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

CLAIM NO:
MQ12X0455

IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

EUROPA OIL AND GAS LIMITED

Claimant

AND

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(2) SURREY COUNTY COUNCIL

Defendants

DETAILS OF CLAIM AND GROUNDS OF LAW

Introduction

1. This is an application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") for an order quashing the decision of the Secretary of State for Communities and Local Government ("the SoS"), dated 26 September 2012, to dismiss an appeal made by the Claimant under section 78 of the 1990 Act against the Second Defendant's refusal to grant planning permission for development comprising:

> "*the 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 0.79 ha, for a temporary period of up to 3 years, with restoration to forestry*" ("the development")

on land at Bury Hill Wood, Coldharbour Lane, Holmwood, Surrey ("the Site"). The decision was taken on the SoS's behalf by the Inspector, as appointed person, and is to be taken as that of the SoS. The proposed development was targeted at exploration, by borehole, of a potential hydrocarbon source known as the Holmwood Prospect.

2. This is a claim to which Part 8 of the Civil Procedure Rules applies. The Claimant is a person aggrieved by the SoS's decision and is substantially prejudiced thereby; the Claimant seeks to have that decision quashed on the basis that, for the reasons set out below, it was not within the powers of the 1990 Act and/or that the relevant requirements have not been complied with in relation to the decision. The questions for the Court's determination in deciding whether to quash the decision are to be found in the Grounds pleaded below. For the purposes of this legal challenge, no substantial dispute of fact is involved.

Factual Background

3. On 1 December 2008 the Claimant applied for planning permission for the development (Ref.: 2008/0169/PS). The application was the subject of a report to the Second Defendant's Planning and Regulatory Committee ("the committee") on 25 May 2011 ("the officer's report"). The officer's report recommended that planning permission be granted (subject to the imposition of conditions and the provision of a legal agreement). However, against that recommendation, the Second Defendant refused planning permission by notice dated 30 June 2011.

4. The Claimant appealed against that decision and a public local inquiry was held on 10th to 13th and 17th to 19th July 2012 by K Williams BA MA MRTPI, an Inspector appointed by the SoS.

5. In a decision letter ("DL") dated 26 September 2012, the Inspector dismissed the appeal.

6. The Inspector described the site and the development in paragraphs 4 and 5 of the DL as follows:

"The site extends to about 0.8 hectares. It is in the countryside to the north of the village of Coldharbour and to the west of Coldharbour Lane. It is within an area of Forestry Commission managed plantation woodland forming part of Abinger Forest. Existing vegetation on the site includes some mature conifers, silver birch, other young deciduous trees and undergrowth. There is evidence of former quarrying on the land. The site is within the Metropolitan Green Belt and the Surrey Hills AONB. It is also within an Area of Great Landscape Value (AGLV), as designated in Mole Valley Core Strategy, Development Plan Document, 2009 (MVCS). The drilling rig, a wellhead cellar and related plant, equipment and temporary buildings would be within the main body of the site, which would comprise a 118m by 55m compound with soil bunds on the northern periphery. An existing access point off Coldharbour Lane would be used and an access track connecting it to the operational part of the site would be upgraded. A flare pit containing three Clean Air Burners would be located near this track, to the south of the main body of the site. A revised site layout drawing (Ref.1.7C) was submitted at the Inquiry and I take that into account.

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 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.

7. At paragraph 6 of the DL the Inspector identified the main issues which were before him. It is principally the first (inappropriate development) and second (openness and the purposes of the green belt ("GB")) which, together with the resultant drawing of the overall balance (Issue 7), are relevant to these proceedings.

8. At paragraph 13 of the DL, the Inspector determined that the development was not major development for the purposes of the National Planning Policy Framework ("the Framework") "*having regard to the scale of the development in the context of minerals*

development generally, its temporary nature and its reversibility, I do not consider this to amount to major development for the purposes of paragraph 116 of the Framework."

9. Further, at paragraph 53 of the DL the Inspector found that:

> "*...On the basis of the evidence submitted I conclude that it is unlikely to be feasible to explore the Holmwood Prospect from outside the AONB. Nor has it been shown that there is any feasible and preferable site within the AONB...*"

10. Although the Inspector did not advert to it in the DL, the relevant portion of the GB both substantially mirrored the AONB in this locality and extended beyond it. Indeed, as the Surrey Minerals Plan 2011 Core Strategy Development Plan Document ("SMPCS") (adopted 19th July 2011) records (at paragraph 3.45), "*Almost all mineral deposits in Surrey are within the MGB* [Metropolitan Green Belt]." The resulting conclusion, on the evidence, as to an absence of alternative sites was a material consideration.

11. As to whether or not the development was inappropriate development in the GB the Inspector said at paragraphs 15 to 16 of the DL:

> "*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 arising 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.*
>
> *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."

12. On the effect on GB openness and on GB purposes, he said at paragraph 17 of the DL:

> *"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 height, 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 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."*

13. The need for the development is considered in paragraphs 46 – 49 of the DL. The Inspector concluded at paragraph 49:

> *"I conclude on this issue that the principle of investigating onshore oil and gas resources is consistent with the Government's policies towards energy and minerals. The evidence submitted suggests a significant level of uncertainty with regard to the likelihood of hydrocarbons being found in this case and, if they are found, the scale of the resource. Based on the appellants' own estimates, while the chances of finding hydrocarbons are good by industry standards, it is more likely that no resource would be found. While not insignificant, the estimated amount of resource is small in the context of UK production. The potential for future commercial and tax revenues weighs in the appellants' favour. However, these benefits would not result directly from this development but from future extraction which, if it occurred, is likely to be in a different location."*

14. On the overall planning balance the Inspector said at paragraphs 57 and 58 of the DL:

> *"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 given to any harm to the Green Belt. I attach substantial weight to the harm through inappropriateness. In the particular circumstances of this case, where the development would 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 tranquillity. 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, having regard to the temporary and limited extent of this harm, I consider that 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.

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."

Grounds

Ground 1

15. In considering Issue 1 (*whether the proposal would be inappropriate development*), the Inspector:

    (a) Erred in his understanding and application of national GB policy in concluding that the proposed development was neither "*mineral extraction*" nor "*engineering operations*" for the purposes of paragraph 90 of the Framework;

(b) Similarly, erred in his approach to, and application of, Policy MC3 of the SMPCS in his apparent conclusion that the appeal proposal fell outwith that descriptor "mineral extraction" for the purposes of that Policy;

(c) Concluded that "*...the Framework does not exclude temporary development from amounting to inappropriate development*" (last sentence of DL paragraph 15 of the DL). Irrespective of whether he was correct in so concluding, he erred in his consideration of Issue 1 in that he failed to consider the material corollary, namely whether the temporary nature of the development, whatever descriptor was applied, affected the issue of GB (in)appropriateness; and

(d) In the alternative, failed to give any or any adequate or intelligible reasons for his conclusions in these respects; in the result the DL gives rise to substantial doubts whether the decision-maker erred in law.

Particulars

16. Whilst policy statements should not be construed as if they were statutory or contractual provisions, they fall to be interpreted objectively in accordance with the language used, read as always in its proper context (*Tesco Stores v Dundee City Council* UKSC 13 at [18, 19]). A decision-maker's failure in this respect – i.e. a failure properly to interpret or apply a policy – represents an error of law.

Ground 1(a)

17. Paragraph 90 of the Framework provides that, amongst other matters, development falling within the descriptors 'mineral extraction' and 'engineering operations' are not inappropriate development (provided they preserve the openness of the GB and do not conflict with the purposes of including land in the GB).

18. The Inspector concluded that the exploration for minerals did not fall within the descriptor 'mineral extraction' [DL, paragraph 15]. The Inspector arrived at that conclusion having regard to paragraph 147 of the Framework which provides, in so far as relevant:

> *"Minerals planning authorities should...when planning for on-shore oil and gas development, including unconventional hydrocarbons, clearly distinguish between the three phases of development (exploration, appraisal and production) and address constraints on production and processing within areas that are licensed for oil and gas exploration or production."*

19. Paragraph 147 applies to plan making as opposed to development control. The underlying purpose behind it is to ensure that applications to explore for minerals[1] are not refused on the basis of effects that would arise from production should minerals be found. That is why this policy requires mineral planning authorities to plan positively to address constraints on production in licensed areas. The Site falls within such a licensed area (i.e. licensed by the Secretary of State under the Petroleum Act 1998). Paragraph 147 is a policy designed to promote exploitation of resources. However, the Inspector has turned the intent underlying this policy on its head and used it in such a way as to inhibit exploration.

20. Moreover, paragraph 147 does not, in any event, use the term 'mineral extraction'. The three phases to which it does refer are 'exploration', 'appraisal' and 'production'. Where the word 'production' has been carefully employed to mean the final phase of mineral development in contradistinction to 'exploration', the phrase 'mineral extraction,' when employed in the same document, must be taken to mean something different. 'Mineral extraction' properly understood and read in context is a portmanteau term which includes all phases of development; in particular it here includes exploration (by drilling).

21. The development proposed can be summarised as a borehole designed to gain access to sub-surface target strata and to extract therefrom a sample of hydrocarbons (oil or gas). The fact (i) that the resulting exploratory well might prove dry and (ii) that, even if hydrocarbons were found, only a small quantity would be extracted in no way alters the underlying character of the development[2]; the whole operation was designed to facilitate extraction of a sample. On any objective and proper analysis, the proposal fell four-square within the descriptor 'mineral extraction'. Further, the Inspector's finding

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[1] "*Minerals of local and national importance*" are defined by list in the Glossary to the Framework; in that list are found "*oil and gas (including hydrocarbons)*"

[2] Note: the prospects of finding hydrocarbons at this target were high by industry standards (albeit at, roughly, a one in three chance) [DL, paragraph 48]

in this respect fell outwith the possible interpretations of the descriptor when properly read in the prevailing context.

22. The Claimant's submission is supported by an analysis of the use of the term 'mineral extraction' in the wider context of GB policy. The reason GB policy treats 'mineral extraction' as not being, in principle, inappropriate development (paragraph 90 of the Framework) is because it is temporary. [3] Production, albeit temporary, can last for years. Exploration is - generally, and certainly here, - a far shorter phase. Furthermore, the impacts arising from production are likely to be significantly greater than those from exploration. For the Framework to treat production as not being, in principle, inappropriate but to treat the antecedent exploration stage differently would be illogical and perverse since the reasoning underlying the Framework's conclusion on production applies with even greater force to exploration. The Inspector's approach introduces a fundamental tension into the Framework whereby exploration, a necessary antecedent step to production, is required to show very special circumstances thus effectively nullifying the more favourable treatment of the subsequent production phase – whether from the same site or from another - as being potentially appropriate GB development. The Claimant submits that the Framework is not illogical or perverse in this respect and bears the interpretation for which the Claimant argues; thus the Inspector erred in law in his interpretation and application of policy.

23. Despite, acknowledging in paragraph 15 of his DL, that the development "*includes elements of such [engineering] operations*", the Inspector also concluded that the proposed development did not fall into the category of "engineering operations" for the purposes of paragraph 90 of the Framework (see also section 55(1) of the 1990 Act). That conclusion is manifestly wrong in law. An "engineering operation" is an operation which would generally be supervised by an engineer (*Fayrewood Fish Farm Ltd v Secretary of State for the Environment* [1984] J.P.L. 267). The proposed development is an engineering operation and would be undertaken by engineers. Indeed extensive evidence was called at the inquiry to explain the technical, engineering aspects of the well construction process and, in particular, directional drilling i.e. the operation of drilling from a point on the surface at some distance removed in the horizontal plane

[3] This was expressly stated to be the reason in PPG2 (paragraph 3.11) which preceded the Framework. There has been no fundamental change. The same reasoning underlying the previous policies applies under the Framework.

from the underground target strata. The detailed well-planning leading to the establishment of the drilling apparatus at surface, and the subsequent, technically demanding steering of the drill-head in both the vertical and horizontal planes, are quintessential engineering operations and demand great precision in execution based on considerable engineering judgement, planning and supervision. The Inspector's interpretation failed to represent an objective construction of the policy and, indeed, reflected a conclusion not properly open to him on the wording of the policy.

24. It follows that the Inspector erred in concluding that the proposed development was neither "mineral extraction" nor "engineering operations" for the purposes of paragraph 90 of the Framework.

Ground 1(b)

25. So far as concerns the SMPCS, Paragraph 3.45 and Policy MC3 thereof provide:

> *"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 development in Green Belts as it is a temporary operation that can be carried out without compromising openness.*
>
> ...
>
> *Policy MC3 – Spatial strategy – mineral development in the Green Belts*
>
> *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 SMPCS defines "mineral development" (Glossary at page 85) as "*In Surrey this refers to proposals for the winning and working of minerals, associated processing, storage, transportation or manufacture of minerals, and for development related to the provision of rail aggregate depots or sites for recycling and secondary aggregates.*"

27. This very wide definition reinforces the distinction properly to be drawn in Policy MC3 between, on the one hand, that which can only occur where minerals actually are to be found – namely "mineral extraction" comprising both the winning an working of minerals (the production phase) and the antecedent exploration phase – and, on the other, mineral development which is not location-specific in its requirements.

28. The Second Defendant, which is not only the local planning authority for present purposes but also the plan-making authority for the SMPCS:

(a) Had imposed no GB reason for refusal in rejecting the instant planning application;

(b) On the subsequent appeal and at the Inspector's request, confirmed various matters through Messrs Atkins who acted on their behalf (Atkins' letter to the Planning Inspectorate, undated but received by the Claimant on 30th May 2012). That Atkins' letter expressly cited paragraph 90, of the Framework, singling out "mineral extraction" and "engineering operations", and confirmed:

> *"In this case the Council's view is that given the temporary and reversible nature of the proposed development the openness of the Green Belt would be maintained in the longer term. Furthermore, and for the same reasons, the proposal would not be in conflict with the five purposes of the Green Belt set out in paragraph 80 of* [the Framework]...
>
> *There is also no conflict between* [the Framework] *and Surrey Minerals Plan 2011 Policy MC3...*
>
> *In policy terms the Council does not believe that there is conflict between the county and national policy. Therefore the Council concludes that the proposed development is not inappropriate in the Green Belt*"; and

(c) The Second Defendant's own planning witness at the inquiry expressly opined, amongst other things, that the development was an engineering operation (White Planning Proof at paragraph 6.16).

29. In the premises, and for the reasons given above and similar to those pleaded under Ground 1(a) above, the Inspector erred in his approach to Policy MC3 of the SMPCS in so far as the DL reflects a conclusion by him that the development (i) did not fall within "mineral extraction" for the purposes of Policy MC3 and (ii) failed to accord with that policy. His findings failed to reflect an objective reading of the policy and, in any event, reached a construction not properly open on the wording of the policy. Whilst the Inspector was not bound to follow the reasoning of and the conclusions reached by the Second Defendant (and the Claimant), the Second Defendant's reasoning in this respect accords with that of the Claimant and is compelling in identifying the correct, objective interpretation and application of Policy MC3. In diverging from the reasoning and interpretation underlying the Second Defendant's and Claimant's cases in this respect the Inspector erred in law.

Ground 1(c)

30. At paragraph 15 of the DL, the Inspector concluded that the Framework did not exclude temporary development from amounting to inappropriate development. That conclusion begged the question of whether the temporary nature of the development proposed (some eighteen weeks) indicated that, whatever descriptor – whether mineral extraction or engineering operations or some other descriptor – fell to be applied, the development was properly to be regarded as appropriate by virtue of its lack of material impact on keeping the GB open and on any relevant GB purposes. See further below under Ground 2(b).

31. The Inspector – notwithstanding his consideration of Issue 2 - did not properly consider this matter and, in so doing, erred in that he failed to have regard to a material consideration. The failure can also be characterised as a failure properly to understand and apply the prevailing policy matrix.

Ground 1(d)

32. An Inspector in a case such as this is required, as soon as practicable, to "*...notify the decision on the appeal, and the reasons for it, in writing...*" (emphasis added) (Regulation 19(1) of the Town and Country Planning Appeals (Determination by Inspectors) (England & Wales) Rules 2000. In *South Bucks District Council v Porter [No.2]* [2004] UKHL 33 at [35 – 36] the Court held:

> *"The reasons given for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds...They should enable disappointed developers...or...their unsuccessful opponents to understand how the policy or approach underlying the grant of planning permission may impact upon future applications..."*

33. The Inspector here, in considering whether the development was variously "mineral extraction" and/ or "engineering operations" in terms of the Framework failed to give any or any adequate or intelligible reasons for concluding that it was neither. He similarly failed in explaining his apparently parallel conclusion in respect of Policy MC3. In particular and in both cases, not only did he fail to explain adequately or intelligibly the basis upon which he ruled out variously mineral extraction and engineering operations as descriptors, he failed to identify into what category of development (under section 55(1) of the 1990 Act) he considered the appeal proposal did fall; he thereby compounded the inadequacy of his reasoning. Nor does his consideration of the temporary nature of the development afford any intelligible reasoning to allow the informed reader to understand the extent to which he had treated this consideration as material or how it had been factored into his approach to Issue 1(or 2). It is impossible to understand the basis upon which the Inspector reached his conclusions on this aspect and thus, irrespective of Grounds 1(a)-(c), an informed reader cannot be satisfied that the Inspector did not err in law.

34. The Claimant has been substantially prejudiced by the Inspector's failure to provide an adequately reasoned decision, both under this Ground and as identified below. Moreover, the Inspector's approach has wider prejudicial implications. His conclusions in paragraphs 15 to 16 of the DL reflect an 'in principle' conclusion – irrespective of whether there be any impacts on openness/permanence etc – that, since mineral exploration, and particularly the drilling of exploratory boreholes for hydrocarbons, cannot be categorised as (i) engineering operations or mineral extraction for the

purposes of paragraph 90 of the Framework or (ii) as mineral extraction for the purposes of Policy MC3, it is thus inappropriate development. That has significant implications nationally in terms of the Framework and elsewhere within Surrey in respect of Policy MC3. The same point applies in respect of the temporary aspect of the appeal proposal.

Discretion to quash

35. Having ruled out, under Issue 1, 'mineral extraction' and 'engineering operations' as possible descriptors of the proposed development, and thus concluded 'in principle' (i) that Paragraph 90 of the Framework could not be prayed in aid and (ii) that, apparently, the first paragraph of Policy MC3 could not apply, the Inspector went on to consider GB openness and GB purposes (Issue 2 - see also Ground 2 below). It is noted that he there found diminution of openness and conflict with GB purposes. But his antecedent errors of law (as pleaded under Ground 1) necessarily provided a flawed basis upon which to approach Issue 2, (GB openness and purposes). In the result his downstream reasoning – even assuming, contrary to the Claimant's submissions, that the matters pleaded at Ground 2 do not represent an error of law – is flawed. There is no tenable basis for arguing that his conclusions on Issue 2 would have been the same had he not erred in law in considering Issue 1.

36. Moreover, the Inspector gave substantial weight to his conclusion on Issue 1 and moderate weight to his conclusion on Issue 2 when he turned to weigh the overall balance [DL, paragraph 57 – Issue 7]. Had the Inspector approached, interpreted and applied GB policy properly and correctly, he would have found that the proposed development fell to be considered under a paragraph 90 descriptor and gone on to consider harm to GB openness and purposes under that paragraph. It is entirely possible – and, the Claimant submits, likely – that he would, in such circumstances, have found no materially adverse impact on the GB. But even if this Inspector would still have concluded that there was harm to both GB openness and the GB purposes and thus would have concluded that the development was inappropriate under paragraph 90, his findings on such harm, as carried forward into the overall balance (Issue 7), would have been different. In such circumstances, he would have attributed substantial weight to harm by reason of inappropriateness [DL, paragraph 57]. But the Inspector would <u>not</u> then have considered GB openness and purposes on a standalone basis; to have done so

would have been to cover again something he had necessarily already considered as part of the question of (in)appropriateness in the GB. Consequently, a significant negative factor (to which the Inspector attributed moderate weight [DL, paragraph 57]) in the planning balance would have not arisen. It cannot be said that the overall decision inevitably would have been the same. That is what the Defendant would need to demonstrate in order for the Court to exercise its discretion not to quash the decision:

> "*Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision.*" (*Smith v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291 at [10])

Ground 2

37. The Inspector further erred in his understanding and application of GB policy and/ or failed to have regard to material considerations in his approach to openness and GB purposes (Issue 2). In the alternative, it is unclear whether he correctly understood and applied such policy (and had regard to material considerations) in that he failed to identify his reasons and reasoning adequately and intelligibly.

Particulars

Ground 2(a)

38. At paragraph 17 of the DL the Inspector identified the test he applied in considering GB openness. He said: "...*The appeal site is not of an open appearance. However, I consider Green Belt openness in terms of the absence of development*".

39. In so doing the Inspector erred in law in that he applied the wrong policy test and/ or ignored a material consideration:

    (i) If the Inspector was there indicating that his baseline – against which he had assessed the introduction of the appeal proposal – was simply an undeveloped appeal site and that he had ignored its existing lack of openness, he failed to have regard to a most material consideration. It is noted that GB policy is a planning, not a landscape, designation which aims to protect the GB from such

development as will adversely affect permanence/openness etc (and offend against GB purposes). But, in assessing whether the appeal proposal would have such an effect, it was necessary to consider all elements of the factual matrix, including the nature of the appeal site. Yet the Inspector's words indicate that it was the absence of development alone – and not the site's lack of openness - which he considered as material. He thus failed to have regard to a material consideration;

(ii) In the alternative, if the Inspector was thereby positing a general test for assessing the impact of bringing forward the proposed development, his formulation was in error and self-defeating; his formulation indicates an approach which views introduction of any development as necessarily having an effect on openness, to whatever extent. Yet GB policy accepts that development can be brought forward in the GB without adversely affecting openness (or GB purposes); see for example paragraph 90 of the Framework and paragraph 3.45 of the SMPCS. The Inspector's words fail accurately to reflect an objective reading of GB policy both in the Framework and the SMPCS; indeed, his interpretation is not one open to him on the works used in such policy. He thus erred in his construction and subsequent application of GB policy; and

(iii) Whichever be the correct interpretation to place on the Inspector's words in this respect, his reasons and reasoning fail the tests of adequacy and intelligibility.

Ground 2(b)

40. Paragraph 79 of the Framework sets out the fundamental aim of GB policy. It states:

> "*The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.*" (emphasis added)

41. The purposes served by the GB (paragraph 80 of the Framework), including the need to assist in safeguarding the countryside from encroachment, must be read in this context.

42. The Inspector concluded:

> "...*that 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.*" (emphasis added)

43. The Claimant disagrees with the Inspector's conclusions on openness (and GB purposes) and reserves its right to argue the contrary should the issue arise elsewhere. However, even if the Inspector's conclusion are to be assumed to be correct for the purposes of this legal challenge, the Inspector was still required to carry out a further step in his reasoning. He failed to go on to consider the next and necessary step, namely whether such temporary effects would offend against (i) the fundamental aim of GB policy to keep land permanently open, (ii) the openness and permanence of GBs and (iii), against that background of permanence, the GB purposes which he identified. Even if it be the case that the mere fact of a development's being temporary does not preclude its having an adverse impact on GB permanence and openness etc, it does not follow that a temporary impact – here a mere eighteen weeks – will automatically translate into an adverse effect in those terms.

44. The Inspector's failure in this regard amounts to a failure properly to understand and apply GB policy; his construction and application of policy fail to reflect an objective interpretation and, indeed, depend upon a construction of GB policy which neither the Framework nor Policy MC3 of the SMPCS can properly bear. It can further be characterised as a failure to have regard to a material consideration. In so doing he erred in law. In the alternative, and in any event, the Inspector's reasons and reasoning in respect of Issue 2 are inadequate and insufficiently intelligible; they leave a substantial doubt whether the Inspector correctly understood and applied GB policy.

Discretion to quash

45. The Inspector's conclusion on Issue 2 and GB policy were a further negative factor in the planning balance [DL paragraph 57]. A proper understanding and application of GB policy by the Inspector would have changed the factors in the planning balance and, again, it cannot be argued that the decision would have been the same. See also under Ground 1 above.

Ground 3

46. Even if, contrary to the matters pleaded under Grounds 1 (and 2), the Inspector's construction of GB policy in those respects was correct, he failed to recognize and consider the resulting policy tension – and wider implications - in terms of both the Framework and the SMPCS. He thereby failed (i) correctly to understand and apply policy in the overall sense, (ii) to have regard to material considerations and (iii) to provide adequate or intelligible reasons for his overall conclusion.

Particulars

47. In the alternative, and contrary to what is pleaded under Grounds 1 (and 2), if the Inspector was correct in his conclusion (i) that the development here proposed fell outwith the descriptors 'mineral extraction' and 'engineering operations' and, therefore, (ii) that, on that basis alone, the appeal proposal could not be appropriate development in terms of GB policy, he thereby erred in failing to consider (the implications of) that conclusion properly or fully in the wider policy context and, in particular, failed to advert to or recognize the resulting tension with other parts of the Framework. His conclusion, if correct, is additionally one of much wider significance for mineral exploration generally in the context of the Framework since he thereby concluded, as a matter of general principle, that the Framework precluded mineral exploration being brought forward in the GB other than in very special circumstances. On the substantially unchallenged evidence (on this aspect) before this Inspector – and as a matter of simple logic – it as clear that (i) carrying out any suitable exploration is a necessary pre-condition to the subsequent bringing forward of any production-phase exploitation of hydrocarbons (or minerals generally) and (ii) the room for manoeuvre in selecting sites for exploration – given the greater uncertainties at that stage as to the precise location and depth of any hydrocarbons or other minerals - is materially more constrained than that for any subsequent production phase. In the result, the Inspector's conclusion on Issue 1 gives rise to a significant tension within the Framework itself.

48. Paragraph 142 of the Framework provides that:

> *"Minerals are essential to support sustainable economic growth and our quality of life. It is therefore important that there is a sufficient*

supply of material to provide the infrastructure, buildings and goods that the country needs. However, since minerals are a finite resource, and can only be worked where they are found, it is important to make best use of them to secure their long-term conservation." (emphasis added)

49. Paragraph 144 (first bullet) requires the giving of *great weight to the benefits of mineral extraction, including to the economy.* On the Inspector's definition of 'mineral extraction' such great weight apparently does not attach to any necessary antecedent step of exploration but this merely and further heightens the tension to which his interpretation of policy gives rise.

50. In the result, on the Inspector's construction, exploration for minerals in the GB will always have to show very special circumstances. Yet the subsequent production phase – being a phase (i) where the locational constraints are less such that it may be possible to find a site outwith the GB and (ii) which cannot, in any event, occur without prior exploration – can potentially qualify as appropriate development so as to avoid the requirement to show very special circumstances. The Inspector's approach to policy makes such favourable policy treatment of the production phase substantially academic; GB exploitation of a minerals prospect – whether from the same site as used for exploration or from another – will already have had to show very special circumstances to clear any exploration hurdle. (In the present case, the Claimant has made clear that the appeal site would not be used for any subsequent production from the Holmwood Prospect.)

51. Given the conclusion reached by this Inspector, any decision-maker properly instructing himself was required to take a further step in the reasoning; it was necessary to acknowledge this inevitable tension and logical contradiction in the Framework (and in the context of wider policy) and to identify the overall effect of the Framework, read as a whole, in policy terms. One possible result was that the policy tension itself fell to be regarded as a very special circumstance to be weighed in the balance. In the result, the Inspector erred in law in that:

    (i) He failed adequately or at all to advert to the wider policy tension and internal contradiction resulting from his interpretation of the Framework and in so doing

failed to have regard to a most material consideration. It is probably inevitable that, where policy deals with a wide-range of disparate elements, as does the Framework, tensions will sometimes be revealed with different policy elements pulling in different directions. The Inspector failed to read the Framework as a whole – as he was required to - in the light of this tension and to reach an objective interpretation resulting from that overall reading;

(ii) Irrespective of any failure under (i) above, he in any event failed to reach or apply an overall objective reading of the Framework in reaching his conclusions. His approach cannot be reconciled with an objective reading of the Framework overall. Indeed, his conclusions are inconsistent with any interpretation the wording of the overall Framework can realistically be argued to bear. His reading of policy perpetuates rather than reconciles a logical contradiction in the Framework's application to exploration for hydrocarbons (and other minerals) in the GB. Yet, even assuming that his approach to paragraph 90 were correct (contrary to the Claimant's grounds pleaded above), he failed to consider whether the Framework could still be interpreted objectively and applied in a logical fashion without internal contradiction or tension. In doing so, he failed, in drawing the overall balance, to have regard or give effect to an important material consideration, namely the result of his interpretation of the Framework;

(iii) Amongst other things, he failed to consider whether the policy tension to which his reasoning inevitably gave rise was itself capable of amounting to a very special circumstance. Additionally, the fact that any subsequent production phase for this prospect, even occurring from a GB site, would not necessarily be inappropriate development was a most material consideration which the Inspector substantially ignored;

(iv) He similarly erred in his approach to SMPCS Policy MC3; and

(v) In any event, his reasons and stated reasoning are inadequate insufficiently intelligible to allow an understanding of whether or not he erred in law in this respect.

Discretion to quash

52. Again, it cannot sensibly be argued that, had the Inspector not erred as pleaded under this Ground, his conclusion would have been the same.

Conclusion

53. For these reasons the court is respectfully asked to quash the Inspector's decision.

AND the Claimant claims:

(1) An order quashing the said decision;
(2) Further or other relief;
(3) The Claimant's costs to be paid by the First Defendant or such other order as to costs as the Court thinks fit.

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31st October 2012