



Kent Minerals Site Plan - Advice Note

Background

Shortly prior to the Environment and Transport Cabinet Committee on 28 November, KCC received correspondence from the promotor of the West Malling Sandpit site (known as Roughetts Sandpit) which enclosed a legal opinion from Rupert Warren QC of Landmark Chambers.

The opinion referred to the Europa Oil and Gas case and concluded that the way in which consideration had been given to the run-of-the-mill aspects of mineral extraction like screeners and site offices was contrary to the guidance given by the High Court in that case. A copy of the advice was provided in full to Cabinet Committee.

Further to Cabinet Committee, advice was sought from Isabella Tafur, Counsel at Francis Taylor Buildings. Ms Tafur has previously provided advice to KCC in respect of the Minerals Plan Site Plan. Initial advice was provided in a teleconference on 30 November. The teleconference was followed by a written opinion issued on 2nd December.

A copy of the opinion is appended, and the advice therein is summarised below.

Summary of the Opinion

1. Contrary to the opinion expressed at paragraph 8 of Rupert Warren's Advice, it is right that the Minerals Sites Assessment ("MSA") should consider all aspects of the proposed development, including the extraction works themselves, landscaping, extraction plant, vehicles and ancillary buildings in order to determine whether the proposed works constitute inappropriate development.
2. It is open to KCC to determine that the development fails to preserve openness and is therefore inappropriate. However, given that all of the features identified by the MSA on the West Malling Site will ordinarily be present in mineral development, further explanation should be provided as to why, in this particular instance, they render the development inappropriate.



3. In short, if bunds and extraction plant were sufficient to render mineral development inappropriate in the Green Belt, then all mineral development would be inappropriate and the exception in paragraph 146 of the (revised) NPPF would be of no effect.

4. It would be useful to provide further explanation of why the presence of the proposed works and infrastructure on this particular Site render inappropriate that which, on another Green Belt site, may be appropriate. This may be due to the duration of the works, the extent of the working area, the particular sensitivity of the Site or the specific visual impacts that will arise. Whatever the reason, the judgment that the proposed development would fail to preserve the openness of the Green Belt would benefit from further explanation.

Pursuant to the teleconference, I understand that further consideration of green belt matters in respect of the West Malling site is being undertaken, and that Members will be provided with an update in respect of the same at Cabinet on 3rd December.

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IN THE MATTER OF KENT MINERALS SITES PLAN
PROPOSED OMISSION OF WEST MALLING SANDPIT (SITE M8)

ADVICE

Introduction

1. I am asked to advise Kent County Council (“**KCC**”) in respect of its draft Kent Minerals Sites Plan (“**the Draft Plan**”) which is due to be considered by KCC’s Cabinet Committee on 3rd December 2018.

2. The Draft Plan proposes the allocation of a soft sand mineral site at Chapel Farm. It does not propose the allocation of a second soft sand site at Ryarsh, West Malling (“**the West Malling Site**”)¹ on the basis of its Green Belt impacts. That decision is informed by an assessment of the Site in the Minerals Sites Assessment 2018 (“**MSA**”) and in particular, Appendix 2 to that Assessment.

3. The promoter of the West Malling Site has submitted an Advice by Rupert Warren QC dated 27 November 2018 (“**the RW Advice**”) which suggests that the analysis in KCC’s MSA is flawed. It argues that the decision should be reconsidered before the allocations progress any further to ensure that the Draft Plan is sound.

4. I am asked to consider the criticisms raised in the RW Advice and to advise KCC on their merits and any further work that should be undertaken to inform the allocations in the Draft Plan.

¹ Also referred to as Site ‘M8’ in the KCC’ Mineral Site Assessment 2018

Summary of Advice

5. In my view, and contrary to the opinion expressed at paragraph 8 of the RW Advice, it is right that the MSA should consider all aspects of the proposed development, including the extraction works themselves, landscaping, extraction plant, vehicles and ancillary buildings in order to determine whether the proposed works constitute inappropriate development.
6. It is open to KCC to determine that the development fails to preserve openness and is therefore inappropriate. However, given that all of the features identified by the MSA on the West Malling Site will ordinarily be present in mineral development, further explanation should be provided as to why, in this particular instance, they render the development inappropriate.
7. In short, if bunds and extraction plant were sufficient to render mineral development inappropriate in the Green Belt, then all mineral development would be inappropriate and the exception in paragraph 146 of the (revised) NPPF would be of no effect.
8. It would be useful to provide further explanation of why the presence of the proposed works and infrastructure on this particular Site render inappropriate that which, on another Green Belt site, may be appropriate. This may be due to the duration of the works, the extent of the working area, the particular sensitivity of the Site or the specific visual impacts that will arise. Whatever the reason, the judgment that the proposed development would fail to preserve the openness of the Green Belt would benefit from further explanation.

Advice

9. Paragraph 146 of the NPPF makes it clear that mineral development will not be inappropriate provided it maintains the openness of the Green Belt and does not conflict with its purposes. The NPPF plainly envisages that some mineral development may harm openness but that it will not inevitably do so.

10. Any assessment of mineral extraction must therefore start from the premise that there is nothing inherent in the features commonly found in mineral extraction sites which would inevitably harm openness or conflict with Green Belt purposes². Following the Europa Oil approach, features which are “generally encountered” in the context of the mineral extraction cannot without anything more cause a particular proposal to be inappropriate on the grounds of openness. In Europa, this meant the “*structures, engineering works, and associated buildings ... generally encountered in mineral extraction*” or “*the common structural paraphernalia for mineral extractions cannot cause the development to be inappropriate.*”³.
11. Preserving the openness of the Green Belt does not mean ensuring that there is no physical change to it as a result of the development. Otherwise the policy would be unworkable since mineral extraction will almost always involve physical change (such as the extraction works themselves; bunds; landscape planting; and plant for example). A proposal may result in some reduction in the openness of the Green Belt whilst still “preserving the openness” of the Green Belt as required by paragraph 146 of the NPPF.⁴
12. In determining whether a particular mineral proposal harms the openness of the Green Belt, both its visual and spatial aspects will be relevant. The decision-maker must consider all aspects of the proposed development – including the extraction itself and any associated infrastructure and activity – and form a judgment as to whether the development harms openness. In my view it is not correct to say⁵ that “*landscaping, extraction plant, vehicles and ancillary buildings*” should all be left out of account in forming that judgment. All aspects of the proposed development should be taken into account in forming the judgment as to impact on openness.
13. It is then a matter of judgment for the decision-maker whether a particular proposal constitutes inappropriate or appropriate development in the Green Belt. Provided all relevant matters are taken into account, that judgment will be subject to challenge only on rationality grounds.

² Europa Oil and Gas Ltd v SSCLG [2013] EWHC 2643 (Admin) at [64]

³ See High Court decision in Europa Oil at [65] and [75] and Court of Appeal decision in Europa Oil [2014] EWCA Civ 825 at [38]

⁴ Samuel Smith, paragraph 60

⁵ As Rupert Warren does at paragraph 8 of his Advice

14. In determining whether a potentially appropriate development is in fact inappropriate, the following factors are likely to be relevant:

- a) The duration of the proposed development and the reversibility of its effects⁶. A short operation that fully restores the landscape in such a way as to preserve its openness is more likely to constitute appropriate development than a longer-term proposal that causes some permanent harm to the visual or spatial openness of the Green Belt. In this case the proposed operations will take place for some 24 years. Plainly this is a considerable length of time which may be used to support a finding of inappropriateness. I note that in the Samuel Smith case the proposed seven-year operations over six hectares were described by the Court of Appeal as “*a substantial extension to a large existing quarry, with a lengthy period of working and restoration*”⁷. The proposed working of the West Malling site is significantly larger (extending to some 12 hectares) and would be worked for a considerably longer period than the proposal under consideration in the Samuel Smith case.
- b) The physical extent of the proposed workings and the character and topography of the site;
- c) The visual impact of the development⁸. If the site is particularly visible or apparent in important views, then that might suggest that mineral extraction could not be accommodated without harming the openness of the Green Belt. As the Court of Appeal recognised in Samuel Smith mineral extraction will often have long-lasting effects visual effects on the openness of the Green Belt, which may be partly or wholly repaired in the restoration phase – or may not: whether the visual impacts of a particular project of mineral working would be such as to harm the openness of the Green Belt is, classically, a matter of planning judgment⁹. In that case it was recognised that the development would result in a permanent

⁶ Europa Oil at [67]

⁷ Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC [2018] EWCA Civ 489 at [3] and [42]

⁸ Samuel Smith

⁹ Samuel Smith at [39]

change to the landscape¹⁰ and that the bunding and landscape screening would close-off long distance views which were factors that should have been taken into account in the assessment of impacts on openness¹¹. In Samuel Smith, the landscape officer had not objected to the scheme but had identified a number of aspects that were harmful to the landscape and visual amenity of the area and which the Court considered should have been factored into the judgment on openness.

- d) The particular Green Belt purposes served by the site in question. Some purposes, such as preserving the setting and special character of historic towns for example, may be especially relevant to a particular site such that mineral extraction on the site would compromise that purpose.
- e) The proportionality of the proposed physical works and site infrastructure. A proposal that includes more physical works or infrastructure than strictly necessary is more likely to constitute inappropriate development than one that contains the minimum of physical works and infrastructure. The proposed height of bunds or mitigation planting; the extent of the proposed working area and the plant and infrastructure proposed may be relevant factors in determining whether the proposal is appropriate in the Green Belt.
- f) The fact that minerals can only be extracted where they are found such that the development has to take place in the Green Belt¹². If there are other non-Green Belt sites where the requisite minerals can be extracted, this will be relevant to the question of whether a proposal on a Green Belt site constitutes inappropriate development. In this case there is another site outside the Green Belt capable of meeting all of the currently identified need for soft sand in Kent. It may be that in light of the existence of another non-Green Belt site, all of the proposed working on the West Malling Site (i.e. the extraction itself and all associated development) constitutes inappropriate development.

¹⁰ Samuel Smith at [42]

¹¹ Samuel Smith at [43]

¹² Europa Oil, paragraph 67

15. In my view, the objection from the operators of the West Malling site should be used as an opportunity to carry out further work to justify the conclusion that the proposed mineral extraction would constitute inappropriate development. This should involve a careful analysis of all elements of the proposed development (extraction, bunds, plant and all infrastructure and activity).

16. The additional work should revisit the conclusions of the MSA to see whether they remain robust in light of this Advice and in particular, given the existence of an alternative non-Green Belt site, whether any of the proposed elements of the extraction works on the West Malling Site can be considered to be appropriate

Conclusion

17. My conclusions are set out in the Summary of Advice above.

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2nd December 2018