Neutral Citation Number: [2017] EWHC 12 (Admin)

Case No: CO/1265/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2017

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

THE QUEEN **on the application of** **AMANDA BOOT**	**Claimant**
- and -	
ELMBRIDGE BOROUGH COUNCIL	**Defendant**

- -
- -

Andrew Parkinson (instructed by **Richard Buxton Env. & Public Law**) for the **Claimant**
Neil Cameron QC and Zack Simons (instructed by **Elmbridge BC**) for the **Defendant**

Hearing date: 6 December 2016

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Judgment Approved

Mr Justice Supperstone :

Introduction

1. The Claimant seeks to quash the decision of the Defendant, Elmbridge Borough Council, to grant planning permission for a new football and athletics facility in Walton-on-Thames in Surrey ("the Site").

2. I granted permission at an oral hearing on 25 May 2016.

Factual Background

3. The Site is a 14 hectare former landfill site requiring remediation. It is located within the metropolitan Green Belt, adjacent to the river Thames.

4. On 5 March 2015 the Council applied for planning permission for the following development on the Site:

> "Development comprising new football and athletics stadium with spectator seating and detached two-storey building incorporating changing facilities, storage, function and club rooms; floodlighting, additional football and sports pitches, new car park and access road, hard and soft landscaping, dog

> walking area, playground and new electric sub-station following demolition of existing football club and facilities."

5. The purpose of the planning application was to construct the "Waterside Drive Sports Hub". This is intended to provide a shared ground for Walton Casuals FC, Walton and Hersham FC and Walton Athletics Club.

6. As described in the planning officer's report ("the OR") to the Defendant's planning committee at para 22:

> "The Sports Hub will provide a Football Association standard main pitch (which will be 3G), a further 3G synthetic turf pitch, four grass training pitches, an 8 lane athletics track to UK Athletics standards with facilities for field sports located with in-field area, a shared pavilion with spectator seating, changing facilities, storage/function/club rooms, flood lighting, new access road, parking for 265 vehicles and associated landscaping."

7. The proposed development would utilise land that is currently occupied by one football pitch for Walton Casuals FC, an area of informal open space and scrub land. All existing structures on the site would be demolished.

8. On 14 December 2015 the planning committee resolved to grant planning permission, subject to referral to the Secretary of State for Communities and Local Government and receipt of a legal agreement. Planning permission was issued on 26 January 2016.

Grounds of Challenge

9. Mr Andrew Parkinson, for the Claimant, advances two grounds of challenge to the decision: first, that the Defendant's planning committee erred in its interpretation of paragraph 89 of the National Planning Policy Framework ("the NPPF"); second, that the Defendant erred in failing to have regard to a material consideration, namely, an inspector's decision in 2013 in relation to a proposed indoor archery centre on an adjacent site, which was dismissed on the grounds that it would be inappropriate development in the Green Belt, and would conflict with the purposes of the Green Belt and would affect its openness.

The Legal and Policy Framework

10. In considering this challenge I have had regard to the well-known principles applicable in this context summarised by Holgate J in *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at paras 90-98. In particular I remind myself of the comment of Sullivan LJ in *R (Siraj) v Kirkless MBC* [2010] EWCA Civ 1286 at para 19 that:

> "It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a common sense manner, bearing in mind the fact they are addressed to an

> informed readership, in this case the respondent's planning sub-committee."

11. In *Oxton Farms, Samuel Smith's Old Brewery (Tadcaster) v Selby District Council* [1997] WLR 1106, 106, Judge LJ stated that:

> "An application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

12. In *R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) at para 43, Sales J (as he then was) stated:

> "The court should focus on the substance of a report of officers given in the present sort of context to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations…"

13. The relevant national policy framework in relation to Green Belts is in the NPPF, which provides, so far as is relevant, that:

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
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> 80. Green Belt serves five purposes:
>
> - to check the unrestricted sprawl of large built-up areas;
> - To prevent neighbouring towns merging into one another;
> - To assist in safeguarding the countryside from encroachment;
> - To preserve the setting and special character of historic towns; and
> - To assist in urban regeneration, by encouraging the recycling of derelict and other urban land.
>
> 81. Once Green Belts have been defined, local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as … to provide opportunities for outdoor sport and recreation; … or to improve damaged and derelict land.
>
> …

> 87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
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> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
>
> 89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
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> …
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> - provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
>
> … "

14. Annex 1 (Implementation) to the NPPF provides, so far as is relevant:

> "214. For 12 months from the day of publication, decision-takers may continue to give full weight to policies adopted since 2004 even if there is a limited degree of conflict with this Framework.
>
> 215. In other cases and following this 12-month period, due weight shall be given to relevant policies in existing plans according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

15. The Defendant's development plan policy DM17 – Green Belt (Development and New Buildings) provides, so far as is material:

> "b. Built development for outdoor sport, recreation and cemeteries will need to demonstrate that the building's function is ancillary and appropriate to the use and that it would not be practical to re-use or adapt any existing buildings on the site. Proposals shall be sited and designed to minimise the impact on the openness of the Green Belt and should include a high quality landscape scheme."

16. In *North Wiltshire DC v Secretary of State for the Environment* [1993] 65 P & CR 137, Mann LJ stated (at p.145):

> "To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it will usually lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it would be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case?"

The Parties Submissions and Discussion

Ground 1: Error in Interpretation of Para 89 of the NPPF

17. The planning officer's analysis of the appropriateness and impact of the proposal on the Green Belt is dealt with at paras 80-95 of the OR.

18. At paras 81-82 the officer finds that the proposal accords with four of the five purposes of the Green Belt set out at para 80 of the NPPF (see para 13 above) but, in relation to the purpose of "safeguarding the countryside from encroachment", he notes that the proposed development "will give rise to limited encroachment of development into the countryside by introducing a recreational use onto part of the site which was not previously in recreational use".

19. At OR83-84 the officer finds that the proposal will help improve damaged land in a manner which will provide for outdoor sport and recreation, in accordance with para 81 of the NPPF.

20. Paras 88-90 of the OR read as follows:

> "88. Para 89 of the NPPF deals with buildings rather than uses and establishes that buildings (defined by s.336 of the 1990 Act as including any structure or erection i.e. including floodlights, fencing etc.) which provide appropriate facilities for outdoor sport, outdoor recreation are appropriate development provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land within it.
>
> 89. Therefore, the use proposed, and the buildings and structures required to support it, including the pavilion, floodlights, fencing and car park, are appropriate development within the Green Belt provided that they preserve the openness of the Green Belt and do not conflict with the purposes of including land within it.
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> 90. The physical size of the proposed pavilion compared to the existing buildings means that it would have a greater impact on the openness of the Green Belt compared to the existing buildings. While it may be appropriate development an assessment must be made in terms of whether the proposal preserves the openness of the Belt. The proposed landscaping

> in the amended scheme involves the creation of a series of land forms around the perimeter of the site to enhance the character of the informal open space and will assist in screening activity within the site from certain viewpoints. Whilst there would be a larger area of formal enclosed sports facilities it is not considered that the impact on the openness of the Green Belt would be significant."

21. At para 93 the officer notes that it is considered that the proposal would comply with Policy DM17.

22. The officer's overall conclusion is at OR95.

> "Taking Green Belt policy as a whole the proposals comprised development which is appropriate within the Green Belt. There will be limited adverse impact on landscape and visual amenity and 'openness' of the Green Belt, however there will also be significant benefits in terms of facilitating the beneficial use of land within the Green Belt by providing significant opportunities for public access and outdoor sport and recreation and by improving damaged land."

23. At OR177 the officer concludes as follows:

> "It is concluded that the proposal represents appropriate development within the Green Belt. The proposal is not considered to have a significant adverse impact on the openness of the Green Belt or the amenity of nearby properties. On the basis of the above, and in light of any other material considerations, the proposal is considered to be in accordance with the development plan. Accordingly, the recommendation is to grant permission subject to receipt of satisfactory legal agreement and referral to the Secretary of State."

24. This conclusion was accepted by the Defendant's planning committee which in its Statement of Reasons said:

> "There will be a limited adverse impact on landscape and visual amenity and 'openness' of the Green Belt, however there will also be significant benefits in terms of facilitating the beneficial use of land within the Green Belt by providing significant opportunities for public access and outdoor sport and recreation by improving damaged land which is supported by para 81 of the NPPF."

25. Mr Parkinson contends that the question of law raised by the Claimant's first ground of challenge is whether a new sports facility can be appropriate development even if it causes harm to the openness and purposes of the Green Belt.

26. He suggests this is because the Defendant found that the new stadium would cause harm to the openness and purposes of the Green Belt (see OR95 and 177, and the

Statement of Reasons), but (despite this) found it was appropriate development and complied with paragraph 89 of the NPPF.

27. Mr Parkinson submits that the Defendant's interpretation of the policy is wrong. He contends that if a new sports facility causes harm to the openness of the Green Belt (even limited harm) it is not appropriate development for four main reasons:

    i) First, if paragraph 89 of the NPPF permitted less than significant harm to the openness of the Green Belt, it would say so. It does not. To be appropriate, new sports facilities must "*preserve the openness of the Green Belt*". The ordinary meaning of the word 'preserve' is defined in the OED as meaning, '*to keep safe from injury, harm or destruction*' In *South Lakeland DC v Secretary of State for the Environment* [1992] 2 AC 141, at 150 Lord Bridge approved the passage from the judgment of Mann LJ in the Court of Appeal that concluded:

    > "The statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved."

    ii) Second, the Defendant's approach is contrary to the decision in *West Lancashire Borough Council v SSCLG* [2009] EWHC 3631 (Admin), which, he submits, is directly on point.

    iii) Third, the judgment in that case is supported by other case law (see *Doncaster MBC v Secretary of State for the Environment, Transport and the Regions* [2002] EWHC 808 (Admin) at para 68, and *R (Heath and Hampstead) v LB Camden* [2007] EWHC 977 (Admin)).

    iv) Fourth, the Defendant's interpretation would significantly weaken policy protection for the Green Belt. The effect of the Defendant's interpretation is that a number of individual planning applications, each causing harm to the Green Belt (albeit less than substantial), could be permitted without the need to demonstrate very special circumstances. The cumulative effect of this approach, it is said, would result in a "death by a thousand cuts" to the Green Belt (see by analogy the comments made by Sullivan J in *Heath and Hampstead* at para 37).

28. Mr Neil Cameron QC for the Defendant submits that the flaw in the Claimant's argument is the contention that if there is any impact on openness, then development is inappropriate. Having found that the proposed development would have a limited and not significant physical impact on openness the Defendant came to the conclusion that the proposal would preserve openness and was therefore appropriate development in the Green Belt. The Defendant's committee concluded, and were, Mr Cameron submits, entitled to conclude that with those limited physical impacts, the proposed development preserved the openness of the Green Belt.

29. All new buildings in the Green Belt will have some impact on openness, as Dove J observed in *R (Lea Valley Regional Park Authority) v Epping Forest DC* [2016] Env LR 8 at para 62. That being so, it cannot, Mr Cameron submits, be the case that if the

provision of sports facilities causes any harm, even limited harm, then it is inappropriate development.

30. Mr Cameron submits that the passages in the officer's report on which the Claimant relies need to be read in the context of a development plan policy (DM17) which requires proposals to "minimise the impact on the openness of the Green Belt". The appropriateness and impact on the Green Belt of the development is considered at paragraphs 80-95 of the OR. Both the relevant development plan policy (DM17) and national policy (in the NPPF) were noted and drawn to members' attention. At paragraph 90 reference is made to the physical size of the proposed pavilion compared to the existing buildings. Mr Cameron submits that the officer then posed the correct question, namely whether the proposed provision of facilities for outdoor sport and outdoor recreation preserves the openness of the Green Belt. That, he submits, was a matter of planning judgment for the officer and the committee with which the court should not readily interfere.

31. Mr Parkinson responds that this logic rests on the single faulty premise that all new sports facilities in the Green Belt will inevitably impact on openness. This is not, he submits, correct, and not what Dove J was saying in *Lee Valley*. Dove J is simply stating that if openness is taken simply to mean the absence of development, then all development will "*in truth*" have an impact on openness. It is open to a decision maker to find that a particular development in the Green Belt will, assessed in the round, have no impact on openness.

32. In *R (on the application of Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404, Lindblom LJ, dismissing the appeal from the decision of Dove J, makes the point at para 20:

> "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."

33. Lindblom LJ continued at paras 24-26 as follows:

> "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 79-92 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 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…' Dove J saw support for this conclusion in the judgment of Ouseley J at first instance in *Europa Oil and Gas v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin) (at paragraphs 64-78). I think he was right to do so. Ouseley J captured the point well when he said (in paragraphs 66 of his judgment) that under the policies in paragraphs 89 and 90 of the NPPF 'considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of building or structures but include their purpose', and that '… two materially similar buildings [,] one a house and one a sports pavilion, are treated differently in terms of actual or potential appropriateness.' Thus, as Ouseley J said:
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> > 'The Green Belt may not be harmed by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness, and the other it is not harmed by because of its effect on openness. These concepts are to be applied… in the light of a particular type of development.'
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> That reasoning was adopted and applied by HHJ Pelling QC, sitting as a Deputy judge of the High Court, in *Fordent Holdings Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin) (at paragraphs 33-35 of his judgment). An appeal against Ouseley J's decision was later dismissed by this court ([2014] EWCA Civ 825). In that appeal Richards LJ (at paragraphs 35-41 of his judgment, with which Moore-Bick and Kitchin LJJ agreed) expressly endorsed the 'general thrust' of Ouseley J's reasoning in the passage of his judgment referred to by Dove J, including the observations I have quoted from paragraph 66 (see, in particular, paragraph 37 of Richards LJ's judgment)."

34. As Mr Parkinson correctly observes, what Lindblom LJ is not saying at para 24 of his judgment is that if, for the purposes of para 89 of the NPPF, there is limited harm to openness, there has been compliance with para 89. The conclusion of the Defendant that the proposal has a "limited adverse impact on openness" of the Green Belt is not a finding that there has been compliance with the policy that requires openness to be preserved. Accordingly even if the adverse impact referred to at para 95 of the OR is

acceptable for the purposes of DM17, it is not acceptable for the purposes of para 89 of the NPPF.

35. In support of his submission that if a new sports facility causes harm to openness, it is inappropriate development, regardless of the extent of the harm, Mr Parkinson relies on the *West Lancashire Borough Council* case where the wording of the relevant policy (PPG2) is virtually identical to paragraph 89 of the NPPF. At para 21 of his judgment Parker J said as follows:

> "In my view, and agreeing with Ms Reid who appeared on behalf of the Claimant, the policy in PPG2 simply does not accord any latitude to the Inspector to decide that a material change of use of land does affect the openness of the Green Belt but that the extent of such effect does not, in the Inspector's opinion, matter sufficiently to raise significant planning concerns."

36. I agree with Mr Parkinson that the wording of the Defendant's policy DM17 has no bearing on the proper interpretation of the NPPF. If, as appears, DM17 is inconsistent with para 89 of the NPPF, para 215 of the NPPF requires less weight be given to it.

37. Mr Cameron realistically accepts that the *West Lancashire* case does not assist the Defendant, but he submits that the facts of the present case can be distinguished from *West Lancashire*. Albeit acknowledging it is not a powerful argument Mr Cameron observes that the decision in *West Lancashire* was based on a different policy requirement ("maintain", rather than "preserve") in now replaced planning guidance. More importantly in the present case the officer recognised that the proposed building would physically reduce openness (albeit to a non-significant or limited degree) but nonetheless expressed the view that the development would be appropriate, because the proposal preserved openness. Mr Cameron comments that the issues identified in *Europa Oil and Gas* and *Lee Valley* were not addressed in *West Lancashire*.

38. Further, Mr Cameron submits the case of *Doncaster MBC v Secretary of State for Environment, Transport and the Regions* is not concerned with the issues in the present case, namely exceptions to inappropriate development.

39. Mr Parkinson submits that *West Lancashire* establishes that if a proposal has an adverse impact on openness, the "inevitable conclusion" (see para 22 of the judgment) is that it does not comply with a policy that requires openness to be maintained. A decision maker does not have "any latitude" to find otherwise, based on the extent of the impact. In the present case the Defendant concluded that there was an adverse impact on openness, but nevertheless granted permission without giving consideration to whether under paras 87 and 88 of the NPPF there were very special circumstances that would justify it.

40. I accept Mr Parkinson's submissions. In my judgment the Defendant erred in its interpretation of paragraph 89 of the NPPF.

Ground 2: Failure to Have Regard to the 2013 Appeal Decision

41. It is not in issue that a previous appeal decision by an inspector on an appeal may amount to a material planning consideration.

42. On 25 April 2002 an application for planning permission was made for a new indoor archery centre with associated landscaping and parking on an adjacent site at land north of Rivernook Farm, Hurst Farm, Walton-on-Thames. This site was also in the Green Belt.

43. The application was refused by the Council by notice dated 13 February 2013 on the basis that it was inappropriate development that would cause harm to the Green Belt. The applicant appealed. By a decision dated 23 October 2013 an inspector appointed by the Secretary of State for Communities and Local Government dismissed the appeal ("the 2013 Appeal Decision") on the basis that the development was inappropriate development in the Green Belt, and there were no very special circumstances to justify it.

44. The Claimant contends that the officer did not inform the planning committee of the 2013 Appeal Decision which had been brought to his attention by her solicitor.

45. Mr Parkinson makes the point that the proposed archery centre was to be behind the oil tank farm and thus arguably with less impact on openness including views towards the river Thames than the proposed Sports Hub development.

46. Mr Parkinson submits that the fact that in the archery centre building the sports were to take place under a roof, whereas in the proposed football/athletics stadium they will take place in the open air, is irrelevant and plays no part in the inspector's findings in relation to NPPF policy set out at paragraphs 10-15 of the 2013 Appeal Decision. Mr Parkinson relies in particular on what he describes as the key finding in paragraph 11 of the decision that "the erection of a substantial building in this gap would conflict with the GB purpose of preventing neighbouring towns merging into one another". This finding is not, he submits, predicated on the fact that this was an indoor archery centre. That being so, he submits, the previous decision was "sufficiently closely related" (see *Baber v Secretary of State for the Environment* [1996] JPL 1034 at 1040) to the issues in the present case that the inspector should have had regard to it.

47. Further, the finding in the 2013 Appeal Decision was that the erection of a similar sized building in this location would harm the openness of the Green Belt and conflict with the Green Belt purpose of preventing neighbouring towns merging into one another. In reaching a different conclusion in relation to the present application, Mr Parkinson submits, the Defendant was necessarily disagreeing with a critical aspect of the previous decision (see *North Wiltshire DC* at 145, set out at para 16 above).

48. Mr Parkinson contends that the issues raised by the 2013 Appeal Decision are closely related to the proposed development in a number of respects: both proposals concern sports facilities; the buildings are very similar in terms of size; and the two proposals are also closely related in terms of location.

49. Mr Cameron points out that the inspector did in fact (when considering Green Belt openness) make reference to the previous planning permission. The inspector said at

para 13: "I am mindful of the permission granted in the GB for the clubhouse/stands… and the argument that they set a precedent in favour of the current proposal". That (but not the reference to the "Chelsea FC indoor pitch and sports research centre") is a reference to the 2012 application. The inspector noted there were some similarities between those cases and the current one but considered the circumstances also have marked differences.

50. I consider, having regard to the reasons given by the inspector in the 2013 Appeal Decision, that the proposal in that case is distinguishable from the proposal in the present case in material respects. The inspector in the 2013 appeal concluded at DL9 that the proposal was for inappropriate development within the meaning of saved policy GRB17 because "the application form specifies that the proposal is for an indoor archery centre". DL12-15 make clear that the fact that the archery centre proposals were for indoor sport played a significant part in the inspector's reasoning on openness.

51. Mr Cameron also points out that whilst Mr Parkinson emphasises that the length and height of the two buildings are similar, the width of the proposed development is less than that of the indoor archery centre.

52. I consider for all these reasons the two proposals to be materially dissimilar. They are plainly distinguishable. By making a decision on the present application the Defendant was not, in my view, necessarily agreeing or disagreeing with any critical aspect of the decision of the previous inspector.

Conclusion

53. For the reasons I have given the Ground 1, but not the Ground 2, challenge is made out. This claim accordingly succeeds, and the decision to grant planning permission will be quashed.