

## Green Belt Planning

### Openness of the Green Belt: lessons from Samuel Smith

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#### Introduction

- “Openness” of the Green Belt is one of its fundamental characteristics
  - ***133. 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.***
- But not defined in NPPF.
  - Clear from para 133 it is predominantly a spatial designation
  - Generally recognised that it is not a landscape designation
  - But is there a visual component, and how does that relate to landscape impact?

## When is openness relevant?

- Decision-taking:

**“144. 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 resulting from the proposal, is clearly outweighed by other considerations”**

- harm to “openness” can be a vitally important element of the “other harm”
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## When is openness relevant?

- 145. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:
    - ...
    - b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;
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## When is openness relevant?

- g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:
    - – not have a greater impact on the openness of the Green Belt than the existing development; or
    - – not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority.
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## When is openness relevant?

- 146. Certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. These are:
    - a) mineral extraction;
    - b) engineering operations;
    - c) local transport infrastructure which can demonstrate a requirement for a Green Belt location;
    - d) the re-use of buildings provided that the buildings are of permanent and substantial construction;
    - e) material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds); and
    - f) development brought forward under a Community Right to Build Order or Neighbourhood Development Order.
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## Openness as the absence of built development: the old orthodoxy

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*Timmins v. Gedling Borough Council* [2014] EWHC 654 (Admin)

*“[any] construction harms openness quite irrespective of its impact in terms of its obtrusiveness or its aesthetic attractions or qualities”*

### **BUT ALSO**

*“there is a clear conceptual distinction between openness and visual impact”*

*“it is wrong in principle to arrive at a specific conclusion as to openness by reference to its visual impact”*

These latter sentences called into question in *Turner* and *Sam Smith*

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## The visual dimension of openness: *Turner v. SSCLG* [2016] EWCA Civ 466

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- In *Turner*, the Court of Appeal was asked to determine whether an inspector had erred by failing to consider whether the proper construction of “openness of the Green Belt” as used in the sixth bullet point of paragraph 89 in the NPPF meant that the inspector had erred by not adopting a purely volumetric approach
  - Claimant contended the Inspector should simply have compared the volume of structures comprising the existing use of the site (a mobile home and associated storage yard with a moveable population of lorries) with that of the proposed structure (a three bedroom residential bungalow).
  - Inspector found transient nature of lorries etc not comparable to permanent bungalow
  - He had considered visual impact too.
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## The visual dimension of openness: *Turner v. SSCLG (2)*

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- In concluding that he had not, Sales LJ interpreted the concept of openness as one which was “*not narrowly limited to [a] volumetric approach*” but “*is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case*” [14].
- As a matter of interpretation, “openness” was capable of having a visual dimension. Accordingly, he concluded at [27] that the inspector’s evaluation was a rational and legitimate one for him to make on the facts.
- Suggests that visual impact is a permissible consideration – but whether it requires discrete consideration is a matter of planning judgment, on facts of case
- Now need to be read in the light of ***Sam Smith***

## ***Samuel Smith: key facts***

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- The local planning authority, NYCC, granted planning permission for an extension to the operational face of Jackdaw Crag Quarry, a magnesian limestone quarry.
- The quarry, which extends to about 25 hectares, is in the Green Belt, about 1.5 kilometres to the south-west of Tadcaster.
- Claimant, Samuel Smith, has brewery there.



## Samuel Smith: key facts

- Planning officer *did* consider visual impact on the landscape in question, but in question in section on landscape – was not in dispute between the parties.
  - Proposed restoration measures were considered in the same section and were in fact cross-referred to in the section on Green Belt
  - Conclusion was that visual impact was not sufficient to justify refusal of permission. That conclusion on landscape not challenged by the Claimants.
  - When considering Green Belt impact, the officer expressed her view that the development did preserve the openness of the Green Belt.
  - BUT, did not *expressly* consider the visual dimension of openness when considering harm to the GB. That is to say through the prism of openness of GB rather than landscape considerations.
  - Considered it in purely spatial terms.
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## Samuel Smith: The grounds

- Series of linked grounds but fundamentally the question in the Court of Appeal: did NYCC misapply government policy for “mineral extraction” in the Green Belt?
  - Ground 1 most important ground: (1) whether, in assessing the likely effect of the proposed development on the “openness” of the Green Belt, the county council’s committee erred in failing to consider its visual impact on the Green Belt
  - Also ground 3: whether the officer’s report was inconsistent in its conclusions on the likely impact of the development on “openness”
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**Samuel Smith:**  
**The visual dimension of openness**

- Lindblom LJ found that OR was a legal error
- The officer should have  
***“considered... the likely visual impact of the development on the openness of the Green Belt”***

and asked herself

***“whether this was a case in which an assessment of visual impact was, or might be, relevant to the question of whether the openness of the Green Belt would be preserved” ([45]).***

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**Samuel Smith: did Lindblom LJ go further?**

***“Whether, in the individual circumstances of a particular case, there are likely to be visual as well as spatial effects of the openness of the Green Belt, and, if so, whether those effects are likely to be harmful or benign, will be for the decision-maker to judge. But the need for those judgments to be exercised is, in my view, inherent in the policy.” [38]***

***“In my view, therefore, when the development under consideration is within one of the five categories of paragraph 90 and is likely to have visual effects within the Green Belt, the policy implicitly requires the decision-maker to consider how those visual effects bear on the question of whether the development would “preserve the openness of the Green Belt”. [40]***

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## Samuel Smith: Lessons (1)

- What does this mean for decision-makers?
    - Said this followed from decision in **Turner v SSCLG**
    - But has it raised the Q of visual impact from a factor that is capable of being relevant on its facts to one which must be considered every time?
  - Answer: probably, yes.
    - In theory, leaves margin of appreciation to determine whether a development is “likely” to have visual impacts on the openness, and thus whether consideration of harm to visual dimension of openness is required,
    - But safest option, unless development is genuinely underground or visual impacts will clearly not be perceived, consider visual, as distinct from spatial, impact.
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## Samuel Smith: Lessons (2)

What kind of things should be considered?

- Will any long-distance views be affected or cut-off? This is different from landscape considerations – i.e. screening may be good planning in landscape terms but actually harmful in terms of visual dimension of openness of GB.
  - Restoration measures – if development is temporary to what extent will restoration measures restore current visual aspects of openness of GB
  - Visual amenity – consider the visual amenity enjoyed by current users of any GB area. Any public rights of way running through the GB in question?
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### Samuel Smith: Lessons (3)

- Note that what amounts to visual harm to openness may be different to what amounts to harm to landscape/visual amenity
    - E.g. bunds in **Sam Smith** – screen development but block views
  - Do not neglect spatial dimension:

“The openness of the Green Belt has a spatial aspect as well as a visual aspect, and the absence of visual intrusion does not mean that there is no impact on the openness of the Green Belt as a result of the location of a new or materially larger building there.”

- Sales LJ in **Turner**
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### Samuel Smith: Lessons (4)

- Also useful lesson on the meaning of “preserve” the openness of the GB
  - Claimants challenged the officer’s conclusion in paragraph 7.122 of her report, that the “proposed development preserves the “openness” of the Green Belt”, as being irreconcilable with her conclusion in paragraph 7.126, repeated in paragraph 8.5, that “the proposed development would not *materially* harm the character and openness of the Green Belt”. (my emphasis)
  - Argued a finding of any harm to “openness” must lead to the conclusion that the proviso in paragraph 90 of the NPPF was not met. (Applying *R (Boot) v Elmbridge BC*)
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- Lindblom LJ found that this argument was not made out.

**“[It would] have been open to her, in theory, to find that the effect of the development on openness, whilst appreciable, would nevertheless “preserve” it”. [60]**

- But beware – if you consider that, despite some impact, the GB is nonetheless not harmed, i.e. preserved, say so.
  - A finding of some, even limited, harm but preservation overall may fall foul of *R (Boot) v Elmbridge BC* and be subject to challenge.
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