Inspector was erroneously excluding from consideration the possibility of harm caused by the development. The Claimant submits that to interpret NPPF 2024 as the Inspector did, and as the Defendants submit it should be interpreted, is to render footnote 55 entirely otiose in that, if it is correct that

development which is not inappropriate is to be treated as not harming openness there would have been no need to insert a footnote declaring two types of development that were to be similarly treated.

30. Insofar as the Defendants seek to rely on the judgment of Lindblom LJ in *Lee Valley*, it is submitted that such reliance is misplaced because that judgment was concerned with the NPPF as it stood in 2016 and prior to the amendments which are key to the present claim; and that to the extent that *Lee Valley* remains good law as to the interpretation of NPPF 2024, it means no more than that decision makers should not take into account the definitional or actual harm to the Green Belt for proposals for agriculture and forestry.

31. The focus of Mr Goodman KC's argument in oral submissions on this ground was somewhat different. It was submitted that any reliance placed by the Defendants on the judgment of Lindblom LJ in *Lee Valley* was misplaced because that judgment was itself predicated on a flawed analysis of the meaning of "openness". At [7] of *Lee Valley*, Lindblom said as follows:

> "7 Paragraph 79 of the NPPF says that "[the] fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open", and that "the essential characteristics of Green Belts are their openness and their permanence". The concept of "openness" here means the state of being free from built development, the absence of buildings—as distinct from the absence of visual impact (see, for example, the judgment of Sullivan J, as he then was, in *R. (on the application of Heath and Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin), at [21], [22], [37] and [38]; and the first instance judgment of Green J in *R. (on the application of Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin), at [26] and [68]–[75])…" (Emphasis added)

32. Mr Goodman points out that the decision of Green J (as he then was) in *Timmins* on the relevance of visual impact on openness was the subject of express

disapproval by the Court of Appeal in *Turner v SSCLG* [2017] P & CR1 (per Sales LJ (as he then was) at [18]). The Court of Appeal emphasised in that case that "…[t]he question of visual impact is implicitly part of the concept of "openness of the Green Belt" as a matter of the natural meaning of the language used in para.89 of the NPPF". (That reference to [89] of the 2012 NPPF corresponds to [154] in the current version). Sales LJ went on to say:

> "17 Mr Rudd relied upon a section of the judgment of Green J sitting at first instance in *R (Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin) at [67]-[78], in which the learned judge addressed the question of the relationship between openness of the Green Belt and visual impact. Green J referred to the judgment of Sullivan J in *R (Heath and Hampstead Society) v Camden LBC* [2007] EWHC 977(Admin); [2007] 2 P&CR 19, which related to previous policy in relation to the Green Belt as set out in Planning Policy Guidance 2 ("PPG 2"), and drew from it the propositions that "there is a clear conceptual distinction between openness and visual impact" and "it is therefore wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact": para.[78] (Green J's emphasis). The case went on appeal, but this part of Green J's judgment was not in issue on the appeal: [2015] EWCA Civ 10; [2016] 1 All ER 895.
>
> 18 In my view, Green J went too far and erred in stating the propositions set out above. This section of his judgment should not be followed. There are three problems with it. First, with respect to Green J, I do not think that he focuses sufficiently on the language of section 9 of the NPPF, read as part of the coherent and self-contained statement of national planning policy which the NPPF is intended to be. The learned judge does not consider the points made above. Secondly, through his reliance on the Heath and Hampstead Society case Green J has given excessive weight to the statement of planning policy in PPG 2 for the purposes of interpretation of the NPPF. He has not made proper allowance for the fact that PPG 2 is expressed in materially different terms from section 9 of the NPPF. Thirdly, I consider that the conclusion he has drawn is not in fact supported by the judgment of Sullivan J in the Heath and Hampstead Society case." (Emphasis added).

33. Lord Carnwath in *R (Samuel Smith) Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] PTSR 221 agreed with that disapproval (at [25]).

34. Mr Goodman submits that the effect of these later judgments is that Lindblom LJ's reliance on *Timmins* in *Lee Valley* was erroneous and that everything said by him in relation to openness in that case is infected by the notion that visual impact could be hived off from openness considerations, which is clearly wrong. The concept of openness includes visual impact and, as such, *Lee Valley* can be said to have been wrongly decided.

35. It is submitted that, unburdened by the Court of Appeal's analysis of openness in the *Lee Valley* case, the meaning of NPPF 2024 [142], [153] and [155] is clear and there is no warrant for treating not inappropriate (or appropriate) development as not giving rise to any harm to openness. In particular, as stated in NPPF 2024 [153]:

> "When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt, including harm to its openness."

36. That means, submits Mr Goodman, *any* application and not only applications in respect of inappropriate development. This is critical in the present case, submits Mr Goodman, because the Inspector expressly found that there was harm to the rural character and appearance of the site, and he clearly erred in not giving that some weight. As to this last point, Mr Goodman contends that, far from suggesting that harm caused by non inappropriate development be given no weight, Footnote 55 of the NPPF merely requires that such harm not be given "substantial weight".

37. Mr Moules KC for the Secretary of State submitted that it is not reasonably arguable that *Lee Valley* has somehow been superseded (or implicitly overruled) by *Turner* and *Samuel Smith*. *Lee Valley* is good law and makes it clear that

development that is not inappropriate within the meaning of NPPF does not give rise to harm to openness. The Inspector was correct in his approach. Furthermore, Footnote 55 of NPPF 2024 merely serves to put beyond doubt that the *Lee Valley* approach applies to the new and newly formulated exceptions contained in NPPF 2024, including, in particular, that which relates to Grey Belt development. Mr Whale adopted those submissions.

Discussion – Ground 1

38. As the Claimant's principal argument rests heavily on the effect or otherwise of the Court of Appeal's judgement in *Lee Valley*, it is necessary to look closely at that judgment and those that have looked at it since. However, before doing so, I set out the principles applicable when interpreting policies such as the NPPF.

39. The Supreme Court in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017 1 WLR 1865 identified the correct approach:

> "22 The correct approach to the interpretation of a statutory development plan was discussed by this court in *Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening)* [2012] PTSR 983. Lord Reed JSC rejected a submission that the meaning of the development plan was a matter to be determined solely by the planning authority, subject to rationality. He said, at para 18:

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others . . . policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.""
>
> He added, however, at para 19, that such statements should not be construed as if they were statutory or contractual provisions:
>
> "Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1WLR 759, 780per Lord Hoffmann).""
>
> 23 In the present appeal these statements were rightly taken as the starting point for consideration of the issues in the case. It was also common ground that policies in the Framework should be approached in the same way as those in a development plan.
> …
> 25 It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light…" (Emphasis added)

40. The imperative not to treat guidance contained in the NPPF as if it were a statute was reiterated in the same case by Lord Gill:

> "74 The guidance given by the Framework is not to be interpreted as if it were a statute. Its purpose is to express general principles on which decision-makers are to proceed in pursuit of sustainable development (paras 6—10) and to apply those principles by more specific prescriptions such as those that are in issue in these appeals.
>
> 75 In my view, such prescriptions must always be interpreted in the overall context of the guidance document. That context involves the broad purpose of the guidance and the particular planning problems to which it is directed. Where the guidance relates to decision-making in planning applications, it must be interpreted in all cases in the context of section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004, to which the guidance is subordinate. While the Secretary of State must observe these statutory requirements, he may reasonably and appropriately give guidance to decision-makers who have to apply them where the planning system is failing to satisfy an unmet need. He may do so by highlighting material considerations to which greater or less weight may be given with the over-riding objective of the guidance in mind. It is common ground that such guidance constitutes a material consideration: Framework, paragraph 2." (Emphasis added)

41. More recently in *R (Tesco Stores Ltd) v Stockport MBC* [2025] EWCA Civ 610,

Lindblom LJ said as follows:

> "34. The principles governing the interpretation of planning policies – whether in statements of national planning policy such as the NPPF and the PPG or in development plans – are well known.
>
> 35. The distinction between policy interpretation and policy application is important (see the judgment of Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 W.L.R. 1865, at paragraph 26). Interpretation of policy is an activity for judges. Policy-making obviously is not. Nor, of course, is the application of policy in the making of planning decisions. The meaning of the words in a policy produced by the Secretary of State or by a local planning authority is for the court to establish, as a matter of law (see the judgment of Lord Reed in *Tesco v Dundee City Council*, at paragraphs 18 to 20, and the judgment of Lord Carnwath in Hopkins Homes, at paragraph 23). But the use of the policy in determining applications for planning permission and appeals is for the decision-maker, subject only to review by the court on public law grounds.

> 36. Interpreting a planning policy ought not to be a difficult task, but straightforward (see the leading judgment in *R. (on the application of Corbett) v Cornwall Council* [2022] EWCA Civ 1069, at paragraph 19). It should not generally involve the kind of linguistic precision the court would bring to the interpretation of a statute or contract. Construing the language in the policy should not require it to be dismantled and reconstructed, or a gloss imposed upon it, or resort to paraphrase. One can expect the purpose of the policy to be clear from its own provisions, given their ordinary meaning and read in their context. Policies should be stated in plain terms, easy to understand for those affected by decisions made in accordance with them, and capable of being applied with realism and common sense. Mostly they are.
>
> 37. The court should respect the policy-maker's choice of words in formulating the policy as it stands. As a general rule, the temptation to infer terms the policy-maker has not actually used should be resisted. The court will sometimes be able to conclude that the words of the policy mean exactly what they say, nothing more and nothing less. It should not hesitate to do this if it can.
>
> 38. A more sophisticated approach has obvious risks. By going further than it needs in volunteering views of its own upon the meaning of a policy, the court may find itself drawn, unintentionally, towards the role of policy-maker. If a policy is ambiguous or incomplete, it is for the policy-maker to put that right, either by reformulating the policy when it can or by issuing guidance on its application. That is not a job for judges. Another risk is that the court – again without intending it – may obscure the true meaning of the words the policy-maker has used. This is liable to weaken the policy as a means of improving consistency in planning decisions. Many planning policies – including those in the NPPF – cover a wide range of circumstances. Many are framed in broad terms (see the judgment of Lord Carnwath in *Hopkins Homes*, at paragraph 24). Many require the exercise of planning judgment in their application. An interpretation tailored too closely to the facts of a particular case may not fit the facts of another (see the judgment of Holgate J., as he then was, in *Gladman Developments Ltd. v Secretary of State for Communities and Local Government* [2020] EWHC 518 (Admin), at paragraph 99, upheld in this court [2021] EWCA Civ 104). The policy itself could then be compromised and its use unduly constrained."

42. The relevant policy here is the NPPF 2024, the pertinent provisions of which have been set out above. In *Lee Valley*, the Court of Appeal considered whether the authority had erred in granting planning permission in respect of a proposed

development involving the construction of a very large glasshouse on Green Belt land close to the Lee Valley Special Protection Area. The claimant in that case, a regional park authority, argued that even if development was appropriate such that there was no definitional harm, there could still be actual harm to openness. The High Court (Dove J) and the Court of Appeal rejected that approach. It is helpful first to consider the argument presented by the claimant on that occasion, as set out by Lindblom LJ at [14]:

> 14. …[Counsel submitted that the] expression "any planning application" in the first sentence of paragraph 88 of the NPPF means any application for planning permission for development in the Green Belt, whether "inappropriate" or not, and the words "any harm to the Green Belt" mean every possible kind of harm to the Green Belt, including harm to its "openness" and to the purposes of including land in the Green Belt, even if the development is not "inappropriate". The policies in paragraphs 79, 80 and 81 of the NPPF are relevant in decision-making on proposals for agricultural buildings in the Green Belt, even though such buildings are not "inappropriate" development. Under the NPPF "definitional harm" to the Green Belt is distinct from the "actual harm" caused by a development. Paragraph 88 refers to "harm by reason of inappropriateness and any other harm". Even if there is no "definitional harm" – because the proposed building is in principle appropriate – it does not follow that there is no "actual harm" to the openness of the Green Belt, or to the purposes of including land in it. Under the policy in paragraph 88, such harm should be given "substantial weight". This approach applies to proposals for agricultural buildings, even though they are appropriate development in the Green Belt. It was not, however, the approach adopted by the council in this case."

43. That argument, which can be seen to bear some similarity to that of Mr Goodman in the present case, was roundly rejected by the Court. It is helpful to set out the Court's reasoning in full:

> "15. I cannot accept that argument. As Ms Megan Thomas for the council and Mr Village for Valley Grown Nurseries submitted, it <u>does not represent the correct interpretation of the</u>

policies in paragraphs 87, 88 and 89 of the NPPF, read properly in their context.

16. The interpretation of planning policy is ultimately the task of the court, not the decision-maker. Policies in a development plan must be construed "objectively in accordance with the language used, read as always in its proper context", and "not … as if they were statutory or contractual provisions" (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, with which the other members of the Supreme Court agreed, at paragraphs 18 and 19). The same principles apply also to the interpretation of national policy, including policies in the NPPF (see, for example, the judgment of Richards L.J. in *Timmins*, at paragraph 24).

17. The first sentence of paragraph 88 of the NPPF [now the first sentence of [153] of the 2024 version] must not be read in isolation from the policies that sit alongside it. The correct interpretation of it, I believe, is that a decision-maker dealing with an application for planning permission for development in the Green Belt must give "substantial weight" to "any harm to the Green Belt" properly regarded as such when the policies in paragraphs 79 to 92 are read as a whole (consistent with the approach taken, for example, in the judgment of Sullivan L.J., with whom Tomlinson and Lewison L.JJ. agreed, in *Redhill Aerodrome Ltd. v Secretary of State for Communities and Local Government* [2015] P.T.S.R. 274, at paragraph 18). Reading these policies together, I think it is quite clear that "buildings for agriculture and forestry", and other development that is not "inappropriate" in the Green Belt, are not to be regarded as harmful either to the openness of the Green Belt or to the purposes of including land in the Green Belt. This understanding of the policy in the first sentence of paragraph 88 does not require one to read into it any additional words. It simply requires the policy to be construed objectively in its full context – the conventional approach to the interpretation of policy, as the Supreme Court confirmed in *Tesco v Dundee City Council*.

18. A fundamental principle in national policy for the Green Belt, unchanged from PPG2 to the NPPF, is that the construction of new buildings in the Green Belt is "inappropriate" development and should not be approved except in "very special circumstances", unless the proposal is within one of the specified categories of exception in the "closed lists" in paragraphs 89 and 90. 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" (see the judgment of Richards L.J. in *Timmins*, at paragraphs 30 and 31). The distinction between development that is "inappropriate" in the Green Belt and development that is

not "inappropriate" (i.e. appropriate) governs the approach a decision-maker must take in determining an application for planning permission. "Inappropriate development" in the Green Belt is development "by definition, harmful" to the Green Belt – harmful because it is there – whereas development in the excepted categories in paragraphs 89 and 90 of the NPPF is not. The difference in approach may be seen in the policy in paragraph 87. It is also apparent in the second sentence of paragraph 88, which amplifies the concept of "very special circumstances" by explaining that these 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". The corresponding development plan policy in this case is policy GB2A of the local plan.

19. The category of exception in paragraph 89 with which we are concerned, "buildings for agriculture and forestry", is entirely unqualified. All such buildings are, in principle, appropriate development in the Green Belt, regardless of their effect on the openness of the Green Belt and the purposes of including land in the Green Belt, and regardless of their size and location. Each of the other five categories is subject to some proviso, qualification or limit. Two of them – the second, relating to the "provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries", and the sixth, relating to the "limited infilling or the … redevelopment of previously developed sites …" – are qualified by reference both to "the openness of the Green Belt" and to the "purposes of including land within it". The five categories of development specified in paragraph 90 are all subject to the general proviso that "they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt".

20. As Dove J. said (in paragraph 61 of his judgment), the fact that an assessment of openness is "a gateway in some cases to identification of appropriateness" in NPPF policy indicates that "once a particular development is found to be, in principle, appropriate, the question of the impact of the building on openness is no longer an issue". Implicit in the policy in paragraph 89 of the NPPF is a recognition that agriculture and forestry can only be carried on, and buildings for those activities will have to be constructed, in the countryside, including countryside in the Green Belt. Of course, as a matter of fact, the construction of such buildings in the Green Belt will reduce the amount of Green Belt land without built development upon it. But under NPPF policy, the physical presence of such buildings in the Green Belt is not, in itself, regarded as harmful to the openness of the Green Belt or to the purposes of including land in the Green Belt. This is not a matter of planning judgment. It is simply a matter of policy. Where the development proposed is

an agricultural building, neither its status as appropriate development nor the deemed absence of harm to the openness of the Green Belt and to the purposes of including land in the Green Belt depends on the judgment of the decision-maker. Both are inherent in the policy.

21. If the policy in the first sentence of paragraph 88 [now the first sentence of [153]] of the NPPF meant that "substantial weight" must be given to the effect a proposed agricultural building would have on the openness of the Green Belt and on the purposes of including land within the Green Belt, the policy in paragraph 89 categorizing such buildings as appropriate development in the Green Belt, regardless of such effects, would be negated. This cannot have been the Government's intention.

22. It would be, in any event, an important but unheralded change from "previous Green Belt policy" in the third sentence of paragraph 3.2 of PPG2 – the equivalent policy in PPG2 to the policy in the first sentence of paragraph 88 of the NPPF. Paragraph 3.2 of PPG2 was quite explicit. In view of the presumption against "inappropriate development" the Secretary of State would, it said, attach "substantial weight to the harm to the Green Belt" when considering proposals for "such development" – i.e. "inappropriate development", as opposed to all development whether "inappropriate" or not. If the Government had meant to abandon that distinction between "inappropriate" and appropriate development, one would have expected so significant a change in national policy for the Green Belt to have been announced. I agree with what Sullivan L.J. said to similar effect in *Redhill Aerodrome Ltd.* (at paragraphs 16, 17, 21 and 23 of his judgment, which were noted by Richards L.J. in paragraph 24 of his judgment in *Timmins*). Leading counsel for the respondent in that case had been right not to submit that there was any material difference between paragraphs 3.1 and 3.2 of PPG2 and paragraphs 87 and 88 of the NPPF. As Sullivan L.J. said (in paragraph 17):

"… The text of the policy has been reorganised …, but all of its essential characteristics – "inappropriate development is, by definition, harmful to the Green Belt", so that it "should not be approved except in very special circumstances", which "will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations", and the "substantial weight" which must be given to "harm to the Green Belt" – remain the same."

23. But I also think that the argument Mr Jones founded on his distinction between "definitional harm" and "actual harm" fails on its own logic. It means that the construction of agricultural buildings in the Green Belt, though always appropriate, must

> nevertheless always be regarded as harmful both to the openness of the Green Belt and to the purposes of including land within the Green Belt – despite such harm being irrelevant to their appropriateness. And if applied to the second and sixth categories of exception identified in paragraph 89, it would also mean that, for example, a proposed building for outdoor sport or recreation or a proposed redevelopment of a previously developed site could qualify as appropriate development – because it was found to preserve the openness of the Green Belt and not to conflict with the purposes of including land within the Green Belt – and yet still be regarded as substantially harmful to the Green Belt – because it reduced the openness of the Green Belt and conflicted with the purposes of including land within it. I do not think that can be right.
>
> 24. The true position surely is this. Development that is not, in principle, "inappropriate" in the Green Belt is, as Dove J. said in paragraph 62 of his judgment, development "appropriate to the Green Belt". On a sensible contextual reading of the policies in paragraphs 79 to 92 of the NPPF, development appropriate in – and to – the Green Belt is regarded by the Government as not inimical to the "fundamental aim" of Green Belt policy "to prevent urban sprawl by keeping land permanently open", or to "the essential characteristics of Green Belts", namely "their openness and their permanence" (paragraph 79 of the NPPF), or to the "five purposes" served by the Green Belt (paragraph 80). This is the real significance of a development being appropriate in the Green Belt, and the reason why it does not have to be justified by "very special circumstances".
>
> 25. That was the basic analysis underlying the judge's conclusion, with which I agree, "that appropriate development is deemed not harmful to the Green Belt and its [principal] characteristic of openness in particular …". (Emphasis added)

44. That analysis, which is clearly intended to be of general application, provides, in my judgment, a complete answer to the Claimant's principal contention that development which is not inappropriate can give rise to harm to openness and that such harm is to be given at least some weight. That argument simply does not get off the ground in view of the Court's conclusion that:

> "… it is quite clear that "buildings for agriculture and forestry", and other development that is not "inappropriate" in the Green Belt, are not to be regarded as harmful either to the openness of the Green Belt or to the purposes of including land in the Green Belt."

45. The highlighted words confirm that the Court's views were not confined to developments amounting to buildings for agriculture and forestry, but extended to any development that is not inappropriate. I therefore reject Mr Goodman's submission that the ratio in *Lee Valley* is confined to the former and that the critical passages in the judgment of the Court of Appeal are "tightly focused" on that category of development.

46. Faced with this hurdle, Mr Goodman now submits that *Lee Valley* was in effect wrongly decided and should not be followed. He relies upon what is said at [7] of *Lee Valley*:

> "7 Paragraph 79 of the NPPF says that "[the] fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open", and that "the essential characteristics of Green Belts are their openness and their permanence". The concept of "openness" here means the state of being free from built development, the absence of buildings—as distinct from the absence of visual impact (see, for example, the judgment of Sullivan J, as he then was, in *R. (on the application of Heath and Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin), at [21], [22], [37] and [38]; and the first instance judgment of Green J in *R. (on the application of Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin), at [26] and [68]–[75])…" (Emphasis added)

47. It is correct to say that part of the judgment in *Timmins* has since been disapproved by the Court of Appeal in *Turner* and the Supreme Court in *Samuel Smith*. However, it is notable that the passage that was disapproved, i.e. that which appears at [78] of *Timmins* was not cited by Lindblom LJ in *Lee Valley*; reference being made there only to "[26] and [68]-[75]" of *Timmins*.

48. As Sales LJ said in *Turner*:

> "Green J went too far and erred in stating the propositions set out above. This section of his judgment should not be followed."

49. The "propositions" being referred to were that "there is a clear conceptual distinction between openness and visual impact" and "it is therefore wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact", both of which were contained in [78] of Green J's judgment in *Timmins*.

50. Those passages in *Timmins* upon which Lindblom LJ did rely, i.e. "[26] and [68]-[75]" largely draw upon the judgment of Sullivan J *in Heath & Hampstead Society v London Borough of Camden* [2007] EWHC 977 (Admin) and which make the unobjectionable point that visual impact can properly be taken into account in assessing whether VSC exist in respect of development that is otherwise inappropriate.

51. Lindblom LJ did not therefore rely upon those propositions of Green J that were subsequently disapproved.

52. Mr Goodman's riposte to this point is that [78] of *Timmins* is a summary of that which went before and cannot be dissociated from the passages expressly relied upon by Lindblom LJ in *Lee Valley*. I do not agree. Green J was seeking to extract three principles from his preceding discussion, paragraphs [68] to [75] of which (as I have said) largely comprise extracts from *Heath & Hampstead*. Paragraph [75] in particular cites [37] from *Heath & Hampstead*. That latter passage from *Heath & Hampstead* is expressly approved by Sales LJ in *Turner* as being one that "*remains relevant guidance in relation to the concept of openness of the Green Belt*": see [25] of *Turner*. It would be extraordinary if Sales LJ's criticism of [78] of *Timmins* was to be read as also referring to the passages from *Heath & Hampstead* that are expressly approved elsewhere in

Turner. The criticism of the Court of Appeal in *Turner* was focused, not on the unobjectionable statements of principle and extracts from *Heath & Hamstead* at e.g. [75] of *Timmins*, but on the principles that Green J sought to extract from his analysis of previous authority. As Sales LJ said at [26] of *Turner*:

> "… At any rate, Sullivan J [in *Heath & Hampstead Society*] does not say that the openness of the Green Belt has no visual dimension. Hence I think that Green J erred in *Timmins* in taking the *Heath and Hampstead Society* case to provide authority for the two propositions he sets out at para.[78] of his judgment, to which I have referred above."

53. The correctness of Lindblom LJ's analysis is further underlined by Lord Carnwath in *Samuel Smith*, where it was said that:

> "23 It seems surprising in retrospect that the relationship between openness and visual impact has sparked such legal controversy. Most of the authorities to which we were referred were concerned with the scope of the exceptions for buildings in paragraph 89 (or its predecessor). In that context it was held, unremarkably, that a building which was otherwise inappropriate in Green Belt terms was not made appropriate by its limited visual impact (see *R (Heath & Hampstead Society) v Camden London Borough Council* [2007] 2 P & CR 19, upheld at *R (Heath & Hampstead Society) v Vlachos* [2008] 3 All ER 80). As Sullivan J said in the High Court:
>
> "The loss of openness (i e unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness…" (para 22).
>
> To similar effect, in the *Lee Valley* case [2016] Env LR 30, Lindblom LJ said:
>
> "The concept of 'openness' here means the state of being free from built development, the absence of buildings—as distinct from the absence of visual impact …" (para 7, cited by him in his present judgment at para 19).
>
> 24 Unfortunately, in *Timmins v Gedling Borough Council* [2014] EWHC654 (Admin) (a case about another familiar Green Belt category—cemeteries and associated buildings), Green J went a stage further holding, not only that there was "a clear conceptual

> distinction between openness and visual impact", but that it was: "wrong in principle to arrive at a specific conclusion as to openness by reference to visual impact" (para 78, emphasis in original).
>
> 25 This was disapproved (rightly in my view) in *Turner v Secretary of State for Communities and Local Government* [2017] 2 P & CR 1, para 18."

54. Thus, we see that the very passage in *Lee Valley* criticised by Mr Goodman was cited (without criticism) by Lord Carnwath as being a further example ("To similar effect…") of the correctly stated proposition in *Heath & Hampstead*, that the loss of openness within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. It was the further stage to which Green J had gone (in [78] of *Timmins*) that was in error and correctly disapproved in *Turner*. This is underlined by what Lord Carnwath went on to say at [40] of *Samuel Smith*:

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

55. In so doing, it was implicit that Lord Carnwath's view was that what Lindblom LJ had said at [7] of *Lee Valley* was a statement of the correct position. I cannot see any other reasonable explanation for Lord Carnwath's use (in [23] of *Samuel Smith*) of the phrase, "To similar effect…" in heralding the impugned passage from *Lee Valley*.

56. Further confirmation (if such is required) that Lindblom LJ did not err at [7] of *Lee Valley* is provided by Lindblom LJ's own judgment in *Samuel Smith* in the Court of Appeal ("*Samuel Smith (CA)*"):

> 19 In R. (on the application of *Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404, when referring specifically to the broad and basic statement of national Green Belt policy in paragraph 79 of the NPPF, with its emphasis on the "essential characteristics of Green Belts" as "their openness and their permanence", I said that "[the] concept of 'openness' here means the state of being free from built development, the absence of buildings – as distinct from the absence of visual impact" (paragraph 7 of my judgment). This reflects the essential and enduring function of government policy for the Green Belt in keeping land free from development inimical to its continued protection as Green Belt, even where the visual impact of such development on the openness of the Green Belt may not be unacceptable. It recognizes that Green Belt policy regards most forms of development as, in principle, "inappropriate" in the Green Belt simply because it would be there. But it does not mean that the expression "the openness of the Green Belt", when used in various specific contexts within the development control policies in paragraphs 87 to 90, is to be understood as excluding the visual effects of a particular development on the openness of the Green Belt. That is not so – as this court subsequently explained in Turner v Secretary of State for Communities and Local Government [2016] EWCA Civ 466. (Emphasis added)."

57. Mr Goodman submits that Lindblom LJ was here acknowledging and seeking to correct his prior error in *Lee Valley*. Once again, I disagree that that is the import of this passage in [19] of *Samuel Smith (CA)*. Lindblom LJ is here recognising that his statement at [7] of *Lee Valley* – namely that *"[the] concept of 'openness' here means the state of being free from built development, the absence of buildings – as distinct from the absence of visual impact*" - could be wrongly construed as meaning that the visual impact of a development is to be excluded in considering the effect on openness; whereas, as he seeks to explain, the statement was intended to reflect "*the essential and enduring function of*

government policy for the Green Belt in keeping land free from development inimical to its continued protection as Green Belt, even where the visual impact of such development on the openness of the Green Belt may not be unacceptable". In other words, Lindblom LJ's understanding was not and never had been that visual impact was to be excluded in any analysis of openness.

58. Even if there had been any merit in Mr Goodman's argument that Lindblom LJ had incorrectly sought to exclude visual impact from harm to openness, that would not undermine the analysis of the distinction between inappropriate and not inappropriate development. That analysis was not based on a convoluted or legalistic reading of the NPPF but on a reading that is based on context as explained in that case. Nowhere in the lengthy extract from *Lee Valley* cited above is there any suggestion that the distinction between inappropriate and not inappropriate development is based on an approach to openness that seeks to exclude visual impact.

59. The Claimant's failure to undermine the authority of *Lee Valley* in this context means that much of the remainder of its arguments under Ground 1 fall away. Dealing briefly with those arguments, my views are as follows:

60. The first point is based on what is said to be a straightforward and not strained reading of NPPF 2024 [153]. This provides that, "*When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt, including harm to its openness*." Mr Goodman's submission is that "*any planning application*" means what it says and is not confined to applications in respect of inappropriate development. The difficulty with that reading is twofold: first, it is inconsistent with the

reasoning in *Lee Valley*, which, as I have concluded, was not wrongly decided and remains good law in this context; second, it is a reading that is inconsistent with the history and development of the relevant policy statements.

61. As to the first difficulty, it is notable that the Claimant's argument is similar to that which was run and rejected in *Lee Valley*: see [14] and [15] of *Lee Valley* (set out above at [42] and [43]). The reasons for rejecting the argument are comprehensively set out in *Lee Valley* and apply equally here. The fact that *Lee Valley* was concerned with the application of an earlier version of NPPF (NPPF 2012) does not negate its applicability to the present case. Many of the key features of Section 9 of NPPF 2012, entitled "Protecting Green Belt Land" appear in Section 13 of NPPF 2024, which bears the same title, as they did in the predecessor PPG 2. These include the distinction between appropriate and inappropriate development (which was a principal concern in *Lee Valley*), the fact that new development is by definition inappropriate unless it falls within an exception, the fact that some exceptions are qualified and others are not, and the fact that inappropriate development is deemed to give rise to harm and requires to be justified by VSC. The requirement in [153] of NPPF 2024 that when considering any planning application substantial weight is to be given to any harm to the Green Belt, including harm to its openness, must not be read in isolation (as the Claimant's argument necessitates) but in the context of the totality of the policy, including the provision made for development falling within one of the exceptions and which is thereby deemed not inappropriate. If such appropriate development still had to be subject to an openness analysis with harm being given substantial weight, it would negate the purpose of having exceptions: see *Lee Valley* at [21].

62. As to the history of the relevant policy statements, it is relevant to note that PPG 2 was in the following terms:

> "3.2 Inappropriate development is by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development." (Emphasis added)

63. As explained in *Lee Valley* at [22]:

> "…Paragraph 3.2 of PPG2 was quite explicit. In view of the presumption against "inappropriate development" the Secretary of State would, it said, attach "substantial weight to the harm to the Green Belt" when considering proposals for "such development" – i.e. "inappropriate development", as opposed to all development whether "inappropriate" or not. If the Government had meant to abandon that distinction between "inappropriate" and appropriate development, one would have expected so significant a change in national policy for the Green Belt to have been announced."

64. Similarly, if the intention had been for NPPF 2024 to have the effect of dismantling that distinction (which has been in place since PPG 2) there would have been something more than the addition of the words "including its openness" (in [153]) and Footnote 55 to notify so significant a change in national Green Belt policy. The suggestion that there has been such a change, or more fundamentally that there never was a policy that excluded the need to consider harm to openness even in respect of appropriate development, is one that finds little or no support in the authorities or the history.

65. Mr Goodman in his skeleton argument placed some reliance on the Court of Appeal's decision in *R (Lochailort Investments Ltd) v Mendip DC* [2021] JPL 568 where it was stated at [13]:

> "It can thus be seen that national planning policy relating to the Green Belt permits any form of development where that is justified by very special circumstances; and it also describes as "not inappropriate" the various types of development described in paras 145 and 146 [of the then version of the NPPF]. Relevantly, those expressly mentioned types of development include the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, changes of use for outdoor sport, limited infilling in villages, and limited affordable housing for local communities. But even in those cases para.144 requires that planning authorities give "substantial weight" to any harm to the Green Belt."

66. Mr Goodman submits that the Court of Appeal's reading of the policy in *Lochailort* is consistent with that contended for by the Claimant. However, *Lee Valley* was not cited in *Lochailort,* and the comment in [13] thereof was *obiter* in any event. As such, it is not surprising that this case did not feature heavily in Mr Goodman's oral submissions. In my judgment, it provides no assistance to the Claimant.

67. Mr Goodman's further point based on the reading of the text is that the *Lee Valley*-based interpretation of [153] of NPPF 2024 and Footnote 55 renders that footnote entirely otiose. The argument is that if not inappropriate development is to be treated as not giving rise to harm to openness, then Footnote 55, which identifies two further instances of development to which substantial weight to harm is not to be attached, would be rendered otiose. The difficulty with this argument is that it approaches the interpretation of these policy statements as if they were contained within a statute. Taking the correct approach to interpretation, which is to consider the provisions within the overall context of

the policy and bearing in mind that it is designed for practical decision-making (see *Rectory Homes Ltd v Secretary of State for Levelling Up, Housing and Communities* [2021] PTSR 143 at [44]), it is clear in my view that Footnote 55 simply clarifies that a reduction of openness as a result of development on previously developed land or grey belt land is not to be regarded as harm to such openness for the purposes of national Green Belt policy. Far from being otiose, Footnote 55 provides practical clarification in respect of two types of not inappropriate development, one of which (grey belt) is newly included in NPPF 2024. A decision-maker reading the policy in a straightforward and non-legalistic manner will know that these categories of not inappropriate development are also to be treated as not giving rise to harm to openness.

68. This interpretation is supported by what is said in the accompanying Planning Practice Guidance (which is not determinative) at [14]:

> "**How should harm to the Green Belt including harm to its openness be considered if a development is not inappropriate development**?
>
> Footnote 55 to the NPPF sets out that if development is considered to be not inappropriate development on previously developed land or grey belt, then this is excluded from the policy requirement to give substantial weight to any harm to the Green Belt, including to its openness. This is consistent with rulings from the courts on these matters that, where development (of any kind, now including development on grey belt or previously developed land) is not considered to be inappropriate in the Green Belt, it follows that the test of impacts to openness or to Green Belt purposes are addressed and that therefore a proposal does not have to be justified by "very special circumstances". (emphasis added)."

69. Footnote 55 clearly seeks to carve out an exception of some kind from the broad statement that substantial weight be given to any harm to the Green Belt. The Claimant's contention is that the scope of the carve-out is in respect of the

requirement to attach substantial weight to such harm, leaving the decision-maker the discretion to attach at least some weight to such harm. That contention is, in my view, misconceived:

i) The Claimant's interpretation depends on a highly legalistic and technical approach to straightforward wording, an approach that has repeatedly been deprecated as not appropriate in this context;

ii) It fails to take account of the fact that in policy terms substantial weight is to be afforded to *any* harm to the Green Belt. Thus, where such harm is identified, whether it is minor or significant, substantial weight is to be attached to it. Once the threshold requirement of "any" harm is met, the weight to be attached is predetermined; there is no scope, on a straightforward reading of the policy, to attach anything less than substantial weight to such harm;

iii) An approach that countenances some (undefined, albeit less than substantial) weight being attached to harm is one that introduces an unnecessary layer of uncertainty and complexity in what should be a straightforward exercise. It is an approach that also runs contrary to the established policy position (as explained in *Lee Valley*) that not inappropriate development is to be treated as not giving rise to harm.

70. The final, important, consideration in this context is that the Claimant's interpretation of the policy would undermine the purpose of the new exception for grey belt development as set out in [155] of NPPF 2024. This new exception is designed to permit construction on the Green Belt that was not previously permitted. If a decision-maker then still had to consider harm and give that some

weight even where the development is otherwise not inappropriate, then the likelihood is that some grey belt development (which Government Policy seeks to permit) would nevertheless be restricted. I do not think it could have been intended that a permissive policy change should be potentially hamstrung in this way.

Conclusion – Ground 1

71. *Lee Valley* was not wrongly decided. The distinction between inappropriate and not inappropriate development in assessing the effect on openness is one of general application that was properly taken into account in the present case. The Inspector's statement that "the aim of preserving openness cannot be comprised by development that is 'not inappropriate'" is consistent with the interpretation of the NPPF as set out in *Lee Valley* and was not incorrect. Ground 1, therefore fails and is dismissed. This ground was principally predicated on the contention that *Lee Valley* was wrongly decided and/or inapplicable to this case. That essential contention was, notwithstanding the amount of this judgment devoted to it, unarguable. Permission is refused.

Ground 2 – Deliverability of sites.

72. The Government's PPTS provides that local planning authorities should, in producing their Local Plan: (a) identify and update annually, a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against their locally set targets. Footnote 4 to that provision states:

> "To be considered deliverable, sites should be available now, offer a suitable location for development, and be achievable with a realistic prospect that development will be delivered on the site within five years. Sites with planning permission should be

> considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within 5 years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans."

73. At DL 31, the Inspector said as follows:

> "The Council claims a total of 69 pitches. However, more than half of this figure - 35 pitches - is made up of current planning applications. As the Council accepted at the hearing, it is unable to say if planning permission will be granted for these. Consequently, these sites do not meet the definition of 'deliverable' in footnote 4."

74. The Claimant contends that the Inspector erred in concluding, at DL 31, that the 35 pitches which the Claimant said it could supply were not "deliverable" within the meaning of Footnote 4 of the PPTS. The error lies, submits Mr Goodman, in an erroneous self-direction of law to the effect that planning permission had to be in place or would be granted before a site could be considered deliverable.

75. I consider this ground to be based on a misreading of DL 31. There might have been some substance to the Claimant's point about an erroneous self-direction had the analysis of deliverability commenced and ended with DL 31. It is clear from authority that such permission is not a necessary prerequisite to a site being deliverable, and nor must it necessarily be certain or probable that housing will in fact be delivered within 5 years for it to be so: see *Wainhomes (South West) Holdings Limited v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin) at [34(i)] and *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [38]. However, the Inspector's analysis was not so truncated. The Inspector went on at DL 32 to 36 to consider the evidence provided in order to reach an overall conclusion on deliverability that was not based solely on the Council's

inability to say if planning permission would be granted for these sites. Had the Inspector's view been that the only consideration was whether planning permission had been or will be granted, there would have been no need for the Inspector to consider the other matters that he did. That he did so indicates that there was no misdirection in law. The Claimant's argument, it seems to me is based on reading one passage of the DL in isolation, which, it need hardly be stated, is not the correct approach.

76. Here, the Inspector found, having considered the evidence and the Council's assertions as to supply, that "*there is minimal evidence to support any assumption about the likely outcome of the current applications or future windfalls. Consequently, I am not persuaded that either of these matters show that sites are 'available now, offer a suitable location for development, and [will] be achievable with a realistic prospect that development will be delivered on the site within five years*". That was a matter of planning judgment, which was open to the Inspector. It is not arguable that the Inspector's decision discloses any error of law.

77. The Claimant also argues that it is not correct to suggest (as the Defendants do) that the Claimant did not supply any evidence that the sites were available, and seeks to rely on the fact that it supplied evidence of the sites under consideration as planning applications. It is said to have been "implicit" in such material that there was a realistic prospect of the relevant pitch becoming available even if that could not be stated with certainty. However, there was, as the Inspector noted, "minimal evidence" in support of the Claimant's assertions in this regard. In fact, the Claimant's position before the Inspector was that it was "unable to

say" if planning permission would be granted for more than half of the 69 pitches being claimed. The Inspector was entitled to consider this evidence to be inadequate or minimal. In so concluding, the Inspector was not applying a test of certainty or even probability, but was merely stating that the evidence was not specific or such as to support (even to some lesser standard) the assertion that planning permission was bound to be granted.

78. For these reasons, I consider Ground 2 also to be unarguable. Permission is refused.

Ground 3 – Failure to consider Examining Inspector's ("EI's") report.

79. Submissions on this ground, which is pursued in the alternative to Ground 2, were made by Dr Bowes for the Claimant, Mr Grant for the First Defendant and Mr Whale for the Second Defendant. Mr Whale also made submissions on Ground 2.

80. This ground is based on the fact that the Inspector's conclusion as to the deliverability of sites was inconsistent with and/or reached without regard to the findings of the EI on the Local Plan published just months before the Decision.

Factual background to Ground 3

81. The Council's draft Local Plan (2020 to 2037) was, in the usual way, submitted for examination by an Examining Inspector (Ms R Barrett MRTPI IHBC) ("the EI") on 14 February 2022 to consider, amongst other matters, whether the plan was "sound": s.20(5)(b), *Planning and Compulsory Purchase Act 2004*. 'Soundness' in this context includes that the plan is consistent with national policy. Examination hearings were held between June and October 2022 and

the EI's report was published, after a process that included consultation on main modifications ("MMs"), on 18 September 2024. The EI Report extends to 472 paragraphs over 79 pages. At [128] to [133] of the EI Report there is an analysis of the Council's GTAA conducted in 2018 and updated in 2021. The EI's conclusions were as follows:

> "128. The Council conducted a Gypsy and Traveller Accommodation Assessment (GTAA) in 2018, updated in 2021 [EDI4, EDI5]. Those assessments were based on a sound methodology, which accords with Planning Policy for Traveller Sites. Together, they concluded a need for 32 pitches in the District for households meeting the planning definition; indicating that 18 are needed within the first five years of the Plan period.
>
> 129. The GTAA also identifies a need for 20 pitches for gypsy and traveller households who do not meet the planning definition. Taking the two groups together therefore, the need is for 52 pitches over the Plan period, 36 of which are needed in the first five years of the Plan [ED71].
>
> 130. Existing commitments, and deliverable site allocations would deliver 32 pitches in the first five years of the Plan period, 45 pitches over the whole Plan period. That would result in a small shortfall, both within the first five years and over the whole Plan period.
>
> 131. Policy H5 includes a criteria based policy to assess windfall development. Windfall sites come forward approximately once every six months [i.e. at the rate of two per year]. Based on historic windfall and an assessment of a theoretical intensification of existing gypsy and traveller sites, even taking a small proportion of that allowance, the outstanding gypsy and traveller need for both those meeting the planning definition and those not meeting it would be met. In the absence of the supply of additional identified sites, this is a sound and justified approach. It is consistent with the approach taken to housing need for the settled community, the need for which is not met in full.
>
> 132. A need for 6 pitches/plots for travelling show people is also identified in the GTAA. The search for sites has not yielded a suitable candidate. However, the criteria based policy included in policy H5, will enable windfall development to come forward.

> 133. Taking all these considerations into account, given existing commitments and a realistic windfall allowance, together with the inclusion of a criteria based policy to assess future proposals for gypsy and traveller and travelling show people's accommodation, in the absence of provision to meet the full need through the Plan's site allocations, this is a justified approach and is soundly based."

82. At [172] of the EI Report, the EI noted that Policy H5 of the Local Plan, which dealt with GTAA 2021 did not include an accurate description of travelling show people and that the requirements of windfall development are not clear. The EI goes on to suggest that MM11 would address those points, in part by introducing a more accurate description of travelling show people. MM11 was not before the Court.

83. The Council's Local Plan was adopted in October 2024. At [4.28] the Local Plan states that the GTAA 2021 identifies a need for 32 pitches, at least 18 of which should be provided by 2025 and that site allocations are capable of providing between 28-34 pitches, although no timeframe is stated.

84. In the Council's update following publication of NPPF 2024, the identified need was revised to 52 pitches over the plan period with 36 of these within 5 years. It was also stated that windfall pitches would accrue on a "conservative estimate" at the rate of 3 per year.

85. Whilst the Local Plan was put before the Inspector and reference was made to it in the Decision (DL 5), the EI Report was not. It is accepted that the EI Report was neither mentioned nor relied upon before the Inspector. In the Statement of Common Ground prepared for the hearing before the Inspector, no reference is made to the EI Report under "Other material policies and documents".

Ground 3 – Submissions

86. Dr Bowes submits that the Inspector, knowing that the Local Plan had recently been adopted and had addressed GTAA 2021, would know or ought to have known that that there was an EI Report and considered it. Had he done so, he would have had to acknowledge that the EI's conclusions on deliverability were "obviously material" to the matters that he had to decide, and, if he was going to depart from them, supply reasons for doing so. Reliance is placed on *North Wiltshire DC v SS for the Environment* (1993) 65 P&CR 137 where it was held that whilst an inspector is free to depart from an earlier decision which is materially indistinguishable, he ought to have regard to the importance of ensuring consistent decisions and must give reasons for departing from the earlier decision.

87. As to the fact that no party, not least the Council, drew the Inspector's attention to the EI Report or any part thereof, Dr Bowes submits that in the circumstances of the present case, it was unreasonable for the Inspector not to have regard to a recent evaluation of the deliverable sites that was so obviously material to the assessment before him. Reliance is placed on *DLA Delivery Ltd v Baroness Cumberlege of Newick* [2018] PTSR 2063 in which the Court of Appeal (Lindblom LJ) held that there may be circumstances in which it would be unreasonable for the Secretary of State not to have regard to an earlier appeal decision bearing on the issues before him even though none of the parties has relied on the previous decision or brought it to the Secretary of State's attention: see [34] of *DLA Delivery*.

88. Mr Grant submits that unlike the *North Wiltshire* and *DLA Delivery* cases, the Inspector was conducting a fundamentally different exercise based on different

evidence and in respect of a different 5-year period. Furthermore, the Council's position before the Inspector was not wholly aligned with that of the EI, in particular, as to windfall and overall supply. In these circumstances, including the fact of non-reliance, it is unarguable that it was unreasonable for the Inspector not to look beyond what was available to him. He was entitled to assume that each side had put forward everything which they wished to be considered, and this ground is really nothing more than an attempt to backfill an evidential hole of the Claimant's own making.

89. Mr Whale submits that it is absurd to suggest that the Inspector ought to have somehow tracked down the EI Report of his own volition, adopted a figure as to need in that report which the Council itself did not adopt and treated as obviously material a document which the Council itself did not deem worthy of mention.

Discussion – Ground 3

90. The Defendants' submissions are to be preferred.

91. In my judgment, it is highly significant that the EI Report on which the Claimant now places so much reliance was not even drawn to the Inspector's attention. The general rule at an adversarial hearing of this nature is that "it is incumbent on the parties to a planning appeal to place before the inspector the material on which they rely": see *West v First Secretary of State* [2005] EWHC 729 at [42]. The EI Report was not considered sufficiently material even to be included as a further document of relevance in the Statement of Common Ground before the hearing. As stated in *DLA Delivery* (at [34] citing from the first instance judgment in that case):

> "Before the close of the "adversarial" part of the proceedings, the Secretary of State and his inspectors can normally rely, not unreasonably, on participants to draw attention to any relevant decision[, but] that does not mean that they are never required to make further inquiries about any matter, including about other . . . decisions that may be significant."

92. The Claimant's contention that the Inspector ought to have inquired about the EI Report notwithstanding the parties' failure to draw it to his attention cannot be accepted:

i) Authorities such as *DLA Delivery* go no further than to suggest that there *may* be circumstances in which the failure to make such inquiry would be unreasonable. However, it is important to bear in mind that the earlier decisions in such cases were previous appeal decisions dealing with similar issues and/or subject matter and where materiality may well be more obvious. In the present case, the earlier 'decision' is a report on a draft Local Plan dealing with a myriad of issues, only a tiny fraction of which (6 paragraphs out of 472 – 1.3%) could even arguably be said to be relevant to that which the Inspector had to consider. The Court of Appeal in *DLA Delivery* did not seek to prescribe or limit the circumstances in which a previous decision could be material, but commented (at [34]) that materiality may exist where the previous decision "*relates to the same site, or to the same or similar form of development on another site …, or to the interpretation or application of a particular policy common to both cases*". None of these (admittedly non-exhaustive) examples applies here. Far from there being a 'decision' as such on a relevant issue, all that the EI did was to consider different evidential material to reach a view on the 'soundness' of the Council's

GTAA provision. That is not to say that a document such as the EI Report could never be so "obviously material" as to warrant consideration, but the different exercise of which it is a product reduces the likelihood of it being so in a particular case.

ii) That last point leads to a further difficulty for the Claimant which is that, even if the EI Report could be said to fall into the category of a previous material decision as per the judgment in *DLA Delivery*, the context, purpose and evidential basis for that report is so far removed from that before the Inspector as to render it unarguable that he ought to have recognised its significance to the matter before him. As Mr Grant submitted, there was little to no overlap between the tasks being undertaken by the EI and the Inspector or as to material on which those tasks were based:

a) The EI was determining whether the plan was sound. In doing so, the EI would have had regard to whether the plan policies were consistent with national policy, but would also be considering whether the policy was "positively prepared", "justified" and "effective": NPPF 2024 at [36]. By contrast, the Inspector was concerned with the much narrower question of whether the development accords with policy concerning GTAA.

b) The material before the EI dated from 2021, whereas the Inspector had to consider the position as at the date of the hearing. The five-year periods under consideration differed albeit the Plan period encompassed both. The definition of 'traveller'

in the material considered by the EI was not the same as that before the Inspector, although it appears that some adjustment was made by the Council to the figure for need in light of the updated definition;

iii) The conclusions of the EI were not, in any event, *ad idem* with the case put to the Inspector by the Council. The EI considered that 32 pitches were deliverable over the next five years (from 2024) with another 2 per year from windfall. The Council told the Inspector that as of February 2025, it had a supply until 2029 of 36 pitches with a further 15 from windfall over the next 5 years: DL 35. Such inconsistency from the outset undermines any suggestion that the Inspector was bound to consider the EI Report. Why consider something that even the Council cannot identify as reflective of its position before the Inspector? Dr Bowes criticises the Inspector for rejecting the Claimant's case as to supply from windfall and submits that this gave rise to an inconsistency with the conclusions of the EI that warranted explanation. However, this argument is wholly unsustainable in the face of the Claimant's own inconsistent position vis-a-vis the EI Report.

iv) In these circumstances, the recentness of the EI Report and Local Plan is to no avail.

93. Mr Grant and Mr Whale make the further valid point that to require an Inspector of his or her own volition to go behind the presented material to identify potentially relevant content in earlier lengthy reports dealing with hundreds of other matters would be to impose on them a disproportionate and unnecessary

burden. The position here is, as I have said, very different from that arising in cases where a previous appeal decision may be said to be material; and even then the Inspector would generally be entitled to rely on the parties to draw relevant decisions to their attention. In my judgment, there was no obligation on the Inspector, in the circumstances of the present case, to have regard to the EI Report and/or to explain any difference in conclusions. The contrary is unarguable, and permission is refused.

Conclusion

94. For these reasons, it is my view that the Grounds are unarguable. Permission to seek statutory review and/or appeal is refused on all Grounds.

95. I extend my gratitude to all Counsel and their respective legal teams for the helpful and concise manner in which this case was presented.