UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0150 (LC)
UTLC Case Number: LCA/60/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PLANNING PERMISSION – certificate of appropriate alternative development – land on settlement boundary within the general extent of proposed extension to green belt - inner boundary of green belt not yet defined – whether green belt policies should apply to determination of appropriate alternative development – whether very special circumstances would justify planning permission – appeal dismissed – negative certificate confirmed

IN THE MATTER OF AN APPEAL UNDER SECTION 18, LAND COMPENSATION ACT 1961

BETWEEN:

LEECH HOMES LTD

Appellant

and

NORTHUMBERLAND COUNTY COUNCIL

Respondent

Re: Land at East Lane End Farm, Morpeth, Northumberland

Martin Rodger QC, Deputy Chamber President and Mrs Diane Martin MRICS FAAV

11-14 February 2020

North Shields Tribunal Hearing Centre

Mr Paul Cairnes QC, instructed by direct professional access, for the appellant
Mr James Pereira QC and *Ms Daisy Noble*, instructed by Northumberland County Council Legal Services, for the respondents

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The following cases are referred to in this decision:

Armchair Passenger Transport Ltd v Helical Bar plc [2003] EWHC 367 (QB)

City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447

DLA Delivery Ltd v Baroness Cumberlege of Newick & Anor [2018] EWCA Civ 1305

Essex Showground Group Ltd v Essex County Council [2006] RVR 336

North Wiltshire District Council v Secretary of State (1993) 65 P & CR 137

Porter v Secretary of State [1996] 3 All ER 693

R (Corbett) v The Cornwall Council [2020] EWCA Civ 508

R (Factortame Ltd v Secretary of State for Transport, Local Government and the Regions) (No 8) [2002] 3 WLR 1104

Tesco Stores Limited v Dundee City Council [2012] UKSC 13

The Ikarian Reefer [1993] 2 Lloyds Rep 81

Urban Edge Group Ltd v London Underground Ltd [2009] UKUT 103

Wedgewood v City of York Council [2020] EWHC 780 (Admin)

Introduction

1. This is an appeal under s.18 of the Land Compensation Act 1961 (LCA 1961) arising out of the compulsory acquisition of land at East Lane End Farm, Morpeth belonging to the appellant, Leech Homes Ltd. The land is just outside the settlement boundary for Morpeth and was taken on 16 March 2015 for the construction of the Morpeth northern bypass. The appellant seeks a certificate of appropriate alternative development (CAAD) under s.17, LCA 1961 and contends that, absent the bypass scheme, appropriate alternative development would have been residential development comprising approximately 135 dwellings with associated infrastructure, landscaping, open space and access.

2. The significance of development being identified as appropriate alternative development is that, when compensation comes to be assessed, it must be assumed that planning permission for that development either was in force at the valuation date, or would with certainty be in force at some future date identified in the certificate (s.14(3), LCA 1961).

3. The compulsory acquisition of the appellant's land was authorised by the Northumberland County (A1 – South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015, made by the Secretary of State on 12 January 2015. Entry on the appellant's land was effected on 16 March 2015 and the bypass was subsequently constructed and is now open to traffic.

4. The acquiring authority, Northumberland County Council (the Council), which is also the local planning authority, maintains that there is no development which would be appropriate alternative development because the land taken is within the general extent of the green belt and that green belt policies therefore apply to it. The proposition that green belt policies apply to the land is the result of the Council's interpretation of Policy S5 of the Northumberland County and National Park Joint Structure Plan (first alteration, 2005) which proposed an extension to the green belt around Morpeth with its precise boundaries to be defined in local plans. Those precise boundaries had not been defined by the valuation date, 16 March 2015. But the suggestion that green belt policies are to be applied to this site is said by the appellant to be contrary to advice given to the Secretary of State by the Council before confirmation of the necessary development consent order and contrary to the approach taken by the Council to comparable sites immediately adjoining the settlement boundary.

5. Mr James Pereira QC, who appeared on behalf of the Council with Ms Daisy Noble, helpfully acknowledged in written argument served shortly before the hearing that, if the Tribunal concluded that the land was not within the green belt at the relevant valuation date, planning permission for the appellant's CAAD proposal could reasonably have been expected to have been granted at that date, notwithstanding landscape harm and accessibility issues referred to in the Council's evidence.

6. The critical issue in the appeal is therefore whether as a result of Policy S5 the appellant's land was within the green belt or was otherwise land to which green belt policies ought to be applied at the relevant valuation date.

7. The appellant was represented at the hearing by Mr Paul Cairnes QC. The principal evidence given on its behalf was that of Mr Richard J Holland, who is employed by the appellant's parent company, Persimmon Homes (Teeside), as a Land and Planning Manager. Mr Holland has considerable expertise in planning matters and is a member of the Royal Town Planning Institute, but at the commencement of the hearing the Tribunal questioned the status of his evidence, which was tendered as expert evidence despite Mr Holland not in any sense being independent of the appellant. In the end it was agreed by both parties that little turned on the characterisation of Mr Holland's evidence, but we will return to that matter later in this decision. Expert evidence was also given on behalf of the appellant by Mr Darran Kitchener CMILT, MCIHT on transport issues, and by Mr Tom Robinson CMLI on landscape and visual amenity matters.

8. On behalf of the Council expert evidence on planning issues was given by Mr Harry Bolton MRTPI, and Mrs Mary Fisher CMLI gave evidence on landscape matters. Mr Walter Aspinall MCIH MRTPI prepared written evidence on transport issues but, in the event, a consensus was reached on most of those issues and Mr Aspinall's evidence was not relied on.

9. In the course of the hearing the Tribunal conducted a site visit, accompanied by the landscape experts. The land is of course much changed since the valuation date.

The legal framework

10. Compensation is payable after the compulsory acquisition of land under rules contained in s.5, LCA 1961. By rule 2, the value of the land acquired is to be taken to be the amount which it might be expected to realise if sold in the open market. That proposition is supplemented by s.14, LCA 1961 which prescribes assumptions which are to be made about the planning status of the land for the purpose of assessing its value.

11. For land acquired after 6 April 2012, ss.14, 17 and 18, LCA 1961, as inserted by the Localism Act 2011, apply to the assessment of compensation.

12. By s.14(2)(a), for the purpose of determining the value of the land acquired (referred to as the "relevant land"), account may be taken of any planning permission in force on the valuation date for development on the relevant land or other land. The prospect of planning permission being granted on or after the valuation date for development on the relevant land or other land is also to be taken into account (s.14(2)(b)). That prospect must be assessed on the assumptions in s.14(5), but otherwise in the circumstances known to the market at the valuation date. We will return to those assumptions shortly.

13. By s.14(3) it is to be assumed in a rule 2 valuation that planning permission is also in force on the valuation date (or is certain to be granted in future) for "appropriate alternative development" as defined in s.14(4) as follows:

> (4) For the purposes of this section, development is "appropriate alternative development" if—

> (a) it is development, on the relevant land alone or on the relevant land together with other land, other than development for which planning permission is in force at the relevant valuation date, and
>
> (b) on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, planning permission for the development could at that date reasonably have been expected to be granted on an application decided—
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> (i) on that date, or
>
> (ii) at a time after that date.

14. The assumptions to be made when identifying appropriate alternative development are contained in s.14(5) and are the same as those to be made when considering the prospect of planning permission being granted for development which is not appropriate alternative development:

> (5) The assumptions referred to in subsections (2)(b) and (4)(b) are—
>
> (a) that the scheme of development underlying the acquisition had been cancelled on the launch date,
>
> (b) that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme,
>
> (c) that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers, and
>
> (d) if the scheme was for use of the relevant land for or in connection with the construction of a highway ("the scheme highway"), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet.

These assumptions define the hypothetical factual context which are to be taken to exist at the valuation date and in which appropriate alternative development is to be identified. They are referred to collectively as the "cancellation assumption". The matters required to be assumed include "the circumstances known to the market at the relevant valuation date", to the extent that they are consistent with the cancellation assumption (s.14(4)(b), LCA 1961).

15. The 'launch date' referred to in s.14(5)(a) is defined in s.14(6), and it is agreed in this case to be 9 August 2012.

16. In the context of this appeal appropriate alternative development is therefore, in summary, development on the appellant's land alone or on that land together with other land for which, on 16 March 2015, on the statutory assumptions but otherwise in the circumstances known to the market on that date, planning permission could reasonably have been

expected to be granted on an application determined on or after that date. The effect of the statutory assumptions is that when considering what planning permission would have been likely to be granted, the bypass scheme must be assumed to have been cancelled on 9 August 2012, the date it was first launched, and it must be assumed that no action was taken by the Council wholly or mainly for the purposes of the scheme.

17. Either of the parties concerned in a compulsory acquisition may apply to the local planning authority under s.17, LCA 1961 for a CAAD. The local planning authority must issue a certificate identifying each description of development that, in its opinion, is appropriate alternative development in relation to the acquisition concerned (a "positive" certificate), or stating that there is no such development (a "negative" certificate).

18. If a positive certificate is issued, the development described in it is appropriate alternative development for the purpose of s.14 (and no other development is); in the case of a negative certificate, the valuation must be on the basis that there is no development which is appropriate alternative development (ss.17(6)-(7), LCA 1961).

19. On an appeal to the Tribunal against a CAAD under s.18, LCA 1961 the Tribunal does not review the decision of the local planning authority, but is required to proceed as if the application for a certificate had been made to it, and must, as it considers appropriate, either confirm or vary the certificate, or cancel it and issue a different certificate in its place (s.18(2)).

20. In *Porter v Secretary of State* [1996] 3 All ER 693, 703-704 Stuart-Smith LJ said that the question whether a planning permission could reasonably have been expected to be granted is to be determined on the balance of probabilities in the light of all the evidence.

21. In *Essex Showground Group Ltd v Essex County Council* [2006] RVR 336, the Lands Tribunal (George Bartlett QC, President, P R Francis FRICS and A J Trott FRICS) explained at [25] that the proper approach is for the Tribunal to determine what a reasonable local planning authority would have decided in the circumstances to be assumed at the valuation date, having correctly directed itself on law and planning policy. In *Urban Edge Group Ltd v London Underground Ltd* [2009] UKUT 103 that approach was challenged and it was argued that the correct approach was for the Tribunal to determine what the actual planning authority could reasonably have been expected to decide. The Tribunal (George Bartlett QC, President) adhered to its original view (at [49]-[50]). At that time the right of appeal against the grant or refusal of a s.17 certificate lay to the Secretary of State, whose planning inspector would exercise:

> "what is essentially a judicial function, to determine whether planning permission could reasonably have been expected to be granted. The determination to be made in such circumstances, clearly, is not as to whether the planning authority could reasonably have been expected to grant permission but whether it would have been reasonable for planning permission to be granted."

22. There was no disagreement before us that the view expressed by the Tribunal in *Essex Showground* and *Urban Edge* was correct. Thus, when considering under s.14(4)(b) whether planning permission for the appellant's scheme could reasonably have been expected to be granted at the valuation date, or later, the Tribunal is not required to ask itself how Northumberland County Council is likely to have determined the notional application for consent. The Tribunal must put itself in the position of a reasonable decision maker, properly applying the law. It follows that, if at the statutory valuation date the County Council's officers and members had a particular understanding of the meaning of a relevant planning policy, the Tribunal is not required to adopt that understanding or to interpret the policy in the same way, but must decide for itself what the policy means, and apply it correctly.

23. Mr Cairnes relied on the Tribunal's acknowledgement in *Urban Edge* at [50] that, when the Tribunal made its own determination, "evidence of actual decisions made by the planning authority will be relevant and no doubt persuasive". We agree with that statement, but it does not mean that the authority's view must be treated as conclusive, and it does not relieve the Tribunal of the duty of forming its own conclusion as to the correct understanding of the meaning of planning policy, or of forming its own judgment on its application. As Lindblom LJ has recently pointed out in *R (Corbett) v The Cornwall Council* [2020] EWCA Civ 508, at [66], "the professional officers of a local planning authority, and members who sit regularly on a planning committee, will not often be shown to have misinterpreted the policies of its development plan." Nevertheless, errors of law will sometimes be made, and different decision makers may, quite lawfully, reach different conclusions on the same question of planning judgment.

Relevant planning policies

24. Applications for planning permission are required to be determined in accordance with the statutory development plan unless material considerations indicate otherwise (s.38(6), Planning and Compulsory Purchase Act 2004). In *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, 1458 E-F Lord Clyde explained the operation of this principle:

> "If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility."

25. The parties agreed that the proper interpretation of planning policy is an issue of law, while its application is a matter of planning judgment. Lord Reed JSC reviewed the relevant authorities underlying these twin propositions in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 at [17] – [21]). The planning authority is required by statute to have regard to the provisions of the development plan, but "it cannot have regard to the provisions of the plan if it fails to understand them". It must proceed on the basis of a "proper interpretation" of the relevant provisions of the plan. Planning authorities "do not

live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

The statutory development plan

26. There is no disagreement in this appeal over the content of the development plan. At the valuation date it comprised the saved policies of the Castle Morpeth District Local Plan (2003) and a single saved policy from the Northumberland County and National Park Joint Structure Plan (2005).

27. The Local Plan was originally intended to last from 1991 to 2006 but the adoption of a new plan was delayed by local government reorganisation. The Local Plan policies agreed to be of particular relevance to the Tribunal's determination were C1, which concerned settlement boundaries, C17 relating to the Green Belt, H16 on housing in the countryside, and MC1 which dealt specifically with the Morpeth settlement boundary.

28. The Joint Structure Plan establishes the strategic framework for the preparation of local plans. The plan was largely replaced in 2008 and by the valuation date the only surviving component was Policy S5 which proposed an extension to the green belt. The interpretation of Policy S5 is critical to the issues in this appeal. It provided as follows:

> "Policy S5 - Extension to the Green Belt
>
> An extension to the Green Belt will extend from the existing boundary northwards to lie:
>
> - [a list of 18 settlements and other locations covering a wide area incorporating Morpeth]
>
> Precise boundaries, including those around settlements, should be defined in Local Plans having particular regard to the maintenance of the role of Morpeth as defined in Policy S7 and to the sequential approach in Policy S11."

Policies S7 and S11, which are referred to in Policy S5, concerned the settlement boundary and the significance of Morpeth as a main town and focus for development. They were not saved when the Structure Plan expired but it was not suggested that their lapsing had any effect on the application of Policy S5 itself.

29. Policy S5 was accompanied by two indicative diagrams. No reference to these appears in the text itself and Mr Pereira did not dissent from Mr Cairnes' suggestion that they are not to be regarded as part of the statutory development plan. The first diagram showed the County as a whole and indicated the approximate location of the existing adopted green belt boundary, the general extent of the proposed green belt extension, and other strategic designations. The second diagram was an inset of the area around Morpeth which showed the town surrounded by the proposed extension to the green belt. The diagrams did not purport to identify either the inner or the outer boundaries of the green belt extension with any precision, nor do they, or Policy S5 itself, say that all of the land shown within the general extent is Green Belt.

30. Other material policy considerations are agreed to include the emerging Northumberland Local Plan Core Strategy which was published in draft in December 2014, and the consultation draft Morpeth Neighbourhood Plan published in January 2015. These were at an early stage of their progression through the plan making process and it is agreed that they should be given limited weight for that reason. The published evidence associated with these emerging plans is also agreed to be relevant. This material included a consultation on the methodology to be employed in reviewing the green belt boundaries and the Council's own Green Belt Settlements Assessment published in December 2014.

The NPPF and green belt policy

31. The National Planning Policy Framework (2012) and its associated guidance were material considerations in decision making at the valuation date. Of particular importance are paragraphs 79 and 80, which describe the aims and purposes of the green belt and green belt policy, as follows:

> "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."

32. Paragraphs 87 and 88 then provided as follows:

> "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."

33. A written ministerial statement of July 2013, correspondence between DCLG and the Planning Inspectorate in March 2014, and subsequent Planning Policy Guidance all confirm that the single issue of unmet housing demand is unlikely to outweigh harm to the

green belt and other harm so as to constitute the very special circumstances referred to in paragraph 87.

34. It is now agreed that at the valuation date the Council was unable to demonstrate a 5-year supply of deliverable housing land as required by the NPPF. The latest housing land figures had been published in December 2014 with a base date of 1 April 2014. These indicated a deliverable supply of about 3.8 years for the Council area as a whole and 3.6 years for the central delivery area which includes Morpeth. As a consequence of this shortfall, development plan policies which restricted the supply of housing were to be regarded as out of date and that the "tilted balance" favouring the approval of development (NPPF, paragraph 14) was engaged. It is also agreed that the tilted balance does not diminish the requirement for very special circumstances to be demonstrated before development may be permitted in the green belt (NPPF, paragraphs 87, 88).

The appellant's land and other relevant development sites

35. The reference land is situated to the north east of the A192, two km north of Morpeth town centre. At the valuation date it comprised 12.8 hectares (31.5 acres) of bare land in agricultural use for livestock grazing. The landscape is described in the evidence as a plateau, bisected at the southern end by a small steep-sided valley, or dene, associated with a water course known as the Cotting Burn. The Cotting Burn also forms much of the northern boundary.

36. The land adjoins the A192 at its south-west corner, and along its eastern boundary adjoins the rear gardens of the residential area of outer Morpeth at Fulbeck Lane. To the north-west it adjoins a site owned by the appellant, referred to variously in the evidence as 'Land south west of Northgate Hospital', 'Fairmoor' or 'North Morpeth residential site'. We will refer to it as the Fairmoor site. Otherwise the reference land is bordered by land in agricultural use.

37. The Fairmoor site was formerly designated for employment use but in July 2014 outline planning permission was granted for 255 dwellings. At the valuation date the development of this site had yet to commence but it had been completed by the time of our site inspection. The new Fairmoor development is located to the east of the A1, which separates it from the original settlement of the same name.

38. A plan showing other consented and potential residential development sites around Morpeth was agreed by the parties. The Northgate Hospital site (consented in December 2011 and October 2014) and St George's Hospital sites A and B (consented in March 2015) are located to the north of Morpeth. The Loansdean site (consented on appeal in July 2014) and the Stobhill site (consented on appeal in December 2014) both sit on the southern edge of the town.

The CAAD application and the Council's decision

39. On 29 December 2015 the appellant applied to the Council in its capacity as local planning authority under s.17, LCA 1961, for a CAAD to the effect that its 135-home residential scheme is appropriate alternative development for the reference land. The application did not attempt to make a case for permitting 135 dwellings in the green belt and implicitly assumed that green belt constraints did not apply. The time within which the application was required to be determined was subsequently extended by agreement and, after considering the application for two and a half years, the Council issued a negative decision on 29 June 2018.

40. In its decision notice the Council concluded that, on 16 March 2015, residential development (either in the terms proposed in the CAAD application, or generally) or any other non-agricultural development of the land would have been inappropriate and unsustainable. The appellant's land was described as being "in the Green Belt and Open Countryside, and located beyond the settlement boundary for Morpeth, within a location not considered to be sustainable (in terms of pedestrian and local transport, access to local services and a primary school, as well as more generally)". The Council considered that the proposed development would significantly undermine key objectives of the development plan, national planning policy and emerging policy, including green belt policy, the prevention of encroachment into the open countryside and the promotion of sustainable distribution of development. No very special circumstances clearly outweighed the harm which would be caused to the green belt by the suggested development. The proposal was said to be contrary to policies C1, C17, H16 and MC1 of the local plan and policy S5 of the Structure Plan.

41. The Council's decision was made on the assumption that it could demonstrate a five-year land supply. That suggestion is no longer persisted with. Nor does the Council now rely on accessibility to local services and schools as a relevant consideration.

The issues in the appeal

42. In view of the concession made by Mr Pereira that the appellant's CAAD proposal would be appropriate alternative development if the land is not within the green belt, the remaining issues in the appeal are the following:

    (1) At the valuation date, would the appellant's land have been treated as green belt land for the purposes of applying planning policy?

    (2) If so, would very special circumstances clearly have outweighed the harm caused by the CAAD proposal by reason of its inappropriateness, and any other harm, such that planning permission could reasonably have been expected to be granted for it?

    (3) If planning permission could not reasonably have been expected to be granted for the CAAD proposal at the valuation date, could it reasonably have been expected at that date that planning permission would be granted at a time in the future, and if so, when?

    (4) If and to the extent that permission for the CAAD proposal could not reasonably be expected to have been granted at the valuation date, would other development have been appropriate alternative development at that date?

An additional disagreement over the planning conditions and obligations under s.106, Town and Country Planning Act 1990 which would properly have been included in a planning permission for the CAAD proposal had been resolved by the start of the hearing.

Issue 1: At the valuation date, would the appellant's land have been treated as green belt land for the purposes of applying planning policy?

43. An important part of the appellant's case was that the interpretation of Policy S5 of the Joint Structure Plan on which the Council based its decision on the CAAD application, and on which it relied in this appeal, was entirely inconsistent with the approach it had taken to the same policy before the valuation date and subsequently. Mr Cairnes stressed the importance of consistency in decision making and placed weight on the Council's earlier approach. Before considering the central issue in the appeal, whether the site was within the green belt on the valuation date, it is therefore relevant to refer in some detail to the policy statements and development control decisions on which the appellant relies.

How Policy S5 was interpreted by the Council in emerging policy

44. We were first referred to a scoping assessment for the bypass scheme which was prepared on behalf of the Council in May 2009. It referred to Policy S5 and correctly identified that the appellant's land was in an area intended as an extension to the green belt, before adding that it was unclear whether it would be included within the green belt when its boundaries were designated by the local plan.

45. The next significant consideration of the status of the appellant's land appeared in three documents published in December 2014. In that month the Council published its Green Belt Settlement Assessment. The Assessment recognised that the inner boundaries of the green belt which were to be identified for main towns and service centres (of which Morpeth was one) needed to provide sufficient capacity to accommodate housing and economic development needs, both for the emerging plan period and subsequently.

46. The appellant's land was one of the sites assessed by the Council against four of the five purposes of the green belt identified in paragraph 80, NPPF (see paragraph 28 above). The site was considered overall to make a medium contribution to green belt purposes, with the assessor noting its importance in safeguarding the countryside from encroachment and in achieving a satisfactory transition between urban and rural landscapes. The context in which those judgments were made assumed the presence of the forthcoming bypass.

47. The draft Northumberland Local Plan Core Strategy, also published in December 2014, was intended to cover the period to 2031. It built on the Green Belt Settlement Assessment and indicated that the preferred option for Morpeth was to allow most development to take place to the north of the town, including the previously developed sites at the St George's and Northgate Hospitals. Once again, this preference was expressed in the context of the proposed new bypass. The preferred inner green belt boundary was shown on a plan which included the appellant's land in an area straddling the bypass and extending west to the A1. The whole of this area was shown as lying within the inner boundary (i.e. outside

the green belt extension) and as safeguarded for future development after the period covered by the draft Core Strategy document. The proposed green belt boundary was to the north of the appellant's land, for the most part beyond Northgate Hospital, and to the west, beyond the line of the A1. The plan showed the line of the proposed new bypass crossing the appellant's land and then forming the boundary of the green belt along part of its northern edge, before continuing southeast through land intended to be designated as part of the green belt.

48. The third of the December 2014 documents was the Council's Strategic Housing Land Availability Assessment, which considered potential development sites around Morpeth over a time scale of 0-15 years. The appellant's land, and other land adjoining it between the A1 and the settlement boundary, was designated as "uncertain", which we take to reflect the proposal in the draft Core Strategy that the same area should be safeguarded for development after 2031.

How Policy S5 was interpreted by the Council in the promotion of the DCO

49. The three documents published in December 2014 had obviously been in gestation for a considerable period and it was in that emerging policy context that the Council made its application for the Development Consent Order which eventually authorised the acquisition of the appellant's land. The application was made in July 2013 and was examined between January and July 2014, before being approved on 12 January 2015. As part of the process the Council submitted representations of its own, which included an environmental impact assessment identifying current policies of relevance. These included Policy S5 and Policies C16 and C17 of the Local Plan (both of which concerned the green belt). The assessment did not discuss whether the proposed bypass would be contrary to those policies but indicated in tabular form that the impact in respect of all three would be neither compliant nor non-compliant, but "neutral".

50. As the DCO process progressed, the examining authority sought clarification of the perceived relevance of Policies C16 and C17 (without referring to, or questioning the identification of Policy S5 as of relevance). The inspector asked whether any part of the DCO site fell within the green belt. In its response the Council stated that "the proposed site is not within the designated Green Belt" and suggested that its previous references to Policies C16 and C17 had therefore been in error.

51. The inspector duly reported to the Secretary of State that the bypass scheme would occupy no land in the green belt as then defined in the development plan. The inspector made no reference to Policy S5 but was clearly aware that an extension to the green belt was proposed and that the Council's preferred option, in the emerging draft Local Plan Core Strategy, was that the appellant's land should not be included within it but should be safeguarded. Part of the bypass would pass through land which the draft proposed as green belt but the inspector noted the Council's comment that the bypass would not be inappropriate development in the green belt. Paragraph 90 of the NPPF suggested that appropriate green belt uses would include local transport infrastructure which could demonstrate a requirement for a green belt location. The bypass would preserve the openness of the green belt and would not conflict with the purposes of including land

within it. The inspector concluded that the bypass would necessarily enter the proposed green belt, but that the existence of the proposal was not a sufficiently strong reason to impede approval of the scheme.

How Policy S5 was interpreted by the Council in its development control role

52. In its development control role, the Council (or the Planning Inspectorate on appeal from decisions of the Council) made a number of decisions at around the time of the 2014 DCO process and the March 2015 valuation date which at least had the potential to engage Policy S5. The appellant laid particular stress on five of those decisions, concerning development sites at Loansdean, Stobhill, Fenrother, Fairmoor, and Roseden Cottage.

53. The Loansdean and Stobhill development sites are each located immediately outside but adjacent to the southern boundary of Morpeth as set by policy MC1 of the Local Plan. They are therefore within the area covered by the general extent of the green belt described in policy S5. Like the appellant's land, they are both about 2km from the town centre; unlike the appellant's land they are largely unaffected by the bypass and, for that reason, were relied on by Mr Cairnes as good proxies for decision making in a "no-bypass world".

54. Two applications for planning permission for substantial residential development at Loansdean involving almost 400 houses were made before the valuation date. Council officers recommended approval but their recommendations were not accepted by members (we were not told their reasons, but we assume they did not relate to Policy S5). The Council subsequently withdrew its opposition when the applications were pursued to appeals. In his appeal decision issued on 17 July 2014 the inspector gave no consideration to Policy S5 and referred to the subject of the green belt extension only when considering how housing need was to be satisfied. In that context the focus of his attention was on the absence of any proposal in the emerging Local Plan to include the appeal site within the green belt. The inspector noted the recognition in that document that housing was likely to be required in the immediate locality during the period covered by the plan and took that to "indicate that there is no "embargo" on development in the south of the town as a matter of principle".

55. An application for a development of 396 houses on the Stobhill site was determined by the Secretary of State following a non-determination appeal heard in July 2014. As the inspector recorded, it was common ground between the Council and the applicant that Policy S5 was a material consideration but that "the site is not located within or designated as Green Belt". The parties also drew to the inspector's attention the exclusion of the site from the green belt extension proposed in the Council's draft Local Plan Core Strategy. Neither the inspector, nor the Secretary of State, dissented from the view that the site was not currently designated as green belt and the appeal was allowed on 15 December 2014. Referring to Policy S5 the inspector said that "its only role is to establish the strategic framework for the preparation of the emerging [Local Plan]".

56. The Fenrother decision made on appeal in July 2014 concerned a site to the north of Morpeth which was not on the fringes of the existing settlement but was well within the proposed green belt extension. The application was for permission to develop 5 wind

turbines on previously undeveloped land. In his report the Inspector referred to Policy S5 and noted that although the precise boundaries of the proposed extension had never been defined the appeal site was well within the area described in the policy and shown on the key diagram.

57. One issue debated at the inquiry was the meaning of the statement in Policy S5 that an extension to the green belt "will extend" from the existing boundaries. It had been argued for the applicant that the policy did not yet have any operative effect. The issue, as the Inspector put it, was "whether, at this time, the appeal site is within an adopted Green Belt." Agreeing with the professional witnesses who had given evidence the Inspector concluded that the site was already within the general extent of the green belt.

58. In a passage relied on by Mr Cairnes the Inspector pointed out that "this is not a situation where a site might be argued to be on the margins of the area, as the Structure Plan Key Diagram is unambiguous in identifying the location of the site as within the area." The fact that detailed boundaries had not yet been defined "cannot realistically be used as an argument to suggest that the Green Belt extension has not come into effect."

59. In his decision issued on 31 July 2014 the Secretary of State agreed with the Inspector that "the appeal site lies within the adopted Green Belt". He then addressed the consistency of the proposal with green belt policy and concluded that it was inappropriate development which would harm the openness of the area and result in encroachment into the countryside. Although the proposal had environmental benefits, these did not clearly outweigh the harm to the green belt and to visual amenity.

60. Mr Holland was able to identify a number of decisions after Fenrother in which a distinction was made between sites which were "unambiguously" within the green belt and those which adjoined the settlement boundary, and Mr Cairnes submitted that green belt policies had been, and should be, applied only to those in the former category. The most relevant of these decisions concerned appellant's own application to build 255 homes on the site at Fairmoor which lies to the east of the A1 and immediately to the north-west of the land which is the subject of this appeal (see paragraphs 32-33 above).

61. The Council's July 2014 Fairmoor decision identified green belt policies, including Policy S5, as relevant considerations but did not discuss them or suggest any conflict existed with the proposal. Because of its accessibility and proximity to the trunk road network a large part of the application site had been allocated for employment uses in the Local Plan adopted in 2003 and consideration was given to the loss of this allocation and the policy conflict if residential development was permitted. It was noted that the emerging Core Strategy identified the north of the town as the preferred location for the majority of housing, and that there were no existing proposals to develop the land for employment. This enabled the application for residential development to be considered on its own merits. Recognising that the limited supply of housing land engaged the presumption in favour of sustainable development in paragraph 49 of the NPPF, the Council found strong justification for a departure from the established and emerging policy on employment use in the significant contribution the proposal would make to housing delivery.

62. The Council's decision on the application in respect of Roseden Cottage post-dated the valuation date by a few days but it was relied on by Mr Cairnes as demonstrating the approach taken by the Council in light of the inspector's decision in the Fenrother appeal. The officer's report appears to discern two principles in the Fenrother decision. The first is uncontroversial, and is based on the facts of Fenrother itself, namely that "where it is clear that a particular location is within the Green Belt, relevant Green Belt policies apply." The second proposes the converse, namely that "where it is unclear that a particular location is within the Green Belt, relevant Green Belt policies should not apply…". Although this was described in the officer's report as "the methodology of the Fenrother Inspector", on our reading of that decision this second proposition is unrelated to the facts of the wind farm appeal and does not reflect any explicit statement by the inspector. Rather, it involves an assumption which was then applied by the Council to the Roseden site, another located just outside the settlement boundary. On the basis that, in that location, the extent of the green belt as described in policy S5 was considered to be ambiguous, green belt policies were held not to apply and permission for a single new dwelling was granted.

63. We were informed that the analysis exemplified by the Roseden decision was followed consistently by the Council until the Autumn of 2015, and we were shown several examples in which the language of the Roseden report was repeated, verbatim, in other delegated decisions.

64. Mr Cairnes argued that the sites to the south of Morpeth were directly comparable to the appellant's CAAD site, but with the additional feature that development to the south of the town was not dependent on the delivery of the new bypass. On the basis of the material we have now reviewed he submitted that, had the Council been considering a planning application in March 2015, it would have adopted the same approach as in the Stobhill, Loansdean and Roseden Cottage decisions. The appeal site is adjacent to the settlement boundary where the inner extent of the general green belt extension had not yet been defined so the site would not have been treated as falling within the green belt. Mr Cairnes criticised the stance now taken by the Council as inconsistent with its established approach at the valuation date, and he urged on the Tribunal the importance of consistency in public decision making, especially in the planning field.

The alternative approach: appellate decisions on applications within the York green belt

65. The approach taken in Morpeth to policies for the general extension of the green belt subject to later definition in local plans, was not one which was universally adopted. Despite the basis on which it had proceeded in 2014, by the time of the hearing before us the Council contended that its own decisions relied on by Mr Cairnes were based on a mistaken interpretation of Policy S5. That submission was supported by reference to three decisions of the Secretary of State concerning applications for residential development on sites within the general extent of the York green belt where no defined boundary had yet been fixed by an adopted local plan. The sites were identified in the relevant decisions as Land at Germany Beck, Brecks Lane, and Land off Avon Drive.

66. The Secretary of State's decision concerning the land at Germany Beck (together with a second parcel of land West of Metcalfe Lane) was made on 9 May 2007, and concerned

applications for residential development of 700 homes and 540 homes respectively on two sites within the general extent of the green belt around York. The Germany Beck site is about 2 miles south of the city centre, just east of York racecourse. The decision is interesting because it discloses a disagreement between the Secretary of State and her own planning inspector on the issue with which we are concerned.

67. The inspector concluded that, despite being included within the general extent of the greenbelt extension, the sites should not be afforded green belt status. In his view, the indication in the relevant structure plan that the "general extent" of the green belt extended for six miles from the city centre, without saying anything about the inner boundary, did not imply that all land within that extent should be green belt. The structure plan was intended to deal with strategic matters rather than details. Referring to the applicable national policy guidance, PPG 2, the inspector explained that certainty over the location of green belt boundaries was necessary and was to be achieved by adopted local plans. Where precise boundaries were as yet undefined there must, within the general extent of the green belt, be "degrees of uncertainty". The application of Green Belt policy to sites beside the inner boundary "must be very uncertain", while there would be much less doubt about the policy position of land in the middle of the belt, surrounded by fields and farmland. The inspector rejected the submission that green belt policy applies throughout the "general extent" unless and until the option to exclude land had been exercised through the local plan process. Rather, when it was necessary to resolve uncertainty over the applicability of green belt policy, "the key is to test whether, on the basis of appropriateness, prematurity, or precedent there is any reason not to apply Green Belt policies for the time being". The application sites had both been considered in the local plan making process, which was almost at the formal adoption stage, and were recommended for exclusion from the new green belt having regard to contribution to the achievement of green belt purposes. On the basis that the housing needs of the City could not be met without the allocation of the sites for housing, the inspector recommended that consent be granted. If he was wrong about the applicability of green belt policy, he considered that the same housing requirements would constitute very special circumstances sufficient to outweigh any harm to the green belt, so that his recommendation would remain unchanged.

68. The Secretary of State disagreed with this approach in principle and stated at paragraph 15 of the decision letter that she did not consider "that the lack of a defined boundary is sufficient justification to arbitrarily exclude any site contained within the general extent of the green belt". She considered that until such time as the detailed boundaries of the York green belt were defined in a statutorily adopted local plan "both sites should be treated on the basis that they lay within the green belt". The Secretary of State nevertheless went on to grant consent. Treating the sites as being sites to which green belt policy applied the Secretary of State agreed with the inspector's alternative reasoning that the need to satisfy the demand for additional housing constituted very special circumstances of sufficient weight to overcome the harm to the green belt.

69. We make two comments about the debate which featured in the Germany Beck appeal. First, although the Secretary of State objected to land within the general extent being "arbitrarily" excluded from the green belt, she did not address the inspector's assessment of the quality of the sites or their minimal contribution to the achievement of green belt

purposes. The inspector's approach had not been arbitrary, and the test he proposed could not be criticised on that basis. We therefore read the Secretary of State's decision not as objecting only to arbitrary exclusions, but as objecting as a matter of principle to any disapplication of green belt policies from land within the general extent.

70. Secondly, we note that the route by which the Secretary of State determined to grant consent (and which formed the inspector's alternative reasoning) pre-dated by several years a written ministerial statement issued in July 2013 to which our attention was drawn. This emphasised the government's view that the single issue of unmet housing demand was unlikely to outweigh harm to the green belt and other harm so as to constitute "very special circumstances" justifying inappropriate development in the green belt. The outcome of the Germany Beck application appears to us to be at odds with that proposition and, were the Germany Beck decision being relied on by a decision maker at the date relevant to this appeal, 16 March 2015, it would have to be considered subject to the later guidance.

71. The second York decision relied on by the Council, again made by the Secretary of State, concerned a site at Brecks Lane. It was issued on 18 March 2015 and provides a useful review of policy context and interpretation at that date.

72. The Brecks Lane application was for development of 102 homes on a site which was agreed by all parties to be within the outer edge of the York green belt despite its boundaries remaining undefined by an adopted local plan. On one reading of the decision there appears again to be tension between the approach of the inspector and that of the Secretary of State, although they concurred in the outcome. The inspector agreed with the parties that the site was within the outer edge of the green belt but considered that it was "not appropriate to assume every piece of un-built land within the general extent of the Green Belt should necessarily be considered Green Belt, rather each case should be considered on its own merits". The Secretary of State agreed with the inspector that the proposal would have a significant and harmful effect on openness, and that the site met four of the five green belt purposes. Whilst it was of lower value than some surrounding green belt areas, "it is nonetheless a Green Belt site and, as such, it is afforded significant protection". Despite attributing significant weight to the provision of affordable housing and other economic benefits in the overall planning balance, the Secretary of State concluded, in agreement with the inspector, that very special circumstances did not exist to justify the proposal. Although the Secretary of State expressed himself in terms which might be thought more categoric than the inspector ("it is nonetheless a Green Belt site"), read as a whole the decision appears to us to confirm that the Secretary of State was adopting the same approach as the inspector by considering the matter "on its own merits". Having concluded that the site served green belt purposes, he applied green belt policies to it. He did not take the more robust approach his predecessor had applied to Germany Beck.

73. The last of the trio of York decisions was made in April 2017 and concerned land off Avon Drive. The application sought consent for 192 dwellings on land within the general extent of the York green belt. Referring to the previous Germany Beck decision the Secretary of State reiterated the view that the lack of a defined boundary was "insufficient justification to arbitrarily exclude any site" within the general extent. He agreed with the inspector that,

based on the key diagram included in the regional spatial strategy, "there is no reason not to apply Green Belt policy unless or until an adopted LP defines the long-term Green Belt boundary". No very special circumstances had been demonstrated and the application was accordingly refused.

74. The Avon Drive decision can be read as reconciling the divergence of view apparent between the inspector and the Secretary of State in Germany Beck. The inspector confirmed that the policy context was not materially different 10 years on from Germany Beck, and considered that the "precautionary approach" taken by the Secretary of State remained applicable. He suggested that the key test postulated by the inspector in that case ("whether there is any reason not to apply Green Belt policy for the time being") remained appropriate, and he regarded the Secretary of State's decision as not being inconsistent with that approach. The Secretary of State agreed with the inspector's conclusion and did not dissent from his analysis.

75. The Avon Drive inspector had identified an alternative approach (in paragraph 210 of his report) based on appeal precedent, which was to assess a site within the general extent of the green belt against green belt purposes and to have regard to the issues of prematurity and precedent (although neither was in issue in that case). It was said to be common ground in that case that, where there is a dispute between the parties as to whether a site lies within the general extent of the green belt, it would be appropriate to assess it against the five green belt purposes (paragraph 220). Having carried out that exercise the inspector found that the site served a number of green belt purposes, which, he said, "reinforced" his view that it was within the general extent of the green belt.

76. Drawing the York decisions together, we identify the following features of the approach being taken there by the Secretary of State. First, the inclusion of a site within the area indicated on a key diagram referred to in a structure plan was sufficient to place the site within the general extent of the green belt. Secondly, the mere fact that the boundaries of the green belt remained undefined was not a justification for regarding a site, including one adjoining a settlement boundary, as excluded from the general extent. Thirdly, there was a presumption that green belt policy applied to contentious sites within the general extent as indicated on the key diagram, the critical question in such cases being "whether there is any reason not to apply Green Belt policy for the time being". Additionally, or alternatively, the propriety of applying green belt policies should be based on an assessment of the contribution which the particular site made to the achievement of the five green belt purposes identified in NPPF, paragraph 80.

The parties' respective positions

77. For the appellant, Mr Cairnes stressed the need for a consistent approach to be adopted in the decision-making process, which underpins public confidence in the planning system, and referred to the decision of the Court of Appeal in *North Wiltshire District Council v Secretary of State* (1993) 65 P & CR 137, 145, and to the more recent *DLA Delivery Ltd v Baroness Cumberlege of Newick & Anor* [2018] EWCA Civ 1305. He relied on the recognition in the Council's emerging Northumberland Local Plan Core Strategy and the supporting Green Belt Settlements Assessment, both published in December 2014, that an

inner boundary needed to be identified which provided sufficient capacity to meet the Council's strategic land requirements. The preferred option was to allow most development to take place to the north of Morpeth and the proposed green belt boundary was shown some distance beyond the current settlement boundary, with the appellant's land shown as safeguarded for development.

78. Mr Cairnes also relied on the development control decisions made by the Council and by the Secretary of State in respect of comparable sites, which would have been material planning considerations at the valuation date. The Stobhill and Loansdean decisions showed that immediately prior to the valuation date the Council did not consider that green belt policies applied to edge of settlement sites surrounding Morpeth or that their development conflicted with Policy S5. The approach exemplified by these decisions should be preferred to the Secretary of State's decisions concerning the York green belt, which concerned a similar but not identical policy applied in a different part of the country. The Secretary of State had not sought to rely on the approach in the York decisions when deciding the Stobhill appeal.

79. Mr Cairnes submitted that the approach taken by the inspector in the Fenrother case was lawful. Until boundaries were set as part of the plan making process, green belt policies should not be applied unless it was clear that a particular site would be included in the eventual designation. Where boundaries were undefined and the issue of the status of a site arose in the context of determining an application for planning consent, the decision maker was required to exercise a judgment. The decision in the Stobhill and Lonesdean cases had been that the sites were not within the green belt, and had been justified because of their edge of settlement locations.

80. The Council's position was that the appellant's land was designated as being within the general extent of the green belt. It had been assessed in the December 2014 Green Belt Settlement Assessment as serving green belt purposes and was identified in Assessment Map 3 as making a medium contribution to those purposes. Policy S5 required that it be treated as green belt until its designation under the development plan was changed. The tilted balance in paragraph 14 of the NPPF did not apply to green belt land, and normal green belt policies should therefore be applied when considering the notional application for residential development. Substantial weight should be given to the harm which would necessarily be caused to the green belt by the proposed development and no very special circumstances existed to justify a grant of permission.

81. Mr Pereira questioned the relevance of the principle of consistency on which the appellant relies. On matters of planning judgment, one decision maker is free to differ from the judgment of another, provided reasons are given; on matters of law, a decision maker is not required (or permitted) to repeat the mistakes of a predecessor. The decisions of the Secretary of State concerning the York green belt were correct in law and relevant to the interpretation of strategic policy concerning the general extent of the green belt. He placed reliance on Mr Holland's acceptance in cross examination that the appellant's land is within the general extent of the green belt. At the valuation date it was too early in the plan making process for any significant weight to be given to the emerging Northumberland Local Plan Core Strategy, published in December 2014.

Conclusion

82. In his submissions Mr Cairnes did not suggest that Policy S5 was not already operative or that it had not already had the effect of generally extending the green belt. Although the Policy is expressed in the future tense ("an extension to the Green Belt will extend from the existing boundary northwards") Mr Cairnes did not disagree with the consensus of professional opinion endorsed by the inspector in the Fenrother case (see paragraphs 193 and 203 of his report) that the general extension had come into effect.

83. Mr Cairnes also agreed with the Tribunal that a site was either currently within the green belt or currently outside it, and that the designation "treated as green belt" was not one with any meaning in planning law. The boundaries between land within and outside the green belt were currently undefined, and the frequent references in the evidence to land being within "the general extent" of the green belt reflected this. But that does not mean that there exists an indeterminate category where the application of green belt policy is a matter of discretion.

84. These are both important points. The decision maker is required by s.38(6) of the Planning and Compulsory Purchase Act 2004, to determine a planning application in accordance with the statutory development plan unless material considerations indicate otherwise. If the effect of Policy S5 is that land outside the settlement boundaries of Morpeth is green belt, the decision maker is not free to disapply green belt policies, and must give effect to the presumption against development unless very special circumstances outweigh the harm to the green belt which would result.

85. Policy S5 distinguishes between green belt and settlements, and provides that precise boundaries between them is to be defined in local plans. Until those boundaries are fixed, it is not possible to know with any assurance whether a particular site is within the green belt or not. To proceed, in that state of uncertainty, on the basis that green belt policies do not apply, would in a sense be to pre-empt the plan making process. That is the justification for the "precautionary approach" taken by the Secretary of State in the Germany Beck decision and the other York appeals.

86. The precautionary approach is a response to this state of uncertainty. It amounts to a presumption against granting consent unless consent would be granted if the site was known to be within the green belt. It is the antithesis of the approach taken by the Council and by the Secretary of State in Morpeth applications and appeals. The Morpeth approach postulates that a site on the fringe of the settlement, which is not "unambiguously" within the general extent of the green belt extension, should be assumed to be outside the green belt. In its evolved form that approach was said to be justified by the decision of the inspector in the Fenrother appeal, but as we have explained (at paragraph 62 above), there is nothing in that decision which dispenses with green belt policies for sites not "unambiguously" within the general extent of the new green belt.

87. There is no obvious relevant difference between the policy context applying around York and in Northumberland. Mr Pereira did not attempt to distinguish the applicable policies, or to suggest that each approach was correct in its own circumstances. On the contrary, he

submitted that the Council's decision making and that of the Secretary of State in the Morpeth cases was based on a mistaken understanding of the effect of Policy S5. For his part, Mr Cairnes did not suggest that the approach taken by the Secretary of State in the York appeals was wrong. His suggestion that it is a matter of planning judgment whether green belt policy should be applied to such sites perhaps made it unnecessary for him to do so, but we do not find it easy to reconcile his approach with the Secretary of State's reasoning.

88. We do not think the principle of consistency in decision making has any part to play in determining which view is correct. The law is not different in York and Morpeth, and to prefer a particular approach simply because it has been adopted in the local authority area in which the appellant's land is situated would be to treat the meaning of planning policy as a question of geography. We agree with Mr Cairnes that it is reasonable to assume the Council would have adopted the approach it had taken to other fringe sites. But, as we have already explained (at paragraphs [21]-[22] above), we are not required to determine what the Council would have done, but what a reasonable decision maker, properly advised as to the law and the meaning of relevant policies, would have decided.

89. Nor is it relevant to consider what the market might have expected at the valuation date. The cancellation assumption, and the assumption of circumstances known to the market at the relevant valuation date, both required by s.14(4)(b), define the factual circumstances in which the notional application for planning permission is to be taken to have been made. They have nothing to do with the meaning of Policy S5, which did not change.

90. We are not in any doubt that the precautionary approach taken by the Secretary of State to the York appeals is the appropriate one for a decision maker to take in the circumstances of this case. Once a site is included within the description of the general extent of the green belt in the relevant policy, the mere fact that the precise boundaries of the extension have not yet been defined is not a reason for treating the land as if green belt policies do not apply to it. The only safe assumption, in the absence of some good reason for concluding that the site is not within the green belt, is that it is green belt land. The approach taken in the Morpeth cases appears to give no weight at all to Policy S5 (even in cases where it was recognised as being applicable, such as Stobhill and Fairmoor) which does not seem to us to be a defensible position.

91. We do not accept Mr Cairnes' submission that the applicability of green belt policy is simply a matter of planning judgment. There are aspects of judgment in determining whether, despite being within the general extent of the extension, there is a sufficient reason to conclude that a particular site is not green belt land but, in general, the proper application of s.38(6) of the 2004 Act requires it to be assumed that green belt policies apply unless and until precise boundaries are defined through the local plan process.

92. Planning judgment is required in the assessment of a particular site against the five purposes of the green belt identified in NPPF paragraph 81. But, in agreement with Mr Bolton who said that he had considered this issue "for the sake of robustness", we prefer to regard that analysis as serving a subordinate role. It will be relevant in cases where there is said to be a good reason for disapplying green belt policies, despite a site being within the

general extent of the extension to the green belt. We have therefore asked ourselves whether there is any reason not to apply green belt policy for the time being, and whether the site contributed to any of the purposes of the green belt.

93. The appellant's land clearly contributes to green belt purposes, and in his oral evidence Mr Holland agreed that it did so. In its 2014 assessment the Council considered that the site made a medium contribution to those purposes, particularly in safeguarding the countryside from encroachment. The assessment was made on the assumption that the bypass would be built. Without the bypass there is no reason to consider that the site would make any less contribution, and it might have attracted a higher rating by reason of its role in preventing the merger of Fairmoor and Fulbeck.

94. Approaching the status of the appeal site as a matter of planning judgment and assuming only a medium contribution to the achievement of green belt purposes, we can nevertheless see no reason not to apply green belt policies to the appellant's land. Nothing in the evidence or submissions identified any reason not to do so. Indeed, Mr Holland agreed that if we were satisfied (as we are) that the site is within the general extent of the green belt by reason of Policy S5, green belt policies should be applied to it.

95. After we issued this decision in draft we were provided by the parties with a copy of the very recent decision of Stuart-Smith J in *Wedgewood v City of York Council* [2020] EWHC 780 (Admin) which concerned the lawfulness of a decision by the City Council to grant planning permission for the development of a site within the general extent of the green belt around York. Although the decision under challenge was made in November 2019 the policy context described above appears not to have changed significantly and the York green belt remains undefined. The reasons for granting permission recorded in the Officer's Report showed that it was considered that green belt policies should not be applied to the site with which the Court was concerned because of its urban location (was not connected to the open countryside and was regarded by the local authority as forming part of the urban area). The Court concluded that the approach evidenced by the Officer's Report was legally correct and involved making a planning judgment about the status of the site that was rational and permissible.

96. The issue of whether the site was or should have been treated as being within the green belt was described by Stuart-Smith J as "novel and difficult", a characterisation with which we respectfully agree. The learned Judge was also clear that the issue involved "a planning judgement within the exclusive province of the local planning authority". We recognise that there is a difference in emphasis between the site-specific assessment approved in *Wedgewood* and the precautionary approach which we have applied in reaching our own conclusion, in which we have assessed the characteristics of the site in order to determine whether an exception ought to be made in the application of green belt policy. But we think it unlikely that a different conclusion would have been reached in either case if the alternative approach had been followed. For that reason, although the Council asked for the opportunity to make further submissions in the light of *Wedgewood*, we did not think it necessary to request them.

97. We therefore determine the first issue in the Council's favour and will approach the remaining issues on the basis that the appellant's land is within the green belt and subject to green belt policies.

Issue 2: Do very special circumstances clearly outweigh the harm caused by the appellant's proposal, such that planning permission could reasonably have been expected to be granted for it?

98. On the basis that the CAAD proposal is for development in the green belt, paragraph 87 of the NPPF is engaged. Inappropriate development is, by definition, harmful to the green belt and would not be approved except in very special circumstances. As there was disagreement between the expert witnesses on the extent of that harm, we will consider that question first.

99. The evidence which we received on the quality of the landscape and the visual impact of the CAAD proposal would be material considerations in any application concerning the site. The experts were agreed that the land is not in an area of designated high landscape value, nor subject to any other landscape policy designation for strategic gap, green wedge or local green space. In the Northumberland Landscape Character Assessment, it sits in landscape type 38 (Lowland Rolling Farmland) and landscape character area 38b (Longhorseley), the latter being classified as of medium sensitivity.

100. In her evidence for the Council, Mrs Fisher provided her own landscape sensitivity assessment as at the valuation date, concluding that the landscape had 'community value' and medium susceptibility to the proposed development, resulting in overall medium sensitivity to the development. Medium range views of the land were available from the north-east and west, whilst from the north and south it was enclosed. She identified that the land played a key role as part of the rural setting of Morpeth, though not as a skyline or backdrop to views. Mrs Fisher explained that 'community value' was a non-specific term used to identify a landscape with no specific designation, but which need not be regarded as being of low value to its local community. She concluded that the proposed development would alter an area of open countryside to one of townscape, connecting Morpeth to Fairmoor, and that the effects would be major/moderate and its significance adverse. She concluded that the visual effects would be adverse, except from Fulbeck Lane where proposed planting would, over time, reduce the effect to neutral.

101. Mr Robinson, in his evidence for the appellant, disagreed with Mrs Fisher's conclusions. He assessed that the magnitude of change to the landscape character would be moderate but not adverse and in some respects neutral. He pointed out that the land has no landscape designation, that the proposed development included landscape mitigation and suggested that a townscape is a valid form of landscape. Regarding visual impact, Mr Robinson concluded that the proposed development would be viewed in two parts either side of the Cotting Burn. Houses to the west side would be seen in association with the consented Fairmoor development to the north while houses to the east would be seen in association with Fulbeck. The whole would become part of Morpeth's suburban edge.

102. In the Northumberland Key Land Use Impact Study dated September 2010, to which both experts referred, the site was agreed to be covered in part by an area of lower landscape sensitivity, adjacent to the A192. The remaining majority of the land was 'white land', not identified as having either higher or lower landscape sensitivity. The settlement boundary along the eastern boundary of the reference land, adjoining Fulbeck, was identified as 'garden/field boundary'. It was agreed that the whole document was produced with knowledge of the proposed bypass and was therefore informative but not indicative of thinking in a 'no-bypass world'.

103. Mr Cairnes reminded us in his submissions that the Council's 2014 Green Belt Assessment demonstrated that the appeal site made only a medium contribution towards green belt purposes. Having heard the evidence and viewed the site from different vantage points we do understand why it was not assessed as making a greater contribution to green belt purposes, but its classification as making a medium contribution to green belt purposes does not mean its contribution is insignificant. Viewed from the land north of Lancaster Park, from which the bypass is largely concealed in a cutting, there is a good view across the site which allows an impression of how it would have looked had the bypass been cancelled. Mrs Fisher's description of the site as comprising open pastoral farm land is fully justified from this vantage point and its contribution to openness is apparent. It is true that there was already quite a lot of development around the site before the bypass. The A1, the new Fairmoor development, Lancaster Park on the horizon to the west and Fulbeck fringing the site to the south are all visually significant from within the site and contribute to the impression that this is what Mr Robinson called a "peri-urban" location. Mrs Fisher described the site as not experiencing "a huge urban influence".

104. Mr Robinson's point on coalescence was well made, and we can see how, when viewed from the A192, the presence of the Cotting Burn might cause the portion of development to the north to appear to join with the new Fairmoor site, while larger houses in larger plots to the east of the Burn may merge with Fulbeck. A degree of separation will be maintained by the strong landscaped corridor dividing the two parts. There is no doubt, however, that the contribution which the site makes to openness would be largely eliminated by the development of 135 houses and that the original distinct separation of Fulbeck from Fairmoor would be substantially eroded. In short, the harm caused to the green belt by the CAAD scheme would be substantial.

105. The appellant's primary case was that the appellant did not have to demonstrate the very special circumstances necessary to justify development in the green belt and that the tilted balance should be applied, with the more restrictive policies in the development plan being treated as out of date and outweighed by the acknowledged shortage of housing land. That case falls away with our conclusion on the first issue.

106. The appellant did develop an alternative case on very special circumstances. This was not deployed in its statement of case, or in Mr Holland's original report, but emerged in his report in response to Mr Bolton's evidence. It began with the proposition that a number of circumstances could collectively amount to being very special, and that a single very special circumstance need not be demonstrated. Although it was accepted that, in view of published Planning Policy Guidance, housing need was unlikely to provide very special circumstances on its own, taken in conjunction with other matters it could provide the

necessary counterbalance to harm caused to the green belt by inappropriate development. Mr Pereira did not challenge that proposition.

107. The circumstances on which the appellant relied related very substantially to the supply of housing in the world of the cancellation assumption. Mr Holland suggested that in the absence of the bypass the ability to satisfy housing demand around Morpeth would have been removed altogether or significantly diminished. It was agreed that strategic delivery of all 375 houses planned on the St George's Hospital site would not have been possible. The bypass would facilitate delivery of 255 of those units by providing direct access to Phase B of the development. Without it only the 120 houses planned for Phase A could confidently be delivered without causing significant additional traffic capacity issues in the town centre (particularly at the already highly congested pinch point at Telford Bridge). This would be the biggest limiting factor to development anywhere other than to the north of the town.

108. Housing land supply at the valuation date stood at only 3.6 years, and Mr Holland contended that without the bypass and the ability to deliver St George's Phase B housing, the shortfall from the required five-year housing supply would necessitate consideration of alternative and otherwise suitable sites, even within the green belt.

109. Mr Holland also proposed that other benefits would be achieved by development on the appellant's land, including additional open space and public access, s.106 contributions and affordable housing. In cross-examination he acknowledged that there was no evidence of need for additional open space or for public access, and that the CAAD application would simply provide these 'in-site' rather than for general public benefit. He also acknowledged that the purpose of s.106 provisions was to mitigate harm and would not constitute very special circumstances and that the affordable housing provision at 30% was no more than policy compliant.

110. Apart from these matters it was not clear what other substantial factors the appellant relied on as providing, in combination with housing need, sufficiently special circumstances to justify and outweigh the harm which would be caused to the green belt by the CAAD proposal. The fact that the land made only a medium contribution towards green belt purposes does not persuade us that the need for housing land is capable of bearing the weight placed on it. At the valuation date the provision of 120 houses at the St George's A site would have alleviated the shortfall adjudged severe by officers three months earlier when the Stobhill development was approved. We accept that housing land supply would have been a serious concern but Mr Holland acknowledged that it was not enough on its own, and in our judgment the other matters which he referred to were insubstantial and amounted to little more than compliance with existing policy. We consider that a reasonable decision maker, approaching the CAAD proposal on the basis that it involved development in the green belt, would have found no special circumstances sufficient to justify granting consent.

Issue 3: At the valuation date, could it reasonably have been expected that planning permission would be granted for the CAAD proposal in the future, and if so, when?

111. Section 14(4) identifies appropriate alternative development as development for which planning permission could, at the valuation date, reasonably have been expected to be granted on an application decided on that date, or at a time after that date. The third issue is whether planning permission could reasonably have been expected to be granted after 16 March 2015. If so, compensation will be assessed on the basis that it is taken to be known at the valuation date that planning consent would be granted on that later date.

112. The question is not, as it was sometimes put by the parties in their written material and submissions, whether there was a reasonable prospect of planning permission being granted at a date in the future. A "reasonable prospect" of an outcome is not necessarily synonymous with the occurrence of that outcome being reasonably to be expected. One might say that there is a reasonable prospect of the occurrence of something which has only a 40% chance of happening, but that is not what we understand to be the effect of s.14(4). Before the Tribunal could grant a certificate based on the expectation of planning permission being granted at a date in the future, we would require to be satisfied that at the valuation date it was more likely than not that planning permission would be granted by that date.

113. We have determined that the appellant's land is within the green belt, and subject to green belt policies, so the arguments of the parties on future policy direction can only now be considered in that context. Thus in considering the emerging local plan, the world of the cancellation assumption is the world of the green belt, subject to two routes by which its status might change. The first is the possibility that the site might be removed from the green belt when its precise boundaries come to be defined in the Local Plan; the second is the prospect that a time may come when the need for housing sufficiently outweighs the harm to the green belt so that the boundary is moved beyond the appeal site.

114. The case for the appellant was explained by Mr Holland, who undertook assessments of the likelihood of planning permission being granted for the CAAD scheme in the period up to 10 years after the valuation date, then up to 15 years, and finally in the period beyond 15 years. The case was founded on the lack of housing supply in the world of the cancellation assumption, and on a review of the potential alternative sites around Morpeth as considered in the Green Belt Settlement Assessment. Emphasis was placed on the benefits offered by the appeal site in terms of direct access to the A1. Mr Holland concluded, without differentiating between the 1 – 10 year and 11 – 15 year periods, that an application for residential development would have been considered increasingly favourably during the later years of the plan as the 5 year supply of housing in Morpeth reduced and the need for more sites became acute. Further weight was added to this proposition by the suggestion that development of the appeal site would provide sustainable and otherwise unavailable access eastwards towards the St George's Hospital site, although we note that the two sites are not contiguous. Looking beyond 15 years Mr Holland concluded that it was very likely that planning permission would be granted for the site.

115. For the Council, Mr Bolton commented on the identification of the appeal site as safeguarded land in the draft Core Strategy, which was still under consultation and produced in the knowledge of the bypass. In his opinion the boundary created by the bypass influenced the proposed designation of the site and he contended that without the

defensible boundary of the bypass the site would have been retained within the green belt; even if it were to have been designated as safeguarded land, there would have been be no reasonable expectation of planning permission being granted during the plan period to 2031. Looking beyond 15 years, even with decreasing levels of housing delivery, because planning policy, demographics and political climate are impossible to judge there remained in Mr Bolton's view a great deal of uncertainty over whether the appeal site would be a preferred development location.

116. We recognise that the appeal site does have merits which would have caused it to be considered for residential development after the valuation date in the world of the cancellation assumption. However, the site is within the green belt, which adds a high level of protection to be weighed in the balance, and risk to the outcome of an application.

117. Before it would be possible to conclude that the site would, on balance of probability, be likely to obtain planning permission for the appellant's proposed development, it would be necessary for a number of milestones to be passed with outcomes favourable to the appellant. It would be necessary either for the land to be excluded from the green belt when its boundaries were defined, or for sufficiently special circumstances to exist to enable planning permission to be achieved despite its retention in the green belt. It would also be necessary that it be designated as available for residential development and not either safeguarded for future development after the period of the Core Strategy, or identified as available for employment uses. Each of these contingencies introduces a measure of delay and uncertainty, and successive contingencies compound the odds against the achievement of permission for the appellant's proposed development at, or by, any particular date.

118. The difficulty for the appellant is that the cancellation assumption itself casts a fog over the local and strategic development landscape around Morpeth and County wide. It is not possible, on the evidence presented to us, to form any confident conclusion on the changes which might have been required. Mr Holland agreed, when it was put to him in cross examination, that if the bypass had been cancelled the whole development strategy for Morpeth would have needed to be revised. The inspector reporting to the Secretary of State on the Stobhill application accepted evidence he received that the development of the majority of the land to the north of Morpeth depended on the bypass, and that the Council's development strategy, with its focus on North Morpeth, would clearly be affected if the bypass did not proceed. The bypass was critical to housing growth in Morpeth, and its cancellation might have precipitated a rethink not only of the distribution of housing and employment land around Morpeth, but within a wider area.

119. While we think it is likely that there would have been hope value for the site, we conclude that at the valuation date it could not reasonably have been expected that planning permission would be granted for the CAAD proposal at, or by, any given future date.

Issue 4: Would other development have been appropriate alternative development at the valuation date?

120. The appellant advanced no positive case that any other form of development would have been appropriate alternative development. In the Council's evidence and submissions reference was made to the possibility of other forms of development appropriate to the green belt, such as the construction of buildings for agriculture or forestry or one of the other exceptions identified in NPPF, paragraph 89. There was no evidence of a need for any such development and it is not possible for us to conclude, on the balance of probability, that an application for any of them would have succeeded.

Postscript – The status of Mr Holland's evidence

121. As we mentioned at the start of this decision, Mr Holland, an employee of the appellant's parent company, Persimmon Homes, since 2012 and currently its Land and Planning Manager, tendered evidence which was intended to be received by the Tribunal as expert evidence. When the Tribunal questioned the status of his evidence at the start of the hearing it appeared not to have occurred to either party that there was anything unusual or worthy of comment in a current employee of one party being tendered as its principal expert witness.

122. Mr Cairnes sought to meet the Tribunal's concerns by asking Mr Holland to confirm that he understood that his first duty was to the Tribunal and not to his employer, and that he had no personal financial interest (such as a bonus scheme or other incentive) in the outcome of the appeal. No objection had been raised by the Council when he had filed his expert reports (nor was any raised by Mr Pereira at the hearing). In cross examination by Mr Pereira, Mr Holland agreed that his employment by Persimmon required him to further its interests and those of its subsidiaries, but he denied that his personal prospects would be affected, as he put it, "whether or not I win this case".

123. The Tribunal indicated at the commencement of the hearing that it would form a view on the admissibility of Mr Holland's report once it had heard his oral evidence. Neither party objected to that course.

124. In his closing submissions Mr Pereira referred to the familiar decisions in this field, *R (Factortame Ltd v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] 3 WLR 1104, and *Armchair Passenger Transport Ltd v Helical Bar plc* [2003] EWHC 367 (QB). He invited us not to exclude Mr Holland's evidence but to treat it with caution in view of his employed status.

125. An expert witness is permitted to give evidence on a matter of opinion in order to provide independent assistance to the Court or Tribunal by way of 'objective unbiased opinion in relation to matters within his expertise' *The Ikarian Reefer* [1993] 2 Lloyds Rep 81. In *Factortame* the Court of Appeal held that it was highly undesirable for an expert to have a significant financial interest in the outcome of a case in which he was instructed, as he would if, for example, he was engaged to give evidence on a contingency basis. It would only be in a very rare case indeed that the court would be prepared to allow an expert to be instructed under a contingency fee agreement.

126. *Armchair Passenger Transport* concerned the admissibility of evidence given on behalf of the defendant in a road traffic accident credit hire case by a former employee of the hire company whose charges were sought to be recovered by the claimant. At paragraph 29 of his judgment Nelson J summarised the principles, largely derived from *Factortame*, concerning the admissibility of the evidence of employees, former employees or others with connections to one of the parties:

> "The following principles emerge from these authorities: -
>
> i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.
>
> ii) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.
>
> iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.
>
> iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.
>
> v) The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.
>
> vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.
>
> vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence."

127. We have considered the questions identified in paragraph (v) above. We have already acknowledged that Mr Holland is well qualified to give expert evidence by reason of his experience and qualifications. We are also satisfied that he was aware that, in his capacity as an expert witness, he had a duty to the Tribunal and that it should be his primary duty, ranking ahead of his obligations to his employer. We are less sure that Mr Holland understood what that duty entails, or that he was able fully to carry it out. It was not clear what steps, if any, he had taken to ensure that he brought an objective mind to the questions he had to consider, and it was obvious from his oral evidence that he was personally committed to his employer's case. We intend no criticism of Mr Holland when we say that any employee of a commercial business would find it difficult to form objective and independent opinions, and that he was no exception.

128. In the circumstances of this case, however, we are happy to admit Mr Holland's evidence. No objection was taken to it by the Council. It mostly concerned matters of factual record, and there was no disagreement between the parties over the relevant facts. To the extent that it included expression of opinion on issues of planning judgment, we have found those to be peripheral to the central issue. Moreover, as an expert tribunal, the Tribunal is well equipped to form its own judgment on those issues.

Disposal

129. For these reasons our conclusion is that the appeal should be dismissed and the negative certificate issued by the Council is confirmed.

Martin Rodger QC

Deputy Chamber President

Diane Martin MRICS FAAV

6 May 2020