Neutral Citation Number: [2015] EWCA Civ 10

Case No: C1/2014/1517 & C1/2014/1530

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Green
[2014] EWHC 654 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE TOMLINSON
and
MR JUSTICE MITTING

- -

Between :

The Queen on the application of **(1) Mrs Jean Timmins** **(2) AW Lymn The Family Funeral Service Limited**	**Claimants/ Respondents**
- and -	
Gedling Borough Council	**Defendant/ Appellant**
- and -	
Westerleigh Group Limited	**Interested Party/ Appellant**

- -
- -

Richard Kimblin (instructed by **the Solicitor to Gedling Borough Council**) for **Gedling Borough Council**
Stephen Sauvain QC and John Hunter (instructed by **Hill Dickinson LLP**) for **Westerleigh Group Ltd**
Paul Brown QC (instructed by **Taylor & Emmett LLP** and **Clyde & Co LLP**) for the **Respondents**

Hearing date : 3 December 2014

- -

Approved Judgment

Lord Justice Richards :

1. The main issue in this appeal is whether the creation of a cemetery is "inappropriate development" in the Green Belt, within the meaning of section 9 of the *National Planning Policy Framework* ("the NPPF"), with the consequence that planning permission should not be granted for it except in very special circumstances.

2. The issue arises in the following way. The second appellant, Westerleigh Group Limited ("Westerleigh"), made an application to the first appellant, Gedling Borough Council ("the Council"), for planning permission for the development of a crematorium and cemetery in an area of Green Belt known as the Lambley Dumbles, Nottinghamshire. The second respondent, AW Lymn The Family Funeral Service Limited ("Lymn"), made a competing application for the development of a crematorium, without an additional cemetery, in the same area. The first respondent, Mrs Jean Timmins, was an objector to both applications. The Council, acting through its Planning Committee, granted Westerleigh's application and refused Lymn's application. Mrs Timmins and Lymn brought judicial review proceedings to challenge the decision.

3. During the decision-making process and in the early stages of the judicial review proceedings, all concerned proceeded on the basis that the cemetery element of Westerleigh's scheme was not inappropriate development in the Green Belt. In September 2013, however, in the light of the judgment of the Administrative Court in *Fordent Holdings Limited v Secretary of State for Communities and Local Government* [2013] EWHC 2844, to which I will return, the grounds of claim were amended to include a ground that the Council erred in treating the application for the cemetery element as not inappropriate development in the Green Belt.

4. The judicial review claims were heard by Green J who, in a judgment handed down on 11 March 2014, allowed the claims on the inappropriate development ground and quashed the decision: see [2014] EWHC 654 (Admin). He granted permission to appeal on the basis that the issue is one of real importance.

5. The Council and Westerleigh have both pursued appeals. Their various grounds of appeal raise the following broad issues: (1) is the creation of a cemetery inappropriate development? (2) if so, was there a material error in the Council's treatment of the cemetery in Westerleigh's application, such as to justify quashing the decision?

The meaning of "development"

6. When considering the policies on inappropriate development in the Green Belt, it is helpful to keep in mind that "development" has the same meaning in this context as in the Town and Country Planning Act 1990 ("the 1990 Act"). Section 55 of that Act provides in material part:

> "55(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, 'development' means the carrying out of building, engineering, mining or other operations in, over or under land, or the making of any material change in the use of any buildings or other land."

In so far as Westerleigh's application related to a cemetery, the development for which permission was sought consisted in a *material change of use* of land, as distinct from the carrying out of building or other operations on land.

7. It should also be noted that "building" is defined by section 336 of the 1990 Act as including any structure or erection and any part of a building as so defined.

The present policy: the NPPF

8. Section 9 of the NPPF is headed "Protecting Green Belt land". It starts with some broad principles, in paragraphs 79-81:

> "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.
>
> 80. Green Belt serves five purposes:
>
> - to check the unrestricted sprawl of large built-up areas;
> - to prevent neighbouring towns merging into one another;
> - to assist in safeguarding the countryside from encroachment;
> - to preserve the setting and special character of historic towns; and
> - to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.
>
> 81. Once Green Belts have been defined, local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land."

9. After paragraphs relating to the establishment of new Green Belts and the defining of Green Belt boundaries in local plans, one gets to the key provisions relating to inappropriate development, at paragraphs 87-90:

> "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.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of

inappropriateness, and any other harm, is clearly outweighed by other considerations.

89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:

- buildings for agriculture and forestry;
- provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
- the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
- the replacement of a building, provided the new building is in the same use and materially larger than the one it replaces;
- limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
- limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.

90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:

- mineral extraction;
- engineering operations;
- local transport infrastructure which can demonstrate a requirement for a Green Belt location;
- the re-use of buildings provided that the buildings are of permanent and substantial construction; and
- development brought forward under a Community Right to Build Order."

The previous policy: PPG2

10. Section 9 of the NPPF replaced previous Government policy on the Green Belt, as set out in *Planning Policy Guidance 2: Green belts* ("PPG2"). A comparison between the two documents features large in the rival submissions in the present case.

11. PPG2 contained, in paragraphs 1.4-1.5, provisions broadly corresponding to those of paragraphs 79-80 of the NPPF concerning the fundamental aim of the Green Belt and the purposes it serves. Paragraphs 1.6-1.7 of PPG2 were similar to paragraph 81 of the NPPF, in that they referred to the positive role that Green Belts have to play in pursuing various objectives, including the provision of opportunities for outdoor sport and outdoor recreation near urban areas.

12. Paragraphs 3.1-3.2 of PPG2 contained the presumption against inappropriate development which is reflected in paragraphs 87-88 of the NPPF:

> "3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances. See paragraphs 3.4, 3.8, 3.11 and 3.12 below as to development which is inappropriate.
>
> 3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should not be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations …."

13. The last sentence of paragraph 3.1 cross-referred to paragraphs 3.4, 3.8, 3.11 and 3.12 for inappropriate development. There were some differences in the structure and detailed content of those provisions as compared with paragraphs 89-90 of the NPPF:

> "***New buildings***
>
> 3.4 The construction of new buildings inside a Green Belt is inappropriate unless it is for the following purposes:
>
> - agriculture and forestry …
> - essential facilities for outdoor sport and outdoor recreation, for cemeteries, and for other uses of land which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in it (see paragraph 3.5 below);
> - limited extension, alteration or replacement of existing dwellings …;

- limited infilling in existing villages … and limited affordable housing for local community needs under development plan policies according with PPG3 …;

- limited infilling or redevelopment of major existing developed sites identified in adopted local plans ….

3.5 Essential facilities (see second indent of paragraph 3.4) should be genuinely required for uses of land which preserve the openness of the Green Belt and do not conflict with the purposes of including land in it. Possible examples of such facilities include small changing rooms or unobtrusive spectator accommodation for outdoor sport, or small stables for outdoor sport and outdoor recreation.

…

Re-use of buildings

…

3.8 The re-use of buildings inside a Green Belt is not inappropriate development providing:

(a) it does not have a materially greater impact than the present use on the openness of the Green Belt and the purposes of including land in it;

(b) strict control is exercised over the extension of re-used buildings, and over any associated uses of land surrounding the building which might conflict with the openness of the Green Belt and the purposes of including land in it …;

(c) the buildings are of permanent and substantial construction, and are capable of conversion without major or complete reconstruction; and

(d) the form, bulk and general design of the buildings are in keeping with their surroundings ….

…

Mining operations, and other development

3.11 Minerals can be worked only where they are found. Their extraction is a temporary activity. Mineral extraction need not be inappropriate development: it need not conflict with the purposes of including land in Green Belts ….

3.12 The statutory definition of development includes engineering and other operations, and the making of any material change in the use of land. The carrying out of such

> operations and the making of any material changes in the use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the Green Belt. (Advice on material changes in the use of buildings is given in paragraph 3.8 above)."

The basis of the Council's decision to grant planning permission

14. The Council's decisions on the competing planning applications were based on lengthy officers' reports, comprising an introductory report and separate reports on the Lymn application and the Westerleigh application respectively. It is sufficient for present purposes to quote two passages.

15. The introductory report said this, under the heading "Very special circumstances and other legal issues":

> "Both applications are for inappropriate development in the Green Belt. It should be noted that even if an application contains elements that on their own would be appropriate development (such as a cemetery), the Courts have held that the whole of the development is still to be regarded as inappropriate [footnote reference to *Kemnal Manor Memorial Gardens Ltd v First Secretary of State* [2005] EWCA Civ 835].
>
> Therefore in order to be granted planning permission, very special circumstances (VSC) have to be demonstrated which outweigh the general harm ….
>
> The very special circumstances referred to by Westerleigh in its planning statement … are, in summary:-
>
> - The defined and over-riding need for a new crematorium to serve this part of Nottinghamshire including the benefits of reduction in travel.
>
> - The provision of a further 3 acres of burial land which will relieve pressure on cemetery facilities throughout the District …."

16. The report on the Westerleigh application included the following, under the heading "Green Belt considerations":

> "Development within the Green Belt is inappropriate, unless it is for one of the purposes identified in paragraph 89 of the NPPF or Policy ENV26 of the Replacement Local Plan (RLP).
>
> Policy ENV26 of the RLP states that within the Green Belt planning permission will be granted for appropriate development including, amongst other things, cemeteries ….
>
> This is reflected in paragraph 89 of the NPPF ….

> …
>
> As stated in the NPPF, where development is deemed inappropriate, the application will need to demonstrate that very special circumstances exist which outweigh the harm to the Green Belt and any other harm caused. Crematoria are inappropriate development and 'very special circumstances' need to be demonstrated ….
>
> …
>
> As such, it is considered that, given the very special circumstances that apply in this case, the proposed development would not unduly harm the openness of the Green Belt and consider that the proposal complies with Policy ENV26 of RLP and paragraphs 80, 87, 88 and 89 of the NPPF.
>
> With regard to the proposed cemetery, the list of appropriate Green Belt uses within paragraph 89 of the NPPF and Policy ENV26 of the RLP includes cemeteries and, as such, this element of the proposal is acceptable in policy terms, if it were proposed on its own.
>
> In my opinion, therefore, the proposed cemetery constitutes an appropriate form of development within the Green Belt and that, given the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows, it would preserve the openness of the Green Belt in this location and would not conflict with any of the purposes of including land within the Green Belt, in accordance with Policy ENV26 of the RLP and paragraphs 89 of the NPPF."

The judgment of Green J

17. Green J held that the Council erred in interpreting paragraph 89 of the NPPF as treating cemeteries as appropriate development (provided they met the limited test contained in the paragraph). He said that paragraph 89 is concerned with the construction of new buildings and might, for example, address toilet facilities or a cafeteria or a car park which serves a cemetery but is not concerned with the cemetery itself, so that "the Defendant erred in treating the exception as applying to the cemetery as opposed to a new building which provided facilities to serve the cemetery" (paragraph 23 of his judgment).

18. He went on to say that that conclusion would not matter if upon a true construction of section 9 of the NPPF as a whole (as opposed to paragraph 89 specifically) cemeteries are not treated as exerting any adverse effect upon the Green Belt. For reasons given at paragraphs 25-32 of his judgment, he held that section 9 means that *any* development in the Green Belt is treated as *prima facie* inappropriate and can only be justified by reference to very special circumstances, save in the defined circumstances set out in paragraphs 89 and 90; and that the creation of a cemetery does not fall within one of the exceptions in paragraphs 89 and 90.

19. An important part of that reasoning, at paragraph 31 of the judgment, was that the proposed development constituted a material change of use from agricultural land to a cemetery. Had paragraph 3.12 of PPG2 applied, the development would have been considered appropriate in so far as it maintained openness and did not conflict with the purpose of including land in the Green Belt:

> "However that paragraph has not been replicated in the NPPF. This, in my view, was intentional and reflects a deliberate shift in policy towards a tightening of the circumstances in which development could occur within the Green Belt."

20. At paragraphs 33-40 the judge went on to consider the existing case-law, especially *Fordent* (see paragraph 3 above). That case concerned a proposed material change of use from agricultural use to use as a caravan and camping site (found to be a use for outdoor sport and recreation), together with the construction of a shop and other buildings. An inspector appointed by the Secretary of State found that this would be inappropriate development within the meaning of the NPPF, in particular that a material change of use did not fall within paragraph 89, which related only to the construction of buildings, and that the effect of paragraph 90 was that all material changes of use were by definition inappropriate development. His Honour Judge Pelling QC dismissed an application under section 288 of the Town and Country Planning Act 1990 to quash the inspector's decision. He did not go as far as the inspector in relation to paragraph 90, holding that a change of use falling within one of the categories identified in that paragraph was in principle capable of being not inappropriate, though none of those categories applied to the proposal in question. But he agreed with the inspector that paragraph 89 related to the construction of buildings, not to material changes of use, and that development in the Green Belt was inappropriate unless it fell within one of the exceptions identified in paragraphs 89 and 90. Green J said that the conclusions he had arrived at in the present case were the same as those of Judge Pelling in *Fordent*. He also observed in passing that the submissions accepted in *Fordent* emanated from the Secretary of State for Communities and Local Government, whose policy document is of course in issue.

21. One other matter relating to case-law which Green J addressed, at paragraphs 41-45 of his judgment, arose out of the statement in the planning officers' introductory report that both planning applications were for inappropriate development and that "even if an application contains elements that on their own would be appropriate development (such as a cemetery), the Courts have held that the whole of the development is still to be regarded as inappropriate", with a footnote reference to the *Kemnal Manor* case (see paragraph 15 above). It was submitted to the judge that the direction given to the Planning Committee by the planning officer was that they were still required to consider the entirety of the development (crematorium and cemetery) as inappropriate and therefore apply the very special circumstances test. The judge rejected that submission for three reasons. First, it was inconsistent with the facts: there was no evidence that the very special circumstances test was applied to the cemetery part of the proposal; on the contrary, the documents showed clearly that the test was applied exclusively to the crematorium part. The second and third reasons run together: the point in the *Kemnal Manor* case, in particular per Keene LJ at paragraph 34, was that a development should not be regarded as appropriate development merely because part of it is appropriate; and the relevant paragraph of the officers' report should be

read accordingly, as no more than an instruction to the Planning Committee that the inclusion of a cemetery (wrongly thought to be appropriate development) did not mean that the crematorium component of the proposal should likewise be treated as appropriate.

22. This led to the judge's conclusion, at paragraph 46, that the Planning Committee erred in acting on the officers' advice that a cemetery was appropriate use. In the following paragraph he noted that the first witness statement of the Principal Planning Officer stated, with commendable frankness, that if the judgment in *Fordent* had been available at the time of the report they would have gone on to consider whether very special circumstances justified the approval of the cemetery as inappropriate development.

23. At paragraphs 48-53 the judge found that the Council's error in treating the cemetery element of Westerleigh's application as appropriate development was a material error. The officers' report had identified the cemetery as one of the advantages of the Westerleigh application; the decision between the competing applications was extremely finely balanced, at least in relation to need; and the addition of a cemetery could have been the tipping point between them. To seek to overcome this problem, Westerleigh had entered into a section 106 obligation committing it not to take forward the cemetery element of the development for which permission had been granted. The judge held that this came far too late to affect the decision-making of the Planning Committee and could not therefore have any effect on the materiality of the Council's error, which had to be measured as at the date of the decision.

The first issue: whether the cemetery was inappropriate development on the proper interpretation of the NPPF

24. There is no dispute as to the correct general approach towards the interpretation of the NPPF. Policy statements of this kind should be interpreted objectively in accordance with the language used, read as always in its proper context, which is not to say that such statements should be construed as if they were statutory or contractual provisions (see per Lord Reed JSC in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 83, at paragraphs 18-19). The NPPF is on the face of it a stand-alone document which should be interpreted within its own terms and is in certain respects more than a simple carry-across of the language in the guidance it replaced (see *Europa Oil and Gas Limited v Secretary of State for Communities and Local Government and Others* [2014] EWCA Civ 825, [2014] JPL 1259, in particular at paragraphs 15 and 32). But the previous guidance, in this case the guidance on Green Belt policy in PPG2, remains relevant. In *Secretary of State for Communities and Local Government and Others v Redhill Aerodrome Limited* [2014] EWCA Civ 1386 the Court of Appeal rejected a submission that "any other harm" in paragraph 88 of the NPPF had a narrower meaning than in paragraph 3.2 of PPG2, which would have made it less difficult than under PPG2 to establish the existence of very special circumstances justifying a development. In so doing, the court said this (per Sullivan LJ at paragraphs 16-17):

> "16. If it had been the Government's intention to make such a significant change to Green Belt policy in the Framework one would have expected that there would have been a clear statement to that effect. Mr Katkowski accepts that there is no

such statement. In my judgment, all of the indications are to the contrary:

(i) While there have been some detailed changes to Green Belt policy in the Framework, protecting the Green Belt remains one of the Core planning principles, the fundamental aim of Green Belt policy to prevent urban sprawl by keeping land open, the essential characteristics of Green Belts, and the five purposes that they serve, all remain unchanged. By contrast with paragraph 86 of the Framework, which does change the policy approach to the inclusion of villages within the Green Belt, paragraph 87 emphasises the continuation of previous Green Belt policy (in PPG2) in respect of inappropriate development: 'As with previous Green Belt policy'.

(ii) The Impact Assessment in respect of the Framework published by the Department for Communities and Local Government in July 2012 said that 'The government strongly supports the Green Belt and does not intend to change the central policy that inappropriate development in the Green Belt should not be allowed'. Under the sub-heading 'Policy Changes' the Impact Assessment said that 'Core Green Belt protection will remain in place'. It then identified four proposed 'minor changes to the detail of current policy' which would resolve technical issues, but not harm the key purpose of the Green Belt, 'as in all cases the test to preserve the openness and purposes of including land in the Green Belt will be maintained'. On the face of it, paragraphs 87 and 88 would appear to constitute 'central policy' which the Government did not intend to change.

(iii) That there was no intention to change this aspect of Green Belt policy is confirmed by the Inspector's statement in paragraph 19 of her decision: that the *River Club* approach to 'any other harm' in the balancing exercise [i.e. the approach under PPG2] is reflected in decisions by the Secretary of State since the publication of the Framework. We were not referred to any decision in which a different approach has been taken to 'any other harm' since the publication of the Framework.

17. I readily accept that these indications are not conclusive. The Framework means what it says, and not what the Secretary of State would like it to mean …. However, if the Framework has effected this change in Green Belt policy it is clear that it has done so unintentionally. Mr Katkowski did not submit that there was any material difference between paragraphs 3.1 and 3.2 of PPG2 and paragraphs 87 and 88 of the Framework. He was right not to do so. The text of the policy has been reorganised … but all of its essential characteristics … remain the same …."

25. Against that background, Mr Kimblin, on behalf of the Council, advances two alternative bases on which a material change of use of land to use as a cemetery is submitted to be not inappropriate development, within the meaning of section 9 of the NPPF, provided that it preserves the openness of the Green Belt and does not conflict with the purposes of including land in the Green Belt. The first basis is that the second bullet point of paragraph 89 ("provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries") should be given a flexible interpretation and be read as covering not only the built structures but also the use that goes with them. The second is that paragraphs 89 and 90 are not to be read as closed lists, dealing respectively with new buildings and with other forms of development and treating all development in the Green Belt as inappropriate unless it falls within one of the exceptions in those paragraphs: other forms of development, including the long established category of use as a cemetery, may be appropriate provided that they preserve openness and do not conflict with Green Belt purposes. It is submitted that the policy of the former PPG2 with regard to inappropriate development has been carried over into the NPPF: there has been a process of condensation but the policy is unchanged (cf. the opening words of paragraph 87, "As with previous Green Belt policy …") and the provisions of the NPPF should be read accordingly. The published Impact Assessment, referred to in the passage quoted above from the *Redhill Aerodrome* case, does not identify any relevant change of policy. Further, Green J's interpretation leads to absurdity. For example, on that interpretation a change of use of agricultural land in the Green Belt to use as a cricket pitch would be inappropriate development and would require very special circumstances to be shown, despite the fact that paragraph 81 obliges local planning authorities to provide opportunities for outdoor sport and recreation; yet the construction of a cricket pavilion for an existing cricket pitch would in principle be appropriate development and would not require very special circumstances to be shown.

26. Mr Sauvain QC, for Westerleigh, focuses in effect on the second of the bases advanced by Mr Kimblin, whilst adopting the first basis as an alternative. On his primary position, it was by reason of paragraph 3.12 of PPG2 ("… the making of any material changes in the use of land …") that a change of use of land to use for outdoor sport or recreation or to use as a cemetery was not inappropriate development; but this reflected a recognition that such uses are appropriate provided they preserve openness and do not conflict with Green Belt purposes, and this has carried through into the NPPF even though the NPPF contains no express equivalent of the relevant part of paragraph 3.12 of PPG2. On a fair reading of the NPPF, it does not contain an exhaustive list of appropriate and inappropriate development. Paragraphs 89 and 90 contain a series of exceptions based on various policy considerations but there is no express statement as to the limit of what is appropriate or what is inappropriate. No significance should be attached to the fact that the draftsman, in condensing what was formerly in PPG2, has omitted the part of former paragraph 3.12 that related to material changes of use as a general category. The Impact Assessment shows that no change to the former policy was intended in this respect; and if a change had been intended, one would have expected some mention of it in the opening words of paragraph 87 of the NPPF. There is no reason why development that does not impact on openness or on Green Belt purposes should be inappropriate. It accords with common sense that if a development meets all the requirements of Green Belt policy it should be regarded as "appropriate" in the ordinary sense of that word. In addition to those points, Mr Sauvain makes a number of detailed criticisms of the judge's

reasoning, in particular at paragraphs 25-30 of his judgment, and submits that the judge was misled by his initial assumption at paragraph 25 that under the NPPF "*any* development in the Green Belt is treated as *prima facie* inappropriate".

27. Mr Brown, appearing for both respondents (he acted for Mrs Timmins alone before the judge below), submits that the judgments of Green J in the present case and Judge Pelling in *Fordent* were correct. Paragraph 89 of the NPPF is concerned only with the construction of new buildings, which is to be regarded as inappropriate development unless one of the listed exceptions applies. It is plainly not intended to cover material changes of use and it is plainly a closed list. Paragraph 90 deals essentially with other forms of development, though they may also involve the construction of buildings and to that extent there is an overlap with paragraph 89. It covers some specific changes of use (notably in the fourth bullet point, "the re-use of buildings …") but does not include material changes of use as a general category. Again, it is plainly a closed list. The policy defines protection for the Green Belt by reference to the closed lists in paragraphs 89 and 90: if development is not within those lists, it is necessarily inappropriate. If it had been intended to lay down a general test that development is not inappropriate provided that it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it, the policy would have said so. The open-ended interpretation advocated by the appellants would not give the Green Belt the protection that the policy intends. If a development falls within the scope of paragraph 81, relating to enhancement of the beneficial use of the Green Belt by means such as the provision of opportunities for outdoor sport and recreation, that will be highly relevant to the question of very special circumstances but does not mean that the development is to be regarded as appropriate.

28. Mr Brown submits that consideration of PPG2 supports, rather than undermines, the judge's interpretation of the NPPF. The various matters covered in paragraphs 3.4 to 3.12 of PPG2 have been transposed in one way or another into paragraphs 89 and 90 of the NPPF, with the notable exception of the general provision in paragraph 3.12 concerning "any material changes in the use of land". Whatever the reason may have been, that provision has been omitted. If the omission is due to an oversight, it is open to the Secretary of State to correct it. The decision in *Europa Oil* (paragraph 24 above) shows that it is possible for the NPPF to have made changes to previous policy that have not been heralded in the Impact Assessment. The situation is very different from that in *Redhill Aerodrome*, where the suggested change was to a core aspect of Green Belt policy and one would have expected a clear statement if such a change had been intended. In so far as it is relevant to consider the way the policy has been applied by the Secretary of State, as mentioned in the quoted passage from *Redhill Aerodrome*, Mr Brown makes the point that the conclusion reached by Green J in this case is the same as that reached by Judge Pelling in *Fordent*, upholding a decision of one of the Secretary of State's inspectors which was successfully defended by the Secretary of State in the face of arguments that it would lead to absurd results. As to the absurdity arguments in the present case, Mr Brown submits that the occasional quirk may arise but that none of the examples given produces an absurd result or provides a good reason for giving the relevant paragraphs of the NPPF a meaning they cannot properly have. The fact that, given what is already on the ground, a particular form of development is treated as not inappropriate (for example, facilities for an existing use of land for outdoor sport or recreation, or the extension of an existing building), conveys no judgment as to the appropriateness or otherwise of what is

already on the ground; and it cannot be said, for example, that because facilities for an existing use are not inappropriate, a new use of the same description is not inappropriate.

29. I am satisfied that Mr Brown's submissions are correct and that Green J's conclusion on this issue should be upheld.

30. Mr Kimblin's first way of putting the case is plainly unsustainable. The second bullet point of paragraph 89 of the NPPF cannot be read as covering a material change of use of land to use as a cemetery. Paragraph 89, as its opening sentence makes clear, lays down a general rule that the construction of *new buildings* in the Green Belt is inappropriate development: "building" for this purpose has the wide meaning given by section 336 of the Town and Country Planning Act 1990 (see paragraph 7 above). The various bullet points are exceptions to that general rule and are therefore likewise concerned only with the construction of new buildings. Thus the second bullet point covers the construction of a building (for example, a café) as an appropriate facility for an existing cemetery, but it does not cover a material change in the use of land so as to create a new cemetery. To the extent that it is relevant to look back at the position under PPG2, there is no reason to believe that the equivalent provision (the second bullet point of paragraph 3.4) was to be read in any different way: any general understanding that a new cemetery fell to be treated under PPG2 as appropriate development was attributable to the "material change of use" provision in paragraph 3.12, not to the terms of paragraph 3.4.

31. I would also reject Mr Kimblin's alternative way of putting the case, and the primary basis on which the case is advanced by Mr Sauvain. The drafting of the NPPF could have been clearer but it seems to me that paragraphs 89 and 90 are properly to be read as closed lists. Paragraph 89 states the general rule that the construction of new buildings is inappropriate development and sets out the only exceptions to that general rule. Paragraph 90 sets out other forms of development (mineral extraction, engineering operations, etc) that are appropriate provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. It is not stated expressly but is implicit that other forms of development apart from those listed in paragraph 90 are inappropriate. I do not think that the NPPF gives any scope to local planning authorities to treat development as appropriate if it does not fall within paragraph 89 or paragraph 90. In particular, there is no general test that development is appropriate provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Had such a general test been intended, in my view it would have been spelled out in express terms and would also have affected the way in which the specific exceptions were expressed.

32. I acknowledge that paragraph 81 of the NPPF, which places an obligation on local planning authorities to plan positively to enhance the beneficial use of the Green Belt by means such as the provision of opportunities for outdoor sport and recreation, gives a degree of support for a wider interpretation. It might be said, for example, to support the view that development in the form of a material change of use of land to use for outdoor sport or recreation is appropriate development, on the basis that it cannot have been intended to categorise as inappropriate a form of development that local planning authorities are required to promote. For my part, however, I consider that such an approach places too much weight on paragraph 81. The fact that a

development represents a use of land that local planning authorities are required to promote may help to establish the existence of very special circumstances justifying the development, but when considered in conjunction with paragraphs 89 and 90 it does not warrant treating the development as appropriate rather than inappropriate; it does not provide a satisfactory basis for reading paragraphs 89 and 90 otherwise than as closed lists of appropriate development. In any event paragraph 81 could not assist the appellants in the present case since the obligation it places on local planning authorities does not extend to the provision of cemeteries.

33. I do not accept that reference to PPG2 justifies a different interpretation. It is striking that paragraph 3.12 of PPG2 contained a general provision concerning material changes of use which is not to be found in the NPPF. It is impossible to say, however, whether the omission of such a provision from the NPPF was deliberate or unintentional (the absence of reference to it in the Impact Assessment is not conclusive); and even if it was unintentional, there is no proper basis for reading the provision into the NPPF. If there is a material omission, the right course is for the Secretary of State to amend the policy, not for the court to adopt a strained interpretation of the policy.

34. Nor do I accept that this interpretation of the NPPF leads to absurdity or to such anomalous consequences as to compel a different interpretation. Even if my preferred interpretation produces some odd results, that is not a sufficient reason for reading into the NPPF a general provision which is conspicuously absent from it, to the effect that any material change of use (or, on a more limited basis, any material change of use to use for sport or recreation, or to use as a cemetery) is appropriate development provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land in the Green Belt.

35. Accordingly, I would reject the case advanced by each of the appellants in relation to the first main issue.

The second main issue: the materiality of the Council's erroneous interpretation of the NPPF

36. I have grouped under this heading the appellants' arguments relating to the materiality of the Council's erroneous view that a cemetery, of itself, is appropriate development.

37. First, it is submitted that the error in classifying the cemetery itself as appropriate development was rendered immaterial by the officers' direction, in accordance with which the Council acted, that the application as a whole was for inappropriate development and that very special circumstances therefore had to be demonstrated. This is the *Kemnal Manor* point. I have set out relevant passages from the officers' reports at paragraphs 14-16 above and have explained at paragraph 21 above the reasons given by the judge for rejecting it. In my view the judge was right to reject the point. The first of his reasons is sufficient to dispose of it: there is no evidence that the very special circumstances test was applied to the cemetery part of the proposal; on the contrary, the documents show that the test was applied exclusively to the crematorium part (a view which is further supported by the witness statement of the planning officer to which the judge refers: see paragraph 22 above). I do not think that one can discount the possibility, in relation to such a finely balanced

decision, that the application of the very special circumstances test to the cemetery element of the proposal might have made a difference to the decision.

38. I also agree more generally with the judge's reasons for concluding that the Council's error in treating the cemetery element of the application as appropriate development was material. The appellants have both sought to rely on the fact that Westerleigh subsequently entered into a section 106 agreement by which it undertook not to proceed with the cemetery element of the development. It is said that this rendered the point academic and/or provided a remedy, so that the judge ought to have declined to grant relief in the form of an order quashing the decision. In my view, however, the judge was plainly correct to hold that the section 106 agreement did not affect the materiality of the Council's error. Since it is possible that the error affected the decision to grant Westerleigh's application and to refuse Lymn's application, it was not remedied by Westerleigh undertaking to proceed with the crematorium element of its proposal alone. In any event, I am not persuaded that any proper basis has been established for interfering with the judge's exercise of discretion with regard to relief.

Conclusion

39. For the reasons I have given, I would dismiss both appeals.

Lord Justice Tomlinson :

40. I have read in draft the judgments prepared by Richards LJ and Mitting J. I agree with them that the appeals should be dismissed for the reasons upon which they agree. The only point of disagreement between them is on the question whether paragraph 90 of the NPPF should be regarded as a closed list. It is unnecessary to decide this point, as both are agreed that since the obligation cast upon local authorities by paragraph 81 of the NPPF does not extend to the provision of cemeteries, reliance upon that paragraph does not assist the appellants in their argument as to the proper construction of paragraph 90. Since in other circumstances the proper construction of paragraph 90 of the NPPF may be important or even potentially decisive, and since our own view expressed on this appeal will in any event not be a binding part of the ratio, I would prefer to reserve my view on the point until such time as it is necessary to decide it.

Mr Justice Mitting :

41. I gratefully adopt and agree with the summary of the background, statutory and policy material, and of facts and the parties' submissions set out in paragraphs 1–28 inclusive of Richards LJ's judgment. I also agree that this appeal should be dismissed for the reasons which he gives in paragraph 30, the last sentence in paragraph 32, paragraph 33 and paragraphs 36–38 of his judgment. I agree with him that because cemeteries are not included in paragraph 81 of the National Planning Policy Framework, it does not assist the appellants in construing paragraph 90. For that reason, even if my interpretation of paragraphs 81 and 90 read together were to be preferred to that of Richards LJ, it could not affect the outcome of this appeal. Nevertheless, because I take a different view from him on that issue of interpretation which may have an impact on other cases, I thought it right to set out my conclusion on it.

42. Even in a central government document giving planning guidance to local planning authorities it would be surprising to find two flatly opposed policies on the same topic set out within three pages of each other. Paragraph 81 imposes a positive obligation on local planning authorities to plan to enhance the beneficial use of the green belt in four ways:

    i) to look for opportunities to provide access;

    ii) to provide opportunities for outdoor sport and recreation;

    iii) to retain and enhance landscapes, visual amenity and biodiversity; and

    iv) to improve damaged and derelict land. (My emphasis).

    Fulfilment of these obligations will normally involve a change of use amounting to development for which planning consent is required. Commonplace examples will include putting land formerly in agricultural use to recreational use; the incorporation of damaged or derelict or agricultural land into a public or private park; and the conversion of a derelict quarry into a fishing or boating lake. It would be a misuse of language to describe such changes of use as amounting to, or occurring only in, "very special circumstances". If, therefore, paragraph 90, like paragraph 89, contains a closed list of changes of use which are "not inappropriate" the only means by which local planning authorities can fulfil the obligations imposed upon them by paragraph 81 is to water down the stringent test set out in paragraph 88.

43. I do not think that, as a matter of language, paragraph 90 compels that conclusion. There is a significant difference in wording between the opening words of paragraphs 89 and 90. Paragraph 89 says in terms that a local planning authority "should regard the construction of new buildings as inappropriate in Green Belt". It is obvious that the exceptions to that general proposition set out in the bullet points define – exclusively – what the exceptions are. By contrast, paragraph 90 does not begin with a general statement that local planning authority "should regard other forms of development as inappropriate in green belt". If the draftsman had intended to create a closed list in paragraph 90, I can see no reason why he should not have adopted the same drafting technique as he did in paragraph 89. What he did was to choose a clumsy double negative to identify "other forms of development" – plainly including changes of use – which might be deemed appropriate. There is, in my view, no difference between the statement made by the double negative "certain other forms of development are also not inappropriate in Green Belt" and the same statement expressed positively, "certain other forms of development may be appropriate in Green Belt". Given that the meaning of the statement is the same, whether it is expressed positively or by a double negative, I can see no reason for interpreting a policy expressed by a double negative more strictly than one expressed positively.

44. Thus interpreted, paragraphs 81 and 90 sit comfortably together; and the absurdity of a policy which would deem inappropriate the laying out of a cricket ground and the playing of cricket regularly on agricultural or derelict land but deems appropriate the construction of a cricket pavilion on the same land would be avoided. On a true construction of paragraphs 81 and 90, paragraph 90 must not be read so as to inhibit or discourage the fulfilment of the local planning authority's positive obligations under paragraph 81.