Neutral Citation Number: [2012] EWHC 2909 (Admin)
Case No: CO/5640/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL
22 October 2012

B e f o r e :

MISS BELINDA BUCKNALL QC
(Sitting as a Deputy High Court Judge)

Between:

NEWLYN DEAN & SONS LTD	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**First Respondent**
- and -	
EAST DORSET DISTRICT COUNCIL	**Second Respondent**

Mr Richard Harwood (instructed by Messrs Horsey Lightly Fynn) for the Claimant
Ms Sarah Hannett (instructed by the Treasury Solicitor) for the First Respondent
The Second Respondent did not appear and was not represented
Hearing date: 12th July 2012

Miss Belinda Bucknall QC :

1. This is an appeal by the Claimant pursuant to section 289 of the Town and Country Planning Act 1990 against the dismissal by the First Respondent's inspector of the Appellant's appeal against four enforcement notices (A, B, E and F) as set out in her Decision Letter dated 16th April 2010. Other notices were also dealt with by the inspector and allowed with a further notice not being appealed. The relief sought is that the Inspector's decisions be remitted to the First Respondent. Permission to appeal was granted on 19th January 2011 by Mr. Justice Lindblom.

2. The First Respondent is the Secretary of State for Communities and Local Government (hereinafter "the Secretary of State"). The Second Respondent did not appear or otherwise take part in the appeal.

3. The enforcement notices related to activities and structures on Bedborough Farm, Uddens Drive, Wimborne, Dorset ("the farm"). The farm is in the Green Belt between Colehill and Ferndown in Dorset and is about 1.5 kilometres by track from the Dorset Heathlands Special Area of Conservation.

4. The enforcement notices related to the following matters. Notice A concerned the unauthorised use of the land for paintballing. Notice B concerned the unauthorised erection of wooden structures, barriers and obstacles and the positioning of wooden crates to act as barriers and obstacles associated with a paintball use of the identified land. Notice E concerned the unauthorised erection of barriers and obstacles constructed of wooden sheets and uncut tree wood and the positioning of metal barrels and plastic water storage containers associated with a paintball use of that land. Notice F concerned the unauthorised use of the land for DIY livery.

5. The grounds of the appeal are that the Inspector's decisions were unlawful because,

    1) she adopted an unlawful interpretation of Planning Policy Guidance Note 2: Green Belts ("PPG2") in holding that the use of land for outdoor recreation and the provision of essential facilities for such uses had to preserve openness to be appropriate development.

    2) consequently, her findings that (a) paintballing uses and the associated structures and (b) the use of land for livery purposes were inappropriate development were unlawful.

    3) the Inspector's conclusions on the visual impact of paintballing were unlawful as (a) they were tainted by the Green Belt error and (b) they were irrational and failed to consider the imposition of conditions.

    4) the Inspector's conclusions on the Green Belt effects of the livery use were in any event irrational, inconsistent and failed to have regard to material considerations.

    5) the Inspector erred in law in considering that it could not be ensured that the manège would remain available to the livery horses, acted unfairly in taking this point against the Appellant without raising it at the Inquiry and failed to reach a reasoned or rational conclusion as to the impact on the Special Area of Conservation.

    6) the Inspector's other conclusions on paintballing and livery were reliant upon the legally defective conclusions

Grounds (1) and (2)

6. Did the Inspector adopt an unlawful interpretation of PPG2? It was common ground at the hearing that PPG2 must be construed objectively in accordance with the language used, read as always in its proper context, and that a failure to do so would constitute an error of law. See *Tesco Stores Ltd. (Appellants) v Dundee City Council (Respondents) (Scotland)* [2012] UKSC 13 and *R (Manchester Ship Canal) v Environment Agency* [2012] EWHC 1643 (QB).

7. The Claimant's case, as set out in its grounds and developed orally during the hearing, was that the Inspector had approached both the paint ball use and the livery use on the basis that each constituted a material change of use of the land and was thus inappropriate development unless it maintained openness and did not conflict with the purposes of including land in the Green Belt; that this approach was wrong in law because outdoor sport and outdoor recreation and cemeteries are deemed to preserve openness and that only the essential facilities for uses other than outdoor sport, outdoor recreation and cemeteries require an assessment as to whether they preserve openness. The interpretation for which the Claimant contended was said to be supported by the case of *Samuel Smith Ltd. v Secretary of State for Communities and Local Government* [2009] EWHC 3238 (Admin), supported by the case of *Gass v Secretary of State*

for Communities and Local Government [2008] EWHC 350 (Admin) and "driven by paragraphs 3.4 and 3.5 of PPG2, not by a catch all interpretation of paragraph 3.12".

8. I was told by Ms Hannett on behalf of the Secretary of State that this case was not advanced before the inspector; on the contrary, as made clear by the closing submissions presented by the Claimant's legal representative at the inquiry (a copy of which was in the papers provided to me) the Claimant accepted that the inspector had to determine whether the paintball and livery use were inappropriate development by reference to, inter alia, paragraph 3.12, thus requiring openness to be assessed. The present contention therefore represents a considerable volte face. That does not mean that it is necessarily wrong; only that I must be very certain that it is right before deciding that the inspector erred in law in taking an approach to construction which is contrary to that developed before her.

9. The relevant parts of PPG2 provide as follows,

"***Intentions of policy***

1.4 The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the most important attribute of Green Belts is their openness ...

Purposes of including land in Green Belts

1.5 There are five purposes of including land in Green Belts:

- to check the unrestricted sprawl of large built-up areas;
- to prevent neighbouring towns from 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.

The use of land in Green Belts

1.6 Once Green belts have been defined, the use of land in them has a positive role to play in fulfilling the following objectives:

- to provide opportunities for access to the open countryside for the urban population;
- to provide opportunities for outdoor sport and outdoor recreation near urban areas;
- to retain attractive landscapes and enhance landscapes, near to where people live;
- to improve damaged and derelict land around towns;
- to secure nature conservation interest; and
- to retain land in agricultural, forestry and related uses.

1.7 The extent to which the use of land fulfils these objectives is however not itself a material factor in the inclusion of land within a Green Belt, or in its continued protection. For example although Green Belts often contain areas of attractive landscape, the quality

of the landscape is not relevant to the inclusion of land within a Green Belt or to its continued protection. The purposes of including land in Green Belts are of paramount importance to their continued protection and should take precedence over the land use objectives.

…

3. Control over development

Presumption against inappropriate development

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 be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development.

...

New Buildings

3.4 The construction of buildings inside a Green Belt is inappropriate unless it is for the following purposes:

...

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)

....

...

...

3.5 Essential facilities (see second bullet point 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.

...

Mining operations and other development

3.11 …

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

…

Visual amenity

3.15 The visual amenities of the green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design.

10. The approach of the inspector to the construction of PPG2 is set out in DL20-26 as follows,

"20. The main issues are (1) whether in respect of each notice, the development amounts to inappropriate development in the Green Belt ...

21. Notice A relates to the change of use of part of the land at Bedborough Farm to use for paintball activities. Notices B and E relate to operational development comprising the erection of structures, barriers and obstacles made from a variety of materials, used in order to facilitate the paintball activities.

22. The paintballing activities are a form of outdoor recreation, and in principle outdoor recreation need not be inappropriate in the Green Belt provided it maintains openness (there is then a footnote which states "In this regard, it should be noted that effect on visual amenity is not the same as effect on openness in Green Belt terms.") and does not conflict with the purposes of including land in the Green Belt (paragraph 3.12 of PPG2). But the nature of the paintballing activities, which involve teams competing to capture flags or locations, appears to require obstacles to provide cover for the warring teams. Certainly, both of the companies which have used this land for paintballing since the use started have used various types of obstacles and barriers.

23. The structures, barriers and obstacles referred to in the Appeal B and E notices appear substantial and because of their solidity and their numbers they would have materially reduced the openness of the Green Belt. Some of the photographs provided to the Inquiry show what appears to be removable obstacles and barriers formed partly of camouflage netting, which would also detract from openness even on a temporary basis. In addition, the stationing of the caravan and trestle tables and the parking of vehicles in connection with the paintballing use would all tend to reduce openness. Although the parking of vehicles would only affect openness when the paintballing activity was operating, the appellants seeks permission to use the site for up to 60 days in any year, which is significantly more than the number of days on which paintball activities would be permitted under the Town and Country Planning (General Permitted Development) Order 1995.

24. Even the reduced number and size of obstacles present on the site at the time of my visit (around 35 not exceeding 3m long and 1m high) (and then there is another footnote which records that the appellants sought permission for a maximum of 40 such obstacles) as a matter of fact and degree have an impact on openness which is more than minimal (although those in the woodland area would have only a limited visual impact). Because of the nature of the paintballing activity, even if no permanent obstacles or barriers were proposed (and that is not the basis on which permission is being sought under the deemed planning application) it is highly probable that temporary structures would be scattered

across the playing area for the time the activities took place (and here there is a footnote reference to the evidence that in addition to the fixed obstacles for which permission is sought there would be other obstacles which would be moved in and out of storage as required.) This would also materially impact on openness. Consequently, I conclude that because the paintball use does not maintain openness it is inappropriate in the Green Belt.

25. Paragraph 3.4 of PPG2 indicates that the construction of new buildings inside the Green Belt is inappropriate unless for a number of restricted purposes. It recognizes that essential facilities for outdoor recreation may not be inappropriate, but only if they are 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. The paintballing use, as indicated above, has materially impacted on openness. For this reason even if they could be argued to be essential facilities, the structures are inappropriate.

26. One of the objectives mentioned in paragraph 1.6 of PPG2 is the provision of opportunities for outdoor sport and recreation near urban areas. However, leaving aside whether this site could be described as being near the urban area, the fact that the paintballing activity might fulfil this objective does not override the advice elsewhere in PPG2 relating to inappropriate development."

11. A similar approach to the law is to be found in paragraph 50 at the start of the Inspector's consideration of the appeal against the enforcement notice relating to the change of use to livery/DIY livery.

12. I start first with the wording of PPG2, as set out above, in order to see whether on its true construction it bears the meaning for which the Appellant contends.

13. Paragraph 1.4 sets out in the first sentence the fundamental aim of Green Belt policy, namely to prevent urban sprawl by keeping land permanently open. The rest of this paragraph explains the benefits that may flow from that policy. The paragraphs that follow must be construed purposively, that is to say construed so that they are consistent with and give effect to the fundamental aim. Any doubt about what subsequent paragraphs mean should, if the language permits, be resolved in favour of a meaning that accords with the fundamental aim.

14. Under the heading "Purposes of including land in Green Belt" paragraph 1.5 sets out five purposes of including land in Green Belts. The first four either expressly or by necessary implication embody the fundamental aim. The fifth, namely to assist in urban regeneration by encouraging the recycling of derelict and other urban land, is a product of the fundamental aim; by requiring Green Belt land to be kept open and thus unavailable for development except in very limited circumstances, planners and developers will be encouraged to focus on urban sites. Under the heading "The use of land in Green Belts", paragraph 1.6 declares the positive role that use of Green Belt land has to play in fulfilling 6 objectives. Of particular relevance to this case is the objective in the second bullet point, namely the provision of opportunities for outdoor sport and outdoor recreation near urban areas. That objective may be furthered, for instance, by preventing development of open land already used as playing fields, as well as by using other Green Belt land for sporting and recreational activities. Provision of cemeteries is not one of the land use objectives in paragraph 1.6; cemeteries are expressly referred to in PPG2 only in the second bullet point of paragraph 3.4. Importantly to the issues under consideration, paragraph 1.7, and particularly the last sentence thereof, makes it unambiguously clear that the purposes of including land in Green Belts (which relates back to paragraph 1.5) are of paramount importance to the continued protection of Green Belts and should take precedence over the land use objectives. In other words while use of Green Belt land near an urban area for outdoor sport and recreation will meet one of the objectives in paragraph 1.6, if that use conflicts with one or more of the paragraph 1.5 purposes, the latter prevails.

15. Paragraph 2 contains guidance for the designation of Green Belts in terms that reinforce the fundamental aim of permanent openness.

16. Paragraph 3, under the heading "Control over development", makes provision for a number of development-related matters. Under the heading "Presumption against inappropriate development" paragraphs 3.1-3.3 reinforce the fundamental aim by declaring the general presumption against inappropriate development and explaining and giving guidance in relation to it. New buildings are dealt with in paragraphs 3.4-3.6 and I shall return later in this judgement to paragraphs 3.4 and 3.5 upon which the Claimant places reliance. Paragraphs 3.7-3.10 deal with re-use of existing buildings. Mining operations and other development are dealt with in paragraphs 3.11 and 3.12. Of particular relevance to this case is the latter paragraph which reminds that the statutory definition of development includes, inter alia, any material change of use. The paragraph goes on to state that the making of material changes in the use of land is inappropriate development unless it maintains openness and does not conflict with the purposes of including land in the Green Belt. That guidance applies generally to all material changes of use, without restriction; there is no exclusion for outdoor sport, outdoor recreation or cemeteries. The remainder of paragraph 3 deals with land use objectives, visual amenity, community forests and park and ride developments.

17. The first point of significance is that nowhere in PPG2 does it say that outdoor sport, outdoor recreation and cemeteries are *deemed* to preserve openness. Bearing in mind (a) the fundamental aim for dedicating land as Green Belt (b) the explicit guidance in paragraph 1.7 that land use to fulfil the objectives stated in paragraph 1.6 is subordinate to the purposes of including land in the Green Belt and (c) the fact that outdoor sport, outdoor recreation and cemeteries are all clearly capable, depending on such considerations as scale, duration, frequency, associated permanent and temporary structures, associated equipment, and access including the parking of vehicles, of impeding openness, such a major concession could be expected to be spelled out expressly and not left to be wrung out of the text as a matter of inference. This point alone militates strongly against the Claimant's contention. It is reinforced by the consideration that if outdoor sport, outdoor recreation and cemeteries are deemed to preserve openness without the need for an assessment of whether they in fact do so, the fundamental aim would be open to serious erosion by use of land for those purposes which do not, in fact, preserve openness, a point well illustrated by the facts of this case.

18. I turn to the Claimant's argument based on the 2nd bullet point in paragraph 3.4. The text in the 2nd bullet point ends with the words "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)". As made clear by the second of the above two clauses and by the terms of paragraph 3.5, those words of qualification apply to "uses" (The argument in the *Samuel Smith* case that they applied to "essential facilities" was rejected; see below). The words thus appear to reiterate the fundamental aim and reinforce the policy that all uses, including outdoor sport and outdoor recreation, must preserve openness. The Claimant contends, however, that only the phrase "Essential facilities ... for other uses of land" is qualified by the above two clauses, leaving "Essential facilities for outdoor sport and outdoor recreation, for cemeteries, and ..." unqualified because they are deemed to preserve openness. That construction, it is said, follows necessarily from the placing of the comma before "and for other uses". This is a very large edifice to construct upon so slight a foundation and I do not accept that it is correct for a number of reasons.

19. First, the placing of a comma immediately before the word "and" is found elsewhere in PPG2 (see for example the last line of paragraph 1.7, the 4th bullet point in paragraph 3.4 and the first line of paragraph 3.12) and the draftsman appears to use a comma before the conjunction routinely, merely to break up a lengthy piece of text. It does not, therefore, to my mind, demonstrate even faintly, an intention so to divorce the text before and after the relevant "and"

in paragraph 3.4 as to prevent the qualifying clauses from applying equally to all the uses in the series.

20. Secondly, paragraphs 3.4 and 3.5 are both concerned with the construction of new buildings in Green Belts and not with defining the status of outdoor sport, outdoor recreation and cemeteries.

21. Thirdly, paragraph 3.5 is intended to provide further guidance as to what is meant by "essential facilities" in the 2nd bullet point in paragraph 3.4. It states in entirely general terms, which do not exclude outdoor sport, outdoor recreation or cemeteries, that "essential facilities should be genuinely required for uses of land which preserve the openness of the Green Belt". It then goes on to give possible examples of small/unobtrusive facilities which would not constitute inappropriate development, significantly taking facilities for outdoor sport and outdoor recreation as examples. This paragraph, therefore, serves to emphasise that all uses, including sporting and recreational use, must preserve the openness of the Green Belt.

22. Fourthly, if the Claimant's contention is correct, paragraph 3.12 has to be construed in a manner which is entirely inconsistent with the generality of the words used.

23. In sum, absent compelling authority to the contrary, I conclude that PPG2 does not on its true construction have the effect for which the Claimant contends.

24. I now turn to consider whether either of the two authorities relied upon by the Claimant are indeed in sufficiently compelling terms to displace that provisional conclusion.

25. The judgement in the *Samuel Smith* case sets out in very great detail the lengthy planning history of a substantial free-standing building erected in a Green Belt in 1999, for the purposes of expanding an existing business for the rearing and training of thoroughbred horses for sale. I need only refer to the following facts and matters.

26. An appeal by Mr. and Mrs. Hutchinson, the owners of the business, against an enforcement notice asserting that the building was inappropriate development and that no very special circumstances had been shown, was heard by an inspector in 2009. At all material times before and at the inquiry it was common ground between the parties, that the building was, indeed, inappropriate development and the issue for the inspector was whether there were very special circumstances within the exception in paragraph 3.1 of PPG2. After the inquiry the inspector gave written notice that since he did not consider himself bound by the statement of common ground, he intended to consider whether the building was in fact inappropriate development, invited written submissions on the point, refused to reopen the inquiry so that the matter could be dealt with orally and ultimately decided that the building was not inappropriate development. In so doing his stated reasons were that the building was essential to the equestrian centre business and that it was genuinely required for the use of land which preserved the openness of the Green Belt and which did not conflict with the purposes of including land in it.

27. In the subsequent judicial review proceedings, it was common ground before the judge, Robert Jay QC, sitting as a deputy high court judge, that the case had to be remitted for procedural unfairness. The judge, however, was pressed by the Claimant to rule on the lawfulness of the inspector's reasons for concluding that the building was appropriate development. Of the four "core submissions" relied upon by the Claimant, the second was that the issue raised by the second bullet point in paragraph 3.4 is whether the essential facilities, rather than the use of land, has to preserve openness. The judge dealt with that submission in paragraph 1.68 of his judgement in the following terms.

"As for Mr. Village's second core submission, I was initially attracted by it but have been persuaded by Mr. Maurici for the defendant that it is incorrect. Outdoor sport and recreation and cemeteries are deemed to preserve the openness of the Green Belt. The issue in those cases is whether the facilities, as adjuncts to such uses are "essential" and "genuinely required". We are concerned with the residual category of case – "other uses of land which preserve, etc." The "other use" here is the Equestrian Centre use, and is a use which involves the entirety of this planning unit, in other words, the whole of the Hutchinsons' 10.5 hectares of land. That said, in my judgement, the inspector erred at DL28 in his approach to the relevant question, namely does the building in question preserve the openness of the Green Belt, etc? He answered this question solely by reference to the relative proportion of built land to the area of land as a whole. In my judgement, he should have considered whether this building, having regard to its size and relative location, building blocks, and appearance, and everything else, preserves the openness of the Green Belt. "

28. He thus rejected the contention by the Claimant that the test of openness applied to essential facilities and not to land use because, on his construction, the question of openness did not arise for consideration at all in the case of essential facilities for outdoor sport, recreation and cemeteries.

29. The first point to note about this passage is that the comment that outdoor sport and outdoor recreation and cemeteries are deemed to preserve openness is obiter, as the judge himself recognised, because the function of the building with which he was concerned had nothing to do with outdoor sport or recreation or cemeteries. The second is that no reason is given for concluding that outdoor sport, outdoor recreation and cemeteries are deemed to preserve openness.

30. In relation to the issue which was before him (his "residual category of case") he construed paragraph 3.4 and the second bullet point therein, together with paragraph 3.5, to mean that the requirement for new buildings to be "essential facilities" and "genuinely required", if they are to avoid being inappropriate, relates only to new buildings for outdoor sports, recreation and cemeteries, with no such requirement in the case of new buildings for other uses of land, where the sole question is whether the building preserves openness. While disagreeing with the judge with diffidence, this approach seems to me to disregard the policy behind the very restricted exceptions allowed by paragraph 3.4. It also seems inconsistent with the construction of the first sentence of paragraph 3.5 which, as already pointed out, is not limited either expressly or by necessary implication to essential facilities for outdoor sport, outdoor recreation and cemeteries. It also makes a distinction which has no discernable logic in the context of Green Belt planning considerations between new buildings constituting facilities for those three specific uses and new buildings constituting facilities for other uses. Finally, it involves the uneasy concept of a building which preserves openness. As defined by section 336(1) of the Town and County Planning Act 1990 a building "includes any structure or erection and any part of a building as so defined". A structure or erection on land that is intended to have its openness preserved permanently, self-evidently does not achieve that objective; to a greater or lesser extent the structure or erection must constitute an obstacle to openness. It therefore makes far more sense in the context of Green Belt planning policy to construe the second bullet point in paragraph 3.4 so that all new buildings are inappropriate unless they can be shown to be essential facilities for whatever the use may be and also genuinely required for that use (the two requirements are not necessarily coterminous); no violence is done to the language in so construing the relevant text.

31. In sum, I am not persuaded that anything in this judgement compels me to accept the Claimant's submission that the three specified categories of use are deemed to preserve openness.

32. Turning now to the *Gass* case, the Claimant submits that it supports the proposition that outdoor sport and recreation are appropriate, subject only to whether the opportunity for them is provided near urban areas as required by paragraph 1.6. Whether in fact it does so, requires careful consideration.

33. The case involved a commercial paint balling development in the Green Belt surrounding the Bournemouth/Poole conurbation and Ringwood, located in the remote countryside and accessible only by a long, narrow, unclassified lane with occasional unhardened passing places. The overall decision of the inspector was that the development was inappropriate. There were two principal grounds of appeal before the court, identified respectively in the judgement as the "access issue" and the "Green Belt issue".

34. The judgement, insofar as it relates to the access issue, sheds no light on the issues before me.

35. As to the Green Belt issue, consideration of this starts at paragraph 14 of the judgement. The respective positions of the parties at the inquiry, as set out in the judgement, were taken from the summary contained in paragraph 32 of the inspector's decision letter. The case for the Claimant in that case, as thus recorded, was that neither the use nor the associated development (which I understand to refer to the associated structures and ancillary features) were inappropriate development, the argument being that paintballing facilities provided opportunities for outdoor sport and recreation and thus fulfilled one of the land use objectives in paragraph 1.6 of PPG2. The case for the planning authority was that while outdoor recreation was an appropriate use of land in the Green Belt (a concession upon which the Claimant in the case before me placed some reliance) paintballing, by its very nature and, in the case of the appeal development, by virtue of its scale and level of commercialisation, was inappropriate development, as was the associated operational development. At some stage the planning authority contended that the appeal development did not meet the land use objectives in any event because it was not near an urban area.

36. I pause here to point out that the fact that a development satisfies a land use objective does not determine that it is appropriate, or vice versa; whether a land use objective is or is not met is merely one of a number of factors to be taken into account in addition to the two requirements in paragraph 3.12 which must both be met. The overriding consideration when determining appropriateness/inappropriateness is whether the land use accords with the purposes of including land in the Green Belt, that question in turn falling to be decided in light of, inter alia, the guidance in paragraph 3.

37. The inspector in that case found that paintballing was an outdoor sport and recreation and thus capable of fulfilling the land use objective in the second bullet point of paragraph 1.6 but concluded on the facts that the appeal development was not near an urban area, with the result that it did not meet the objective. Recognising, correctly, that this was not determinative of whether the development was inappropriate, as did His Honour Judge Denyer in paragraph 21 of his judgement, the inspector went on to consider that issue. Exactly what his approach was is not apparent from the judgement because the relevant paragraphs of his decision letter are not cited. In paragraph 44 of his decision letter, which contains his summary and overall conclusion, he said,

> "Bringing these points together in the context of paragraph 3.5 of PPG2, I do not consider that the use and the associated structures and elements are in their entirety essential facilities that are genuinely required. In particular I am concerned about the scale of the Base Camp and find that this has caused some loss of openness and visual intrusion contrary to paragraph 1.15 of PPG2." (The first sentence does not make grammatical sense because a use is not a facility but on a fair reading and bearing in mind the terms of paragraph 3.5 which he had under consideration and the subject matter of the second sentence, he appears to be saying that the

associated structures and elements in their entirety are not essential facilities genuinely required for a use of land that preserves openness.)

He also gave consideration to the capacity of the car park and the consequences of overspill before reaching his overall conclusion that the development was inappropriate development in the Green Belt. In short, he plainly did not proceed on the basis that he was entitled to dispense with an assessment of whether the development preserved openness.

38. The judge held that there were no grounds for interfering with the inspector's findings of fact as to the nature of the development or his overall conclusion.

39. I can find nothing in this judgement that supports the Claimant's contention as set out above. The high water mark of the Claimant's case is that, as recorded by the inspector and set out in the judgement, the planning authority appears to have accepted that use of land which met the land use objectives of paragraph 1.6 would be an appropriate use. Since, however, it was common ground that paintballing constituted a form of outdoor sport or recreation and since the planning authority roundly contested that any form of paintballing was appropriate development, the concession does not appear to have been intended in the sense in which the inspector recorded it. Any such concession is in any event not binding on me.

40. Finally, the Claimant supports its contention on the further ground that unless outdoor sport and outdoor recreation are deemed to promote openness, the land use objectives in the second bullet point of paragraph 1.6 will rarely be capable of fulfilment because almost any outdoor sport or recreation involves the use of some sort of structure in the form of goal posts, changing rooms etc. A similar submission was made in relation to cemeteries, although not of course by reference to paragraph 1.6.

41. I do not accept the contention so far as it relates to outdoor sport and recreation. The philosophy underlying the second bullet point in paragraph 1.6 is that urban dwellers should be able to use the Green Belt countryside for healthful and enjoyable outdoor pursuits, which may range from regular participation in organised games, to simply sitting in a field and looking at the sky on a fine day. As already pointed out, the objective will be fulfilled in the case of organised sports by protecting existing cricket, football and other playing fields, located within a Green Belt, from development. There is also scope for permitting development of suitable land to such use, provided the requirements of paragraph 3.12 and, as may be relevant, the requirements of paragraph 3.4 and 3.5, are met. Many other sporting and recreational activities, such as children's running races, hare and hound competitions, botany walks, hiking, etc. involve no extraneous equipment whatever. Other outdoor sporting and recreational activities which do require a modest amount of extraneous temporary equipment, such as a once a year village gymkhana or open air play, will, by reason of their ephemeral nature, have no impact on openness. I also do not accept the contention as far as cemeteries are concerned. Facilities amounting to new buildings may be required for cemeteries but equally may not, for instance because a newly developed cemetery is intended for green burials with no grave markers other than trees or because it is associated with an existing cemetery which already provides any necessary facilities.

42. In sum, I conclude that the Claimant's attack upon the inspector's approach to PPG2, in relation to both the paintballing development and the livery/DIY livery development is unsustainable, with the result that Grounds 1 and 2 of the appeal must be dismissed.

Ground (3)

43. Were the Inspector's conclusions on the visual impact of paintballing unlawful because (a) they were tainted by the Green Belt error and (b) they were irrational and failed to consider the imposition of conditions? Ground 3(a) fails for the reasons already given.

44. As for Ground 3(b) the alleged irrationality is said to be found in paragraphs 28-30 of the Decision Letter and the conclusion in paragraph 38. Paragraphs 28-30 contain the inspector's consideration of countryside policy by reference to saved policy CSIDE1. Paragraph 38 summarises her conclusions. At paragraph 27 the inspector begins her consideration of CSIDE1 policy by summarising its terms. No complaint is made of that. The policy required her to consider whether the paintballing use would harm the rural character and the visual amenities of the countryside. In order to understand her approach it is necessary, first, to have regard to paragraph 24. In this she said,

> "24. ... Because of the nature of the paintballing activity, even if no permanent obstacles or barriers were proposed (and that is not the basis on which permission is being sought under the deemed planning application) it is highly probable that temporary structures would be scattered across the playing area for the time the activities took place."

That finding was one which she was fully entitled to make, having heard oral evidence from, inter alia, the Claimant's planning expert.

45. In paragraph 28 she dealt with the structures at the site at the time of her inspection and expressed the view that they gave the appearance of haphazard storage and were at odds with the rural character of the area and harmed the visual amenities of the countryside and were thus in conflict with policy CSIDE1. She expressly recognised, however, that those items had been removed by the time of the inquiry. She further expressly accepted (in paragraphs 29 and 30) that neither the up-to 40 structures for which planning permission was sought nor the caravan, picnic table and car park were in conflict with the policy. It is the acceptance that those items did not conflict with CSIDE1 that is said by the Claimant to make the inspector's conclusion in paragraph 38 (and also in paragraph 31) that there was harm to the rural character and visual amenities of the countryside. Significantly, however, she said at the end of paragraph 28 that,

> "The paintball activity would be also likely to lead to the use of obstacles, whether temporary or not, which would also harm the rural character and visual amenities of the area because of their appearance of haphazard storage, also conflicting with policy CSID1."

I accept the submission on behalf of the Secretary of State that that finding was premised upon the passage in paragraph 24 as set out above, and that it was a finding that she was entitled to make in the exercise of her planning judgement, which is not open to review by this court.

46. It follows that I find there to be no illogicality or *Wednesbury* unreasonableness in her conclusion in paragraph 38 that the paintballing use would cause harm to the rural character and visual amenities of the countryside.

47. As to the Claimant's complaint that the inspector failed to consider the imposition of conditions as to time and location for temporary structures, the Claimant proposed a number of conditions in relation to both the paintballing and the livery/DIY livery but made no such proposals in relation to the temporary structures. It is contended on behalf of the Secretary of State on the authority of *R (Ayres) v Secretary of State for the Environment, Transport and the Regions* [2002] EWHC 295, and I accept, that the inspector was under no obligation to search for a condition which might be used to assist the Claimant.

Ground (4)

48. Were the inspector's conclusions on the Green Belt effects of the livery use in any event irrational, inconsistent and without regard to material considerations? The Claimant relies upon three grounds.

49. The first is that the inspector, having found in paragraph 50 of her decision letter, by reference to paragraph 3.12 of PPG2, that the keeping of horses in the Green Belt is not necessarily harmful to openness or in conflict with the purposes of including land in the Green Belt, wrongly failed to give consideration to the fact that some vehicular travel would be a necessary part of such use. The short reason why this ground is unsustainable is that the inspector did consider vehicular travel expressly in paragraphs 51 and 52 and in the exercise of her planning judgement concluded that the level of vehicular use and parking, including the parking from time to time of numbers of large horse lorries and trailers, associated with the keeping of up to 30 horses, would materially reduce openness.

50. The second ground is that the inspector failed when considering the vehicular impact of livery/DIY livery use, to take into account the vehicular impact of the agricultural use of the buildings at the site and the manège, which would not occur if planning permission for the livery/DIY livery was granted (referred to by the Claimant as "the fall back position"). As pointed out by counsel for the Secretary of State, this point was not part of the Claimant's case in its final address to the inspector, as it assuredly would have been had it been a consideration of any materiality. Furthermore it is inconsistent, at least in part, with the Claimant's submission in its final address that "Whilst the livery use could arguably be sustained in theory without the manège .. the manège could [not] serve any useful purpose if livery use was refused." I therefore reject the submission that the fall back position was a material matter that the inspector wrongly failed to take into account.

51. The third ground is that the inspector wrongly took into account the fact that temporary horse shelters would be needed when considering whether the proposed livery/DIY livery use would preserve openness as required by PPG2 paragraph 3.12. Two reasons are relied on by the Claimant. The first is that "if the keeping of horses is appropriate development then temporary horse shelters will also be appropriate development." The premise appears to be based on the erroneous (as I have determined it to be) proposition that use of land for outdoor recreation is deemed to preserve openness. If so, the conclusion, and with it the first reason, is irredeemably flawed; in applying paragraph 3.12 the inspector had to determine whether the proposed use, including all associated factors, would maintain openness and that exercise included consideration of the impact on openness of the structures needed for such use. The second reason is that whereas the planning application was for livery/DIY livery of up to 30 horses, the inspector could have imposed a condition limiting the number of horses at livery/DIY livery to those which could be stabled (17 in fact but limited by agreement to 12) thus avoiding the need for temporary horse shelters but failed to do so. In paragraph 78, however, she in fact did consider a condition limiting the proposed use to 12 on other grounds but rejected it for good reasons in the exercise of her planning judgement. (See below.) I can find no *Wednesbury* unreasonableness in relation to her approach to this point.

Ground (5)

52. Did the inspector err in law in considering that it could not be ensured that the manège would remain available to the livery horses, acting unfairly in taking this point against the Appellant without raising it at the Inquiry and failing to reach a reasoned or rational conclusion as to the impact on the Special Area of Conservation? The inspector dealt with this issue in paragraphs 78-80 of her decision letter, in the following terms,

> "78. I have considered whether, notwithstanding the number of horses for which approval is sought by the appellants, it would be appropriate to grant planning permission for livery limited to 12 stabled horses only, having regard to Mr. Kite's evidence [he being the representative of Natural England who gave evidence on behalf of the Planning Authority about the impact of riders on the adjacent heathlands] that such a limit, together with the presence of the manège, would provide reasonable confidence that the riding onto the heath would be very low. However, the difficulty as I envisage it would

be to ensure that the manège would remain available for use by all horses on the site for as long as the livery continued. No condition to this effect was put before me, and in any event I am not satisfied that this is something that could be achieved in an enforceable way by condition. Without the availability of the manège for all the horses kept on site being guaranteed in the long term, I cannot have that reasonable confidence. I also have to bear in mind the test set down in *Waddenzee*, which requires me to be certain that the development will not adversely affect the integrity of the heaths.

79. For these reasons, I consider that the livery use is likely to have significant impact on these European sites. Accordingly, I am required by the Regulations to carry out an "appropriate assessment" of the implications of the site in view of its conservation objectives. Bearing in mind the matters set out above, my assessment is that I cannot be certain that horses kept [at] the site would not be ridden on the heaths or that, consequently they would not cause damage to the heathland and its vegetation. Such damage would conflict directly with the nature conservation objectives for the heaths.

80. My conclusion, therefore, is that I cannot be certain, on the information available, that the livery use, if it continued, would not have an adverse effect on the integrity of the European sites at Whitehead Plantation and Holt Heath. There are no imperative reasons of overriding public interest why the livery use should be permitted to continue, either as sought or in reduced form. For these reasons, granting planning permission for the livery development would be in contravention of Regulation 61 of the Habitats Regulations."

53. Her decision that it could not be ensured that the manège would remain available to the livery horses was a decision for her planning judgement and was made for stated reasons that are in no way irrational. Accordingly, the Claimant has failed to persuade me that the inspector erred in law in this respect.

54. The claim that she acted unfairly in taking this point against the Claimant without raising it at the Inquiry is, in my judgement, misconceived. The proof of evidence of Mr. Kite (which was attached to the skeleton submissions on behalf of the Secretary of State) stated that

"7.30 Mitigation provided by the schooling and exercise facility [i.e. the manège] would need to exist so long as the use of the building for livery existed. This might be addressed by a planning restriction".

According to the inspector's notes, Mr. Kite's proof of evidence was taken as read at the inquiry and he was cross examined about, inter alia, his view that the manège was a factor in keeping horses off the heathlands. In my judgement, therefore, the continued existence of the manège as a means of providing exercise for the horses and reducing the risk that they would be ridden on to the heathlands and the potential for ensuring the continued existence of the manège by offering a suitable condition, was fairly and squarely before the inquiry. It was open to the Claimant to make such an offer but it failed to do so. For the reasons already given, it was not for the inspector to propose a condition. In short the inspector was fully entitled to proceed as she did.

55. The claim that the inspector failed to reach a reasoned or rational conclusion as to the impact on the Special Area of Conservation is wholly without merit. In paragraphs 66-80 she gave very detailed consideration to the facts and the legal framework and thereafter applied her planning judgement to arrive at a rational and soundly-based conclusion. This disposes of ground 5.

Ground (6)

56. The Inspector's other conclusions on paintballing and livery were reliant upon the legally defective conclusions. Despite the reference to livery, this ground, as developed, related solely

to the paintballing use and was limited to a consideration of the inspector's approach to travel and a complaint that her conclusions were reliant upon and thus tainted by the alleged Green Belt error. In light of my decision that she made no error in relation to her approach to PPG2, this ground fails.

57. The appeal is dismissed.

58. Since the Claimant has lost on every issue, it must pay the Secretary of State's costs of the appeal. The costs of the application for permission were reserved but, subject to any contrary argument by the Claimant, my provisional view is that the Claimant should pay those costs as well. The Secretary of State has provided me with a statement of costs totalling £10,827 but it is not clear whether this includes the costs of the application for leave. If the parties are unable to agree a costs order I will hear short oral arguments when this judgement is handed down.