

Green Belt Development: the Legal Issues

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Current Pressures

- Government's political promise to increase protection to Green Belt – reiterated through NPPG Guidance (and Press Release)
- Government determination to increase development
- Various forms of infrastructure and housing need including waste and transport infrastructure + LA requirement to provide 5 year HLS/5 year supply of traveller sites.

As experience is showing, you cannot have all three. Pressure on GB is plainly increasing markedly and thus.....

The flurry of cases continues



Here are some of them (the most important in bold):

- *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government [2014] EWHC 2476 (Admin)* overturned in ***SSCLG v Redhill Aerodrome [2014] EWCA Civ 1386*** (“any other harm” under NPPF 88)
- ***R(Cherkley) v Mole Valley DC [2014] EWCA Civ 567*** (need and VSC test)
- ***R. (on the application of Holder) v Gedling BC [2014] EWCA Civ 599*** (relevance of alternative renewables under NPPF 90)
- *R(I.M. Properties Development Limited) v Lichfield District Council [2014] EWHC 2440 (Admin)* (alterations to boundary)
- ***Connors v SSCLG [2014] 2358 (Admin)*** (shortfall in travellers sites)

Cont.

- *R(Copas) v SSCLG [2014] EWHC 2634 (Admin)* (affordable housing)
- *R(Fox Land and Property Ltd) v SSCLG [2014] EWHC 15 (Admin)* (alternative sites)
- ***Gallagher Homes Ltd v Solihull MBC [2014] EWHC 1283 (Admin)*** (alterations to GB boundary)
- *Timmins v Gedling BC [2014] EWHC 654 (Admin)* (permission for cemetery – strict interpretation of exceptions to inappropriate development)
- *Lloyd v SSCLG [2014] EWCA Civ 839* (replacement of mobile home by building – interpretation of exceptions to inappropriate development)
- *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 825*

Issues:



The Issues I am going to examine:

1. Revisions to GB boundaries at plan making – *Gallagher and IM*
2. Inappropriate Development - exceptions
3. VSC and gypsy sites - *Connors*
4. VSC and need – *Cherkley*
5. GB and Renewables - *Holder*
6. Weighing harm in VSC balance - *Redhill*
7. GB and Conservation Areas – *East Northants adding another significant layer of protection in GB*

Headline points

- GB protection is being applied v. strictly by the Secretary of State (although perhaps less so by LPAs).
- Alterations to GB boundaries require exceptional changes in circumstances which “necessitate” revision.
- The VSC hurdle is very high
- In front of the SoS, unmet need will not alone trump GB protection.
- Courts will be exceptionally reluctant to find the SoS’s planning balance to be unlawful – but similarly will be reluctant to find grants by LPA in GB to be unlawful
- “Need” may mean economic demand and will depend on context.

The Policy Framework



- NPPF paras 79 - 92
 - Reflecting PPG2 – old case law under PPG2 endorsed in *R(Wildie) v. SoS [2013] EWHC 2769 (Admin)*
 - Essential tests remain the same
 - New NPPG guidance given 6 October 2014 reiterates NPPF position
 - Consistency with NPPF

New NPPG Guidance



- Read NPPF as a whole,
- GB an example of kind of policy which will indicate that development should be restricted,
- NPPF makes clear that GB boundaries should only be altered in exceptional circs.
- In preparing SHLAAs LAs should take into account GB constraints (and others which suggest development should be restricted)

NPPG announcement seems more about the newspaper headlines rather than any substantive change in policy – but shows political direction of travel in favour of enhanced GB protection as recent decisions have also made clear.

1. Revisions to GB boundaries - 'Exceptional circumstances'



- In *Gallagher Homes v Solihull MBC [2014] EWHC 1283 (Admin)*:
 - Mere process of preparing a new local plan cannot be regarded as exceptional circumstance; general extent of GB already established. Inspector had erred in permitting revision in absence of new facts – had simply come to new view of adverse impact of coalescence.
 - New circons must “necessitate” revision.

I.M. Properties rejected argument that “*fundamental assumption which caused the land initially to be designated must have been subsequently falsified*”. Relevant test is whether exceptional circons necessitate alteration.

2. Inappropriate development - exceptions (1)



Exceptions under Paragraph 89 include:

- *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 replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;*

Decisions on exceptions

- *Timmins v Gedling BC [2014] EWHC 654 (Admin)*
 - Cemeteries themselves were not within the exception in para 89 and were inappropriate development
- *Lloyd v SSCLG [2014] EWCA Civ 839*
 - “*building*” in para 89 did not include mobile home, therefore replacement by log cabin not within exception
- *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 825 – para 90 exceptions include mineral extraction which includes exploration*

3. VSC – Gypsy sites (1)

The Classic Situation – edge of major urban area; Council has not enough sites; not able to promote enough allocations to provide 5 year supply; family needs; human rights; children - request for temporary permissions until the Council sorts its permanent sites out.

You might think that in those circumstances, if limited harm to GB then difficult to resist temporary permissions – a stick to force Councils to get on with their allocations. As case law currently stands - you would be wrong.

VSC – Gypsy sites (2): Connors v SSCLG



The Circumstances:

- Five JR/s288 claims, all relate to refusal of permission for mobile homes within GB
- In all cases 5 year traveller site requirement under Traveller Sites Policy H.25 not met by Councils
- C1: 6 mobile homes; C2: 3 mobile homes next to existing house; C3: 2 mobile homes, two touring caravans, one day room + one utility room; C4: 5 unit site (temporary); C5: 1 mobile home
- Inspector found VSC in relation to C1,2,3 & 5 sufficient to grant planning permission; and sufficient for temporary pp in relation to C4 (council making progress towards 5 year supply)
- SSCLG rejected recommendation and refused in each case – even temporary permissions until councils made sufficient allocations
- On any reading of the Inspector Reports, harm to GB was slight

VSC – Gypsy sites (2): *Connors v SSCLG*



Found by Lewis J:

- Even harm from a temporary grant of permission can be treated as outweighing all the other factors;
- “nothing intrinsically lawful” about SSCLG’s approach that “unmet need alone is unlikely to justify the grant of planning permission in the Green Belt” (although these were not an unmet need only situation);
- Interests of children also raised – the SSCLG’s formulation that those interests were a primary consideration and had (only) significant weight was not wrong as a matter of ‘domestic’ law (non HRA) and under HRA it was clearly proportionate to make decision he did.

VSC – Gypsy sites (3): *Connors v SSCLG*



- Shows that how rigorous the Secretary of State is being even in respect of temporary (and limited) harm and High Court upholds even when:
 - Policy needs are unmet and result from longstanding failure on part of LAs;
 - Unlikely that non-GB alternatives will be found;
 - Inspector finding of limited harm; and
 - Article 8 rights of children and families are engaged and significant weight attached to these factors

4. VSC and need (1)



The big picture point, is that over the last year and despite 5 year HLS requirements, unmet need alone is unlikely to constitute VSC in GB

R(Copas) v SSCLG [2014] EWHC 2634 (Admin)

- Application for permission where applicant arguing for VSC as a result of affordable housing shortfall.
- Limited weight given to it by inspector due to lack of evidence for unmet need in the parish where development sited.
- July 2013 Written Statement taken into account by Inspector despite not being subject of submissions at inquiry.

High court rejected three grounds of challenge to PINS

1. Held that Written Statement only clarified NPPF, did not introduce new policy - not misunderstood by inspector;
2. Therefore no unfairness;
3. No error in describing the weight to be given to lack of alternative sites outside GB as “significant” and then later as “some further weight”.

VSC and need (2) – Cherkley revisited



- *Cherkley* in High Court had laid out key discussion of “need”
- Proposal: golf club and hotel in the Surrey Hills. AONB, AGLV, GB.
- Applicant’s case for VSC: demand for golf course and hotel here equated to need which equated to VSC. The Council accepted that argument and granted pp. Policy said those promoting golf courses would have to demonstrate that there is “a need for further facilities”.
- J said “*Need*” [in GB and other terms] means “required” in the interests of the public and the community as a whole – ie. Necessary in the public interest sense. It does not mean “interest or desire”
- *Cherkley* overturned on basis that:
 - “need” not relevant test under policy (only mentioned in supporting text)
 - Richard LJ went further and said that (contrary to J below) need has “*a protean or chameleon-like character*” and needed to be understood (in this context) “*in a broad sense so that the requirement is being met by establishing the existence of a demand for the type of facility which is not being met by existing facilities*”.

VSC and need (3)



Richards LJ also disapproved J's finding that the committee had misapplied the VSC test:

- Committee had given summary of reasons which said that the economic benefits and environmental safeguards were “sufficient... to outweigh any concerns”
- CA held that nothing showed that committee were applying different test from the VSC test set out in OR.
- Just because they referred to a general balancing exercise does not mean they did not apply the “clearly outweigh” test.
- Also held that there was no basis for describing the economic benefits as a “figleaf”

So a Council which wishes to grant permission in GB is allowed significant flexibility. Developers will want to persuade Councils because SoS likely to be a more difficult hurdle.

5. Material considerations in relation to renewables in VSC balance PPG2 (1)

Holder v Gedling BC [2014] EWCA Civ 599

- In context of VSC test the potential for other less intrusive forms of renewable energy, volume of energy to be produced, and the economic efficiency of the form proposed were both relevant considerations.
- It was a legal error to proceed on basis that they were immaterial.

(Note that this was under PPG2 – Para 91 of the NPPF now introduces a specific statement that VSC for renewables may include “*the wider environmental benefits associated with increased production of energy from renewable sources*”)

6. VSC and weighing harm - (1)

- *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government [2014] EWHC 2476 (Admin)* High Court had held that non-Green belt harms (in particular noise harm to quality of life and unresolved travel issues) could not be added to the Green Belt harm as “any other harm” within the VSC balancing act.
- This was roundly rejected by Sullivan LJ who held that:
 - Policy matrix around GB policy was the substantially the same following NPPF as under PPG2
 - Nothing in the NPPF displaces the statutory duty to have regard to material consideration under s.70(2) –fact that harm might not individually justify refusal does not prevent it being taken into account

Illustration of how strictly SoS is applying GB



- Decision of SSCLG re New Barnfield incinerator difficulties of finding locations for vital infrastructure in GB.

New Barnfield incinerator (APP/M1900/V/13/2192045)

- Permission refused 7 July 2014.
 - Substantial weight attached to need for waste capacity in Herts + effect on climate change targets due to lack of alternatives in pipeline
 - But GB harm + considerable weight given to the “less than substantial” harm to Hatfield House and Park were outweighed.
 - Under challenge – HCC claiming to be in an impossible position to deliver a plant, covered by GB, where?



7. Conservation Areas and GB

General trend in favour of heritage?

- Conservation areas now merit special attention in that authorities must give “considerable importance and weight” to desirability of preserving them: *East Northamptonshire DC v Secretary of State for Communities and Local Government [2014] EWCA Civ 137*
- See in GB context: *Garrod v North Herts DC*[2014] PAD 36 inspector decision – building in conservation area met GB VSC test because its design enhanced the conservation area.

Headline points

- GB protection is being applied v. strictly and the Courts do not intervene.
- Unmet need alone will be highly unlikely to trump GB protection.
- “Need” may mean economic demand and will depend on context.
- Alterations to GB boundaries require exceptional changes in circumstances which “necessitate” revision.
- Availability of alternative renewable energy sources as well as the overall efficacy of a proposal is a material consideration in the VSC balance.
- As ever, the Very Special Circumstances threshold is a very high one.