

Welcome to Landmark Chambers' 'NPPF Case Law Update' webinar

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a Digest' page, please click [here](#).

Your speakers today are...



Rupert Warren QC (Chair)



James Maurici QC

Topic: Housing



David Blundell QC

Topic: The
Presumption In
Favour of
Sustainable
Development

Your speakers today are...



Alistair Mills

Topic:
Interpreting the
NPPF –
Tips and Tricks
from the Cases



Hannah Gibbs

Topic:
Green Belt after
Samuel Smith

Interpreting the NPPF Tips and Tricks from the Cases



Alistair Mills

“I mean what I say, and I say what I mean”

- *R (James Hall) v City of Bradford MDC* [2019] EWHC 2899 (Admin)
 - Regarding categories of harm, there are no others besides those set out in the NPPF
 - There is no category in the NPPF of “minimal heritage harm”
 - No harm, less than substantial harm, substantial harm
- *R (Asda Stores Ltd) v Leeds CC* [2019] EWHC 3578 (Admin)
 - No presumptions in the NPPF other than express ones
 - Retail policy does not contain a presumption

“Words mean what I want them to mean”

- *Redhill Aerodrome Ltd v SSCLG* [2015] PTSR 274
 - “The Framework means what it says, and not what the Secretary of State would like it to mean”
- *Watermead PC v Aylesbury Vale BC* [2018] PTSR 43
 - Not necessary to give concluded view; SoS not before the Court
- *East Staffordshire BC v SSLCG* [2018] PTSR 88
 - Noted that had SoS’s view
- *R (Asda Stores Ltd) v Leeds CC* [2019] EWHC 3578 (Admin)
 - SoS invited to make subs on interpretation of NPPF
- *R (Wiltshire Council) v SSHCLG* [2020] EWHC 954 (Admin)
 - SoS not contesting claim; ordered to attend through counsel

NPPF vs PPG

- *Solo Retail Ltd v Torrington DC* [2019] EWHC 489 (Admin)
 - Different approaches to interpretation of NPPF and PPG?
- *CPRE Surrey v Waverley BC* [2019] EWCA Civ 1826
 - Suggests same approach applies to interpretation of NPPF and PPG
- *Cemex (UK) Operations Ltd v Richmondshire DC* [2018] EWHC 3526 (Admin)
 - National planning policy (including PPG) are material considerations *par excellence*

Policy and Officer Reports

- *R (CPRE) v Herefordshire Council* [2019] EWHC 3458 (Admin)
 - [73] duty to give reasons doesn't require explanation of interpretation of policy
- *R (Brommell) v Reading Borough Council* [2019] JPL 501
 - [37] OR doesn't have to set out every relevant provision of the NPPF
- *R (Irving) v Mid Sussex DC* [2019] EWHC 3406 (Admin)
 - [56] referring to only some development plan policies liable to mislead
- *Safe Rottingdean Ltd v Brighton & Hove CC* [2019] EWHC 2632 (Admin)
 - For Claimant to demonstrate error (including misunderstanding of policies)

Changes in Policy

- *Wakil (t/a Orya Textiles) v Hammersmith and Fulham LBC* [2014] Env LR 14
 - Would change have had an impact on the authority's decision
- *R (Hudson) v RB Windsor and Maidenhead* [2019] EWHC 3505 (Admin)
 - Not enough that there is a material change in policy, the new policy must be material to the decision
- *R (Day) v Shropshire Council* [2019] EWHC 3539 (Admin)
 - Adopt interpretation from previous NPPF if no change
- *Paul Newman New Homes Ltd* [2019] EWHC 2367 (Admin)
 - Shouldn't have to trawl through the previous NPPF to interpret the present one

The Presumption In Favour of Sustainable Development



David Blundell QC

The Cases: Take Five

- 5 key cases of significance on the current NPPF, all first instance:
 - *Wavendon Properties Ltd v. SSHCLG* [2019] PTSR 2077 (Dove J)
 - *Monkhill Ltd v. SSHCLG* [2020] PTSR 416 (Holgate J)
 - *Peel Investments (North) Ltd v. SSHCLG* [2020] PTSR 503 (Dove J)
 - *Paul Newman New Homes Ltd v. SSHCLG* [2020] PTSR 434 (Sir Duncan Ouseley)
 - *Gladman Developments Ltd v. SSHCLG* [2020] EWHC 518 (Admin) (Holgate J)

Case 1: *Wavendon* – easy as 1, 2, 3

- **Facts:** outline application for 203 dwellings – parties on appeal agreed no 5 year housing land supply, SSHCLG recovered jurisdiction and disagreed.
- **Argument:** does para 11(d) mean that *every one* of the most important policies must be up-to-date before the titled balance is disengaged?
- **Findings:** no. 3 key stages to analysis under Art 11(d):
 1. Establish which policies most important for determining application;
 2. Examine each to decide if out-of-date (apply NPPF and *Bloor Homes*);
 3. Form overall judgment whether “as a whole” out-of-date.

Case 2: *Monkhill* - the asymmetric tilted balance

- **Facts:** 28 dwelling in grounds of former country house, most of site in AONB / remainder in area of great landscape value.
- **Argument:** a policy cannot fall in para 11(d)(i) unless expressed in language whose application may provide a clear reason for refusal (here, NPPF/172).
- **Findings:** Holgate J summarised the meaning and effect of paras 11 and 12:
 - Presumption does not displace s38(6) PCPA 04;
 - Relationship between limb (i) and limb (ii) (and fn6);
 - Relationship between limbs (i) and (ii) and s70(2) TCPA 90 and s38(6) PCPA 04;
 - “ineluctable consequence” is asymmetry in the tilted balance.
- NB: comprehensive summary at [39]; useful mini-summary at [45].

Case 3: *Peel* – what does “out-of-date” mean?

- **Facts:** Appeal A, 600 dwellings, marina; Appeal B, residential.
- **Argument:** saved UDP policies out-of-date once the plan period had ended?
- **Findings:** no. Dove J carried out review of 2012 NPPF cases on out-of-date policies:
 - Whether policies were out-of-date for NPPF was question of interpretation of planning policy, especially NPPF paras 11(d) and 213;
 - Nothing in NPPF required policies to be treated as out-of-date after end of plan period – contrary was true, see para 213;
 - *Bloor* applied – question of fact, or fact and judgement;
 - End of plan period relevant but not dispositive;
 - Lord Carnwath in [63] of *Hopkins Homes* laying down no legal principle;
 - 2012 Regulations did not require this result.

Case 4: *Paul Newman* – trigger happy

- **Facts:** non-determination of application for 50 homes in the countryside.
- **Argument:** can a single DP policy be the “basket” of policies for para 11(d)?
- **Findings:** yes, in principle. Sir Duncan Ouseley examines the “triggers” in para 11(d):
 - “where there are no relevant [DP] policies” was “quite clear” – where 1+ policies exist, trigger does not apply:
 - 1 policy suffices;
 - No requirement that the policies be up-to-date – just relevant;
 - “most important ... out-of-date” was “reasonably clear” – not out of date just because in time-expired DP, agreed with *Wavendon*.
- Language difference between 2012 para 14 and 2018 para 11(d) intentional.
- Right to interpret 2018 NPPF on its own.

Case 5: *Gladman* – back to basics

- **Facts:** 2 appeals: 120 dwellings, 240 dwellings. No 5 year supply for either.
- **Argument:** are policies of the DP to be ignored when applying the tilted balance in para 11(d)(ii)?
- **Findings:** no:
 - Still need to consider any relevant DP policies under para 11(d)(ii);
 - Still need to consider weight, not prescribed by NPPF;
 - Have regard e.g. to nature and extent of shortfall, reasons for it and prospects of it being reduced;
 - Para 11(d)(ii) operates in 3 scenarios: (1) no relevant DP policies, (2) most important DP policies out-of-date, (3) housing shortfall = deemed out-of-date;
 - Fn7 deems out-of-date – still must have regard and determine weight.

NPPF Case Law Update: Housing



James Maurici Q.C.

Scope

- Covering Court cases on section 5 of the NPPF “*Delivering a sufficient supply of homes*”
- Chapter 5: paras 59 – 79 and includes:
 - Para 59: “*the Government’s objective of significantly boosting the supply of homes*”.
 - Paras 61 – 64: Dealing with affordable housing.
 - Paras. 67 – 72: Identifying land for homes.
 - Paras. 73 – 76: Maintaining supply and delivery – including at para. 73 “*Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years’ worth of housing against their housing requirement ...*”.
 - Paras 77 – 79: rural housing.

The cases

1. Para. 59: ***Crondall PC v SSHCLG*** [2019] EWHC 1211 (Admin);
2. Para. 73:
 1. ***Tewkesbury BC v SSHCLG*** [2019] P.T.S.R. 2144;
 2. ***Peel Investments (North) Limited v SSHCLG*** [2020] JPL 279;
 3. ***Eastleigh BC*** [2019] EWHC 1862 (Admin);
3. Para. 79: ***City & County Bramshill Ltd v SSHCLG*** [2019] EWHC 3437 (Admin);
4. Annex 2 Glossary: ***Flynn v LB Southwark*** [2019] EWHC 3575 (Admin).

Para. 59: *Crondall*

- ***Crondall*** better known as a case on habitats and the fall-out from the ridiculous decision of the CJEU in ***People over wind and Sweetman v Coillte Teoranta***.
- But one of the grounds also focussed on the interpretation of para. 59 of the NPPF.
- Short but important point established at [108] “[*The Inspector*] entitled to conclude, as he did, that the policy objective of significantly boosting the supply of homes contained in paragraph 59 did not cease to apply when housing land supply in excess of five years could be established”.

Para 73: *Tewkesbury BC* (1)

- FACTS: scheme for 40 dwellings. One issue on appeal was could LPA show a 5YLS.
- Inspector rejected LPA's case that an oversupply of housing land since the start of the development plan period should be counted in calculating 5YLS, he considered that oversupply from previous years could not be "banked" so as to reduce the housing target in future years. He concluded there was no 5YLS and that the presumption in paragraph 11 of the NPPF thus applied, but he ultimately refused PP.
- LPA sought – despite winning appeal – to JR Inspector's findings on 5YLS on basis that important point of interpretation of the NPPF arose;
- Claim dismissed on jurisdictional grounds: *"in the particular circumstances of a decision in relation to a section 78 planning appeal, where the successful party wishes to bring a judicial review in relation to an issue of planning policy interpretation with which it disagrees, having lost that particular battle but won the war in relation to the outcome of the appeal, I do not consider that the principles in relation to dealing with such an academic judicial review are engaged"*

Para 73: *Tewkesbury BC* (2)

- NB para. 14: “... Mr Tim Buley QC, on behalf of the [SSHCLG], contends that, as the inspector observed, the NPPF and the PPG are completely silent on the issue of whether or not any oversupply should be taken into account when calculating the five-year requirement. Since the task of the court is one of textual interpretation of existing policy, and not the creation of policy by filling gaps where policy might have been created, there is, in the present case, simply no policy to interpret. He submits that there are a number of potential alternative approaches which might be taken by any policy-maker in respect of the treatment of oversupply, but that it is not the job of the court to select which policy approach should be taken so as to fill what is an accepted gap in the defendant's national policy. In the absence of any text to interpret, the court has no task of interpretation to perform; since the NPPF is silent and there is no guidance in the PPG, Mr Buley submits that the matter of the treatment of any oversupply is left to the decision-taker based on the particular facts of any given case” (emphases added).

Para 73: *Peel Investments*

- 2 recovered appeals for up to 600 houses in Salford.
- C alleges Inspector erred in finding LPA was able to demonstrate a 5YLS for the purposes of para. 73 because it was incorrect for the to rely purely upon a mathematical quantification of the HLS; as there was a qualitative housing land supply shortfall in terms of the significant deficit in the number of larger family aspirational homes, as well as in terms of the provisions of affordable housing.
- Court rejected this [81] *“The requirement to demonstrate a deliverable five-year housing land supply is one which is purely quantitative. It involves a calculation of the deliverable number of units within the five-year time period, and nowhere in the text of the policy pertinent to how the five-year housing land supply is to be assessed is there any suggestion that the qualitative nature of that supply (including its mix of house type or tenure) has any part to play in determining whether there is a qualifying five-year housing land supply available to a local planning authority”*.
- But *“[t]hat is not to say that those qualitative issues are not relevant to the planning balance.”*
- Subject to an appeal to Court of Appeal ...

Para 73: *Eastleigh BC*

- If no 5YLS NPPF fn 7 deems relevant policies to be out-of-date;
- But NPPF in this regard is a “*one way consideration*” on 5YLS.
- Inspector not *required* to take into account the fact that there is a 5YLS in deciding what weight to give to policies in a Development Plan (in that case countryside policies).
- Weight to be attached to fact of 5YLS for Inspector subject to ***Wednesbury***.
- Failure to give any weight to fact of 5YLS in assessing weight to be given to relevant policies not irrational, was not required to increase weight to these policies because there was a 5YLS.

Para 79: *City & Country*

- Para 79 “*Planning policies and decisions should avoid the development of isolated homes in the countryside ...*”.
- Considers this and the exceptions and earlier Court of Appeal cases of ***Braintree v SSCLG*** [2018] 2 P&CR 9 and ***Dartford v SSCLG*** [2017] PTSR 737.
- (1) Rejects argument that there is a PDL exception [28].
- (2) Rejects argument that the number of intended houses proposed can remove the application of para. 79(!!).
- There is an outstanding appeal ...

Annex 2: Flynn

- Dove J. para. 4 *“[a]ffordable housing is a portmanteau term which comprises a number of potential kinds of tenure. It is a term which is defined in annex 2, the Glossary, to the National Planning Policy Framework”*
- Portmanteau? - a large travelling bag !



NPPF Case Law Update: Green Belt after *Samuel Smith*



Hannah Gibbs

Introduction

- *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) (Respondents) v North Yorkshire County Council (Appellant)* [2020] UKSC 3
- Key issue = the meaning of “*openness*” in the Green Belt, in particular relationship between *openness* and *visual impact*.

“It seems surprising in retrospect that the relationship between openness and visual impact has sparked such legal controversy.” [23]

"Green Belt makes
me and my family
who we are."

#OurGreenBelt



Campaign to Protect
Rural England
Standing up for countryside



I'M NOT JUST A PRETTY PLACE...



I am the Green Belt &
I Encourage Urban Regeneration
Green Belt protection encourages the recycling of
derelict & other land inside towns & cities

”Openness” in the NPPF

- Openness is the backbone of GB policy.

“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.

134. Green Belt serves five purposes:

- a) to check the unrestricted sprawl of large built-up areas;**
- b) to prevent neighbouring towns merging into one another;**
- c) to assist in safeguarding the countryside from encroachment;**
- d) to preserve the setting and special character of historic towns; and**
- e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.”**

”Openness” in the NPPF

“143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

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.”

”Openness” in the NPPF

“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;

...

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”**

”Openness” in the NPPF

“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.”**

Samuel Smith: what was the case about?



Samuel Smith: landscape impacts

- ‘Quality of the Locally Important Landscape Area as a whole would be compromised’
- *Exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so.*
- *Long distance views could be cut off by the proposed bunding and planting.*
- Agricultural land would ultimately be replaced by a ‘deep lower level landscape’ of grassland.
- The ‘character and quality’ of the landscape would be ‘permanently changed’ and the ‘impact cannot be described as neutral’

Samuel Smith's argument

- NY erred in failing to treat the visual effects of the development as “material considerations” in its application of the openness proviso under paragraph 90 (now para 146).
- In other words, visual impact needed to be considered by the Council not just, for example, when thinking about landscape or visual amenity but specifically *through the prism* of openness

Samuel Smith: the judgment

“... The issue which had to be addressed was whether the proposed mineral extraction would preserve the openness of the Green Belt or otherwise conflict with the purposes of including the land within the Green Belt. Those issues were specifically identified and addressed in the report. There was no error of law on the face of the report. Paragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication. As explained in my discussion of the authorities, the matters relevant to openness in any particular case are a matter of planning judgement, not law.” [39]

Reflections on the case

What are the most important points to take away from this case?

1. Openness as a “broad policy concept”

- **“The concept of “openness” in paragraph 90 of the NPPF seems to me a good example of... a broad policy concept.” [22]**
- For the planning decision-maker to decide, on the facts of any given case, what factors are relevant when considering whether openness is preserved.
- Only if the decision maker has failed to consider a factor that, on the facts of the case, was “so obviously material” as to require direct consideration, that there will be scope for the court to intervene.

2. Openness ≠ landscape quality

- **“It is clear therefore that the visual quality of the landscape is not in itself an essential part of the “openness” for which the Green Belt is protected.” [5]**
- **“As PPG2 made clear, it is not necessarily a statement about the visual qualities of the land....” [22]**
- **“Paragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication.” [39]**







3. But visual aspect is not *irrelevant*

- “...though in some cases this may be an aspect of the planning judgement involved in applying this broad policy concept.” [22]
- Possible examples:
 - Mineral extraction requiring restoration
 - Development in GB that constitutes setting of historic town
 - Development particularly close to GB/urban boundary that risks contributing especially to urban sprawl

4. Openness as “counterpart to urban sprawl”

- **“It is naturally read as referring back to the underlying aim of Green Belt policy, stated at the beginning of this section: “to prevent urban sprawl by keeping land permanently open ...” Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt.” [22]**
- Not about openness or absence of development “per se”. Absence of “urbanising development”?
- Mineral extraction, Court highlighted that generally temporary, can be restored, and minerals can only be worked where found.
- **“...Further, as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land” [22]**

Post-war housing

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5. Planning common sense

- Lord Carnwath emphasized:
 - The proper distinction between planning policy application and interpretation;
 - That officer's reports must be read fairly and as a whole, and not subjected to exegetic analysis as if they were a contract.
- During coronavirus pandemic, worth bearing in mind even more than usual when considering challenges.

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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