

# Green Belt Development: the Legal Issues

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## Current Pressures

- Government promise to increase protection to Green Belt
- Government determination to increase development
- Requirement to provide 5 year HLS

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

## A recent rush of cases



A large number of recent cases (the most important in bold):

- **R(Cherkley) v. Mole Valley [2013] EWHC 2582 (Admin) (22<sup>nd</sup> August 2013)**
- Williams v. SoS [2013] EWCA Civ 958 (26<sup>th</sup> July 2013)
- Moore v. SoS [2013] EWCA Civ 1194 (9<sup>th</sup> October 2013)
- **Hunston v. SoS [2013] EWHC 2678 (5<sup>th</sup> September 2013)  
upheld by CA [2013] EWCA Civ 1610 (12<sup>th</sup> Dec 2013)**
- R(Wildie) v. Wakefield [2013] EWHC 2769 (Admin)

As pressure to deliver houses increases, the scope for controversial GB permissions to give rise to challenges is obvious.

## Issues:



The Issues I am going to examine:

- Very special circumstances and 5 year housing land supply
- Very special circumstances and “need”;
- Gypsy sites and GB – recent developments

# 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
  - No intention to relax GB policy? – July Announcement and the Essex Decision
- Development Plan frameworks:
  - Consistency with NPPF
  - Strategic Gaps – adding layers of protection? - *Helioslough v. SoS [2011] EWHC 2054*
  - Long term plans - fixing boundaries – *Essex and draft allocations*

# Very Special Circumstances and 5 year HLS (1)



Context: NPPF14/47/49

- ***“47. ...boost significantly the supply of housing”***
- ***“...ensure that the Local Plan meets the full, objectively assessed needs”***
- ***“49. Housing developments should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up –to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites”.***
- ***“14. Where ...relevant policies are out-of date, granting permission unless....***
- ***Specific policies [including GB] in this Framework indicate development should be restricted.”***

## Very Special Circumstances and 5 year HLS (2)



### Facts:

- **Site: Fields/in GB/near St Albans/ abutting sports fields and residential on two sides**
- **Planning: Permission refused on appeal. DL before Govt policy statement on GB post - Essex – attempt to quash refusal.**
- **Key issue: VSC - lack of 5 year HLS – whether council and SoS had correctly understood the HLS position**
- **Appellant's Case: significant HLS shortfall constituted VSC. There was a policy vacuum on 5 year HLS and by misunderstanding the shortfall the decision was in error:J14**
- **The HLS figures used were old and did not purport to meet the para 47 test.**

## Very Special Circumstances and 5 year HLS (3)



### The High Court Judgment - Hunston:

- **“I do not see how it can be open to a LPA or an inspector to reach a conclusion as to whether [VSC] had been made out [arising from 5 yr HLS shortfall] by reference to a figure that does not even purport to reflect the full objectively assessed needs for market and affordable housing...”J: 28**
- **Restraints which lead to a lower figure being planned for, do not bear on the housing requirement under para 47 to be considered for VSC purposes**
- **Para 14 FN 9 does not affect that analysis – because the argument is circular – J:29.**
- **“The proper course involved assessing need, then identifying the unfulfilled need having regard to the supply of specific deliverable sites over the relevant period. Once that has been done it was necessary next to decide whether fulfilling the need in fact demonstrated.... clearly outweighed the identified harm...”**

## Very Special Circumstances and 5 year HLS (4)



- The Court of Appeal Judgment:
  - Unsurprisingly upheld HC;
  - Could not rely on RSS figure as illustrative of “objectively assessed housing need” – [25].
  - Not for s.78 inspector to carry out local plan process in determining the appeal so as to arrive at a constrained requirement[26]
  - But lack of 5 year HLS is not determinative – the key question is whether VSC [28]. In that assessment the extent of the shortfall will be material as will the planning circumstances of the area [29] and the constraints to dev
  - The para 14 regime is not a punishment for tardy LPAs

## Very Special Circumstances and 5 year HLS (4)



### Impact

**Council's addressing VSC case for housing in GB need to properly assess HLS position (the full need) in deciding whether:**

- *“the harm by reason of inappropriateness and any other harm is clearly outweighed by other considerations.” NPPF88***

**They must then assess the extent of the shortfall and other factors in considering VSC. It appears that the CA judgment makes GB s.78 appeals far more difficult.**

**This appears consistent with:**

- Govt July 2013 announcement**
- Essex Decision**

## Remains to be seen:

- **how Courts will react to challenges brought to GB grants when VSC found on 5 yr HLS grounds.**
- **And what about sites which are identified in draft plans to meet 5 yr HLS needs – what is the correct approach to their release in advance of completion of the statutory adoption processes?**
- **Note – must give clear reasons for finding VSC to exist - *Wildie***

## VSC and Need (1) – What is “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”. *Tesco v. Dundee* applied to interpretation of that policy.

# VSC and Need (1) – What is “need”



## The Judgement

In his pre-ambule the judge said this:

- ***“This proposition is fallacious. The golden thread of public interest is woven through the lexicon of planning law, including into the word “need”. Pure private “demand” is antithetical to public “need”; particularly very exclusive private demand. Once this is understood, the case answers itself. The more exclusive the development, the less public need is demonstrated. It is a zero sum game”.***

So what is “need”? J90 set out the various different sorts of need and J91:

- ***“But whichever level of type of development one is dealing with, a clear distinction is always drawn between “public” need (i.e. what is in the public interest [more housing, new road, new infrastructure]) and private “demand” (i.e. what is in the developer’s interest by having this particular type of development”.***
- **“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”**

## Gypsy sites and GB

### – continued source of much litigation:

- *Ball v. SoS [2012] EWHC 3590 Admin (pending in CA)*
  - *Policy on recovery changed since and more being recovered*
- *Moore v. SoS [2013] EWSCA Civ 1194*
- *Collins v. SoS [2013] EWCA Civ 1193 (not GB but relevant: approach to Children interests in gypsy cases)*