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# You Know You Need to Know Case Law Update

*Merrow Golden*
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**15 June 2020**



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## Decision-making: the Development Plan, the Tilted Balance and Material Considerations

- R (Corbett) v Cornwall Council [2020] EWCA Civ 508
- Gladman Developments v SSHCLG [2020] EWHC 518 (Admin)
- R (Samuel Smith Old Brewery (Tadcaster) et anr) v North Yorkshire CC [2020] UKSC 3

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# Corbett v Cornwall Council

- How do you assess a proposal's "accordance with the development plan as a whole"?

  = a matter of planning judgment

- "If regard is to be had to the development plan for the purposes of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise" (s38(6) PCPA 2004)

- Proposal for a caravan site extension in an Area of Great Landscape Value



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# Corbett v Cornwall Council

- Officer's report:

(i) Conflict with DP policy 14 for the protection of great landscape value

(ii) Compliance with other relevant policies, including policy 5 which encouraged development for tourism

(iii) Overall, proposal accorded with the plan as a whole:

*11. Considering the development in accordance with the development plan and the framework as a whole I would give limited weight to the impact upon the AGLV as the views are localised and can be further mitigated by suitable planning and would attribute greater weight to the economic benefits of the proposal*

*12. The proposal with the recommended conditions would result in a satisfactory development which would add to sustainable economic growth in rural areas and assist the local tourist industry…[recommend approval]*

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# Corbett v Cornwall Council

Policy 14: Areas of Great Landscape Value

*(1) Developments will not be permitted that would cause harm to the landscape, features and characteristics of Areas of Great Landscape Value.*

Policy 5: Business and Tourism

*3. The development of new or upgrading of existing tourism facilities through the enhancement of existing or provision of new, high quality sustainable tourism facilities, attractions and accommodation will be supported where they would be of an appropriate scale to their location to their accessibility by a range of transport modes. Proposals should provide a well balanced mix of economic, social and environmental benefits.*



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# Corbett v Cornwall Council

High Court's view:

22. …If saved Policy 14 means what it says, the plan would require the application to be refused. In these circumstances a decision granting planning permission would be a decision made not in accordance with the plan and would have to have been justified by material considerations indicating the desirability of a determination made otherwise than in accordance with the plan. (…)

28 … [The] development plan read as a whole, including saved Policy 14, does not permit a development that would cause harm to the landscape, features and characteristics of an AGLV covered by that policy. It follows that a determination granting planning permission for such a development would be a determination not in accordance with the development plan."

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# Corbett v Cornwall Council

## Court of Appeal (per Lindblom LJ):

Useful review of previous authorities on assessing accordance with the DP:

- *BDW Trading Ltd* [2016] EWCA Civ 493,
- *R v Rochdale MBC, ex parte Milne* [2000] EWHC 650,
- *Tesco Stores v Dundee CC* [2012] UKSC 13,
- *R (TW Logistics Ltd) Tendering DC* [2013] EWCA Civ 9

Each recognises that different DP policies/parts of a Local Plan can pull in different directions and be mutually irreconcilable

(*BDW Trading* [21]; *Milne* [48]; *Tesco Stores* per Lord Reed [19], per Lord Hope [34]; *TW Logistics* [18])

In assessing whether a proposal accords with the DP, you look at DP "as a whole" (*BDW Trading* [21])



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# Corbett v Cornwall Council

## Court of Appeal (per Lindblom LJ):

43. In my opinion this is a case in which, on their correct interpretation, the relevant policies of the development plan were – as Lewison L.J. put it in *TW Logistics Ltd.* (at paragraph 18) – "[pointing] in different directions". Policy 5, supportive of new "tourism … accommodation" being developed in Cornwall, worked in favour of the proposal. Policy 23 and saved Policy 14, unfavourable to development that would harm the Area of Great Landscape Value, worked against it. It was for the council as local planning authority, responsible for the day-to-day application of development plan policy, to "decide which policy should be given greater weight [in this] particular decision".

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# Corbett v Cornwall Council

## Court of Appeal (per Lindblom LJ):

41. When the relevant policies of the plan are read together, as they must be, I do not think it can be said that Policy 14 has automatic primacy among them, so that any breach of that policy, however slight, will always be conclusive when the decision-maker is considering whether a particular proposal is in accordance with the plan as a whole. That understanding of Policy 14 would not only be an unrealistic and unnecessary constraint on the decision-maker's performance of the section 38(6) duty; it is also incorrect as a matter of construction (…) Nowhere is it stated, or implied, that any conflict with Policy 14 will necessarily lead to a proposal being found to be not in accordance with the development plan as a whole, or to a refusal of planning permission. And in my view there can be no justification for reading words into Policy 14 that are not there, effectively excluding from the matrix of development plan policy relevant to proposals for "tourism facilities … and accommodation" the very policy that specifically relates to development of this kind – Policy 5; denying that policy its proper place in the performance by the council of its duty under section 38(6); and nullifying the support that such proposals are given by the plan.



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# Corbett v Cornwall Council

Policy 14: Areas of Great Landscape Value

*(1) Developments will not be permitted that would cause harm to the landscape, features and characteristics of Areas of Great Landscape Value.*

"42. I am not saying that, as a matter of principle, the breach of a single policy of a development plan can never be capable of amounting to conflict with the plan as a whole. I would not go that far. (…)"

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## Gladman Developments v SSHCLG

- Qn: whether the decision-maker should take development plan policies into account when applying the NPPF para 11(d)(ii) 'tilted balance'?
- Answer: DP policies should be considered in the tilted balance

- Nb. see *Monkhill Ltd v SSHCLG* [2019] EWHC 1993 (Admin) per Holgate J at [39] and [45], for guidance on decision-making under para 11 generally



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## Gladman Developments v SSHCLG

### NPPF para 11(d)(ii)

Plans and decisions should apply a presumption in favour of sustainable development.(…)

For decision-taking this means: (…)

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

[Footnote 7: "out-of-date" includes, for applications involving the provision of housing, situations where the LPA cannot demonstrate a five year supply of deliverable housing sites…or where the HDT indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years…]

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## Gladman Developments v SSHCLG

### Claimant's arguments

- A 2-stage approach should be applied: (i) consider the tilted balance by reference to NPPF policies alone, (ii) then outcome of TB is a material consideration under section 38(6) test, at which point dev plan policies must be taken into account
- Footnote 6: "The policies referred to are those in this Framework (rather than those in development plans)"
- TB was a remedy that applied when the DP was "not working"/failing to deliver development
- If the policies which are most important for determining an app are out-of-date, then to take into account (under the tilted balance) either those policies or conflict with the DP as a whole would be improper – involving double-counting and circularity



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## Gladman Developments v SSHCLG

High Court, per Mr Justice Holgate:

- Previous cases - *Crane* [2015] EWHC 425 (Admin); *Woodcock Holdings Ltd* [2015] EWHC 1173 (Admin); *Hallam Land Management Ltd* [2018] EWCA Civ 1808 - clarified re predecessor version NPPF (para 14) that DP policies were not to be disregarded for purposes of the TB (at [83]-[84])

- Nothing to indicate policy had changed in new NPPF, continues to say "when assessed against the policies in this Framework as a whole" [88]

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## Gladman Developments v SSHCLG

90. Adopting the straightforward approach to interpretation laid down by the case law, paragraph 11(d)(ii) of the NPPF 2019 does not require any relevant development plan policies to be excluded from the tilted balance. The position remains the same as under paragraph 14 of NPPF 2012.

92…LPAs and Planning Inspectors may continue to weigh development plan policies in the tilted balance in paragraph 11(d)(ii).

112…The NPPF does not exclude development plan policies from the tilted balance; they are relevant considerations.



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## Gladman Developments v SSHCLG

The Court emphasised that the TB applied in three different scenarios:

(i) where there are no relevant DP policies

(ii) Where the most important policies for determining the app have been "assessed" by the decision-maker as out-of-date

(iii) Where a shortfall in 5YS triggers the application of the TB and the policies important for the determination of the app are "deemed" out-of-date

"…The language has been chosen so as to be applicable to all three scenarios. It has not been drafted so as to have the effect of *excluding* development plan policies from the tilted balance in scenarios (2) and (3)." [95]

Fn 7 "trigger" only deems certain policies to be out-of-date; "[w]hether they are in fact out-of-date and, if so, in what respects, and how much weight should be attached to [them] remains to be assessed" (at [103])

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- Not sensible to divorce considerations that are relevant under TB from the related DP policies (at [102]); a two-stage approach would require an elaborate form of decision-making (at [104])
- No 'double-counting' – rather two tests/criteria applied to same factors
- Wording in footnote 6 did not apply to para 11(d)(ii) (at [89])



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## Gladman Developments v SSHCLG

- Idea that the TB only applies when the DP not working is from the perspective of a developer/housebuilder (at [98])

100. There are a number of flaws in the Claimant's argument. First, paragraph 11(d)(ii) does not itself provide a solution for the problem with which the Claimant is concerned, namely a shortfall in housing land or a lack of land to meet identified development needs. It does not automatically lead to the grant of planning permission. Instead, paragraph 11(d)(ii) involves the balancing of competing interests, but with a *tilt towards* granting permission. That exercise may or may not result in planning permission being granted. But there is nothing about the nature of that policy or the assessment it requires which would justify the exclusion of development plan policies from the tilted balance.

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# Samuel Smith v North Yorkshire

## Material Considerations (section 70 TCPA)

- Bolton MBC v Environment Secretary (1991) 61 P&CR: anything that might cause the decision-maker to reach a different conclusion
- R (oao Kides) v South Cambridgeshire DC [2002] EWCA Civ 1370 at [121]: anything that (if placed in the scales) would tip the balance to some extent, one way or another

In *Bolton MBC*, counsel had argued that failure to have regard to a matter could only invalidate a decision if it was one which "no reasonable [decision-maker] would have failed to take into account". This was rejected ([2017] PTSR 1063 at 1061H)



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# Samuel Smith v North Yorkshire

## Derbyshire Dales DC v SSCLG [2009] EWHC 1729 (Admin)

- Carnwath LJ (as he then was)
- Questioned approach of *Bolton MBC* (i.e. that a factor "might realistically" have led to a different result) (at [23])
- Referred to *Creed NZ v Governor General* [1981] 1 NZLR 172:

  > What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …."

- Notes that Glidewell LJ in *Bolton MBC* referred to *Creed NZ* but without reference to the fact that the statement had been adopted by the House of Lords and Court of Appeal in subsequent cases

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# Samuel Smith v North Yorkshire

Derbyshire Dales DC v SSCLG [2009] EWHC 1729 (Admin)

Carnwath LJ (as he then was) concluded (at [28]):

It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account "as a matter of legal obligation".



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# Samuel Smith v North Yorkshire

Lord Carnwath applies approach in *Creed NZ* and *Derbyshire Dales*:

32. [having cited to *Derbyshire Dales* at [28]] Mutatis mutandis, similar considerations apply in the present case. The question therefore is whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", or alternatively whether, on the facts of the case, they were "so obviously material" as to require direct consideration.

Refers to *Bolton MBC* but only as having "adopted" the Creed NZ approach …

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# Samuel Smith v North Yorkshire

R (oao ClientEarth) v SSBEIS and Drax Power Ltd per Holgate J

99. In [*Samuel Smith*] the Supreme Court endorsed the legal tests in [*Derbyshire Dales*] and *CreedNZ*…which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or entitled* to take into account. But a decision-maker does not *fail* to take a relevant consideration into account unless he was *under an obligation* to do so. …



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# Samuel Smith v North Yorkshire

R (oao ClientEarth) v SSBEIS and Drax Power Ltd per Holgate J

99…Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account

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## Samuel Smith v North Yorkshire

R (oao ClientEarth) v SSBEIS and Drax Power Ltd per Holgate J

100. It is also plain from the endorsement by the Supreme Court in Samuel Smith at [31] of Derbyshire Dales at [28], and the cross-reference to Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063 but solely to page 1071, that principles (2) and (6) in the judgment of Glidewell LJ in Bolton at p 1072 (which were relied upon in the Claimant's skeleton under grounds 3 and 4) are no longer good law.

(See also *Gladman Developments Ltd v SSHCLG* [2020] EWHC 518 (Admin) at [76])



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# You Know You Need to Know
# Case Law Update

## Green Belt and Development in the Countryside

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## Green Belt and Development in the Countryside

1. R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council [2020] UKSC 3
2. R (Haden) v Shropshire Council [2020] EWHC 33 (Admin)
3. R (Wiltshire Council) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 954 (Admin)



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## *R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council* [2020] UKSC 3


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## *R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council* [2020] UKSC 3

- Whether the LPA had properly understood the meaning of "openness" in the national planning policies applying to mineral working in the Green Belt, as expressed in the 2012 NPPF
- Para 90, NPPF 2012:

  *"Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:*

  - *mineral extraction;"*



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## *R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council* [2020] UKSC 3

- Officer's Report:
  - Considered visual impact in section of report on landscape – not in dispute and no challenge to conclusion
  - Impact on Green Belt, did not *expressly* consider visual dimension of openness when considering harm to the GB
  - Conclusion: development did preserve openness

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## *R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council* [2020] UKSC 3

- High Court (Hickinbottom J):
  - Applying *Turner*, depending on the specific circumstances of a case, visual impact might be taken into account by a planning decision-maker when considering the impact of a proposed development on the openness of a green belt area
  - In circs, the potential visual impact of the development fell very far short of being an obvious material factor



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## *R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council* [2020] UKSC 3

- Court of Appeal:
  - *"It was defective, at least, in failing to make clear to the members that, under government planning policy for mineral extraction in the Green Belt in paragraph 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor in their approach to the effect of the development on the 'openness of the Green Belt' ..."* ([49], per Lindblom LJ).
  - Re officer's own assessment, it was "quite obviously relevant", and therefore necessary part of the assessment.

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## *R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council* [2020] UKSC 3

- Supreme Court (Lord Carnwath) at [22] and [25]:
  - Concept of "openness" is good example of a broad policy concept.
  - Refers back to the underlying aim of Green Belt policy, *"to prevent urban sprawl by keeping land permanently open …".* Openness as counterpart of urban sprawl and linked to GB purposes.
  - Not necessarily a statement about the visual qualities of the land, though in some cases this may be an aspect of the planning judgement involved in applying this broad policy concept.
  - *"[Openness] is a matter not of legal principle but of planning judgement for the planning authority or the inspector*".



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## *R (Samuel Smith Old Brewery (Tadcaster)) v Yorkshire County Council* [2020] UKSC 3

- Conclusion at [39]:
  - *"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."*

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## *R (Haden) v Shropshire Council* [2020] EWHC 33 (Admin)



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## *R (Haden) v Shropshire Council* [2020] EWHC 33 (Admin)

- Permission granted for mineral extraction in the Green Belt
- Four grounds – one relevant to GB (app for permission renewed)
- NPPF 2019 para 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;"*

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## *R (Haden) v Shropshire Council* [2020] EWHC 33 (Admin)

- Stuart-Smith J set out guidance on Lindblom LJ in CoA in *Samuel Smith* re "preserve the openness"
- Ground of challenge:
  - (i) OR approached Q of "preservation" incorrectly: mistaken understanding that "specific localised impacts" could not result in a failure to preserve openness and only "widespread" impacts could be harmful;
  - ii) OR did not include any discussion of whether proposed screening measures themselves might have a harmful effect on the openness of the Green Belt.



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## *R (Haden) v Shropshire Council* [2020] EWHC 33 (Admin)

- OR:
  - *"A decision maker must determine whether the potential impacts of a proposal on openness would be sufficient to materially undermine the perception of 'openness'. This is as distinct from identifying specific localised impacts."*

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## *R (Haden) v Shropshire Council* [2020] EWHC 33 (Admin)

- First element - Stuart-Smith J at [54]:
  - *"Even in this limited context, it is apparent that what the Report conveys is the importance of taking a broader look at the potential impacts of a proposal rather than merely cataloguing and assessing specific impacts that might have a local effect but are not necessarily material when viewed in the overall context of a development. It is not saying that specific localised impacts can never undermine the perception of openness: it is merely saying that they do not necessarily do so."* Considered *"a permissible and correct approach".*



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## *R (Haden) v Shropshire Council* [2020] EWHC 33 (Admin)

- Second element - Stuart-Smith J at [57]:
  - *"While it is correct that the Report does not expressly ask the question whether the proposed screening measures might themselves have a harmful effect on the openness of the Green Belt, a fair reading of the relevant passages makes plain that the Report addresses the question of openness taking into account the screening measures that were proposed and concludes that there was no material residual impact or harm to the openness of the site."*

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## *R (Wiltshire Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 954 (Admin)



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## *R (Wiltshire Council) v SSHCLG* [2020] EWHC 954 (Admin)

- App to change use of annexed accommodation from ancillary to independent residential accommodation on site outside settlement boundary of village
- The issue: whether the Inspector erred in interpretation of the words "subdivision of an existing residential dwelling" in para 79(d) of NPPF (exception to policy avoiding isolated homes in the countryside)
- NPPF paras 77 – 79 (rural housing)

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## *R (Wiltshire Council) v SSHCLG* [2020] EWHC 954 (Admin)

- Inspector:
  - No evidence to substantiate Council's 'narrow' interpretation - that para 79(d) would not apply to the appeal proposal as it related to a detached residential annex rather than a physical component of the main house
  - *"The wording of paragraph 79(d) is not qualified by reference to what form the existing residential development must take, nor is it clear why that would be especially relevant to the principle of sub-division. The proposal would sub-divide the existing planning unit comprising a single dwelling and annex providing habitable residential accommodation into two dwellings. Therefore, I find that it would fall within the scope of the exception set out in paragraph 79(d)."*



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## *R (Wiltshire Council) v SSHCLG* [2020] EWHC 954 (Admin)

- Lieven J at [26]:
  - Starting point: meaning of "dwelling" is Q of interpretation of policy, and not application.
  - Issue is whether "dwelling" means a single residential building, or a wider residential unit that can include secondary buildings within the same plot.
  - That issue is capable of one objective answer regardless of the facts of any particular case (falls within [18] of *Tesco v Dundee* as being a matter of law).
  - Issue is not whether the word "dwelling" is reasonably capable of carrying the meaning given to it by the Inspector but whether that is the correct meaning in the policy context.
  - Once issue of law is determined, may well be questions of planning judgement on a particular case as to whether those facts fall within para 79(d)

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## *R (Wiltshire Council) v SSHCLG* [2020] EWHC 954 (Admin)

- Approach to interpretation (Lieven J):
  - Start with words themselves, context and overarching policy objective
  - "Sub-division of an existing residential dwelling" tend towards dwelling being one physical building
  - If SoS had intended to encompass sub-division of the residential plot then it would have been more natural to use the words "the residential unit" or "the property"



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## *R (Wiltshire Council) v SSHCLG* [2020] EWHC 954 (Admin)

- Supported by change from consultation draft of 2018 NPPF ("property") to final version ("dwelling")
- But, note, SOS's stated intention in GLD letter carried v little weight (see *Tesco v Dundee:* it is not up to a policy maker to say what they think the policy means) – little weight save to extent it is reflected in change in wording
- Context "*strongly militates towards a narrow interpretation*" – sustainability considerations
- Potential implications otherwise: Any residential property with a suitable outbuilding into which a residential use could be inserted would then have policy support to become a separate dwelling.

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# You Know You Need to Know

# Case Law Update

## Green Belt and Development in the Countryside

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*Webinar, 15 June 2020*

## You Know What You Need To Know

David Graham Barrister, Francis Taylor Building

# Cases

**Heritage planning**

*Dill v SSHCLG* [2020] UKSC 20, [2020] 1 W.L.R. 2206: definition of 'building'

*Hampshire County Council v SSEFRA & oths* [2020] EWHC 959 (Admin)*:* 'curtilage'

*Spitfire Bespoke Homes Ltd v SSHCLG* [2020] EWHC 958 (Admin): assessment of harm

**Environmental impacts and assessment**

*R(Swire) v SSHCLG* [2020] EWHC 1298 (Admin)

*Kenyon v SSHCLG* [2020] EWCA Civ 302

*R (Ross & Anor (on behalf of Stop Stansted Expansion)) v SSfT* [2020] EWHC 226 (Admin)

*R(Plan B Earth) v SSfT* [2020] EWCA Civ 214: alternatives

# Heritage- *Dill* (1)

**Dill v Secretary of State for Housing, Communities and Local Government [2020] UKSC 20, [2020] 1 W.L.R. 2206** 2x Eighteenth-century lead urns by John van Nost (d.1729).
Below: urns by the sculptor from Hampton Court gardens (Royal Collection Trust).

# Heritage – *Dill* (2)

Urns originally produced for Wrest Park's 92 acre garden.

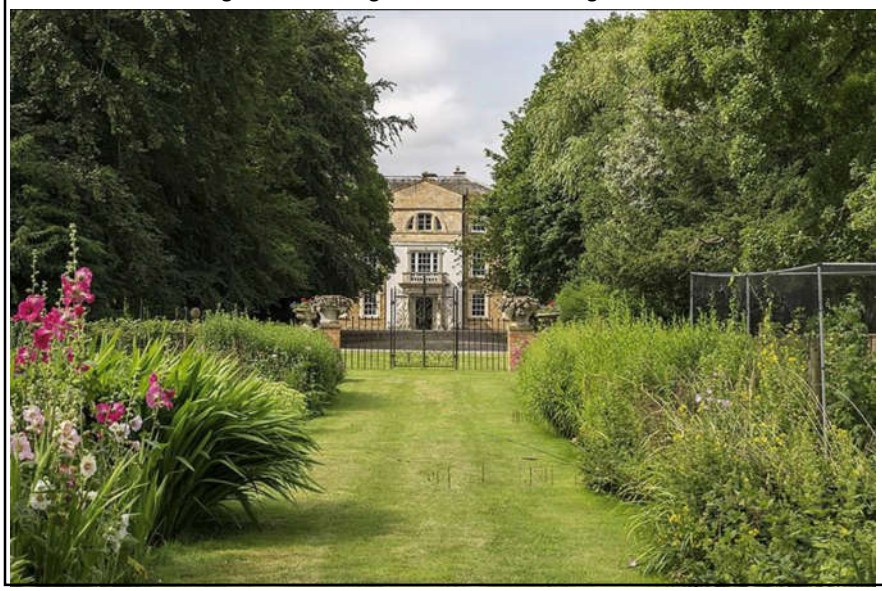
Picture: Grade I listed house and its parterre garden, Wrest Park, Bedfordshire.

# Heritage – *Dill* (3)

Urns moved off the Wrest Park estate by owners in 1950s and inherited by Major Dill, who installed them at Idlicote House where he moved in 1973.

# Heritage – *Dill* (4)

Picture: urns flanking the entrance gate to Idlicote House garden.



# Heritage – *Dill* (5)

FACTS:

Idlicote House had been listed in 1966. The urns and piers they sat on were 274cm high. They were added to the statutory list in 1986.
Each entry stated:
"Pier surmounted by urn C18. Limestone and lead. Square pier with panelled sides, moulded stone plinth and chamfered cornices. Lead urn is decorated with high-relief cherub's heads and flame finial."

The Claimant Marcus Dill was the major's son. He inherited the house in 1993 and sold the urns at auction in 2009.

LPA became aware in 2014 and threatened enforcement action. Mr Dill applied for and was refused retrospective listed building consent (s.8, P(LBCA)A 1990). LPA issued a listed buildings enforcement notice (s.38) requiring reinstatement of the urns at the property. Not possible and criminal penalty for non-compliance.

Appeals to Inspectorate argued that the structures were not 'buildings'; dismissed on basis the list was conclusive. Inspector's appeal decision upheld by EWHC (Singh J) and EWCA.

# Heritage – *Dill* (6)

LAW:
S.1(5) of P(LBCA)A 1990:

> *"In this Act 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act— (a) any object or structure fixed to the building; (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1 July 1948, shall … be treated as part of the building."*

S.91(2)- except where the context otherwise requires, terms havethe same meaning as in s.336 of the Town and Country Planning Act 1990, which provides:

> *'"Building" includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building …'*

# Heritage – *Dill* (7)

HELD (Lord Carnwath JSC):
(1) The statutory listing is not conclusive

[20]: …'The issue of statutory construction is subject to the rule of law that individuals affected by legal measures should have a fair opportunity to challenge these measures and to vindicate their right in court proceedings, and there is a strong presumption that Parliament will not legislate to prevent individuals from doing so.'

[22] 'whether a particular structure constitutes a "building", and its erection a "building operation", is an issue which may undoubtedly be raised in the context of a planning enforcement appeal. As those cases show, it may raise difficult issues of factual judgement, which are much more appropriate for a planning inspector than for the High Court in judicial review. No convincing reason was offered as to why the question whether something qualifies as a "building" should be treated in a different way in the listed building context'

[23] '…Against the desirability of certainty, is the fact that (unlike breach of planning control) contravention of listed building control is a criminal offence, whether or not an enforcement notice is served. In that context the starting point must be the presumption that the accused should be able to raise any grounds relating to the lawfulness of the proceedings on which the prosecution is based…'

# Heritage – *Dill* (8)

HELD (Lord Carnwath JSC):
[24] 'A listed building means "a building which is … included in [the] list". Thus there are two essential elements: it must be both a "building" and it must be "included in [the] list". If it is not in truth a building at all, there is nothing to say that mere inclusion in the list will make it so. Section 7 prohibits the demolition of a "listed building", and section 9(1) makes contravention of section 7 a criminal offence. There is nothing to prevent the accused arguing that the item on the list is not a "building" and so not within the definition. Short of a specific provision that the listing is to be treated as "conclusive" for such purposes, there is no reason to displace the ordinary presumption that the accused may raise any relevant defence. Notably there is no equivalent to the exclusivity provision of section 64 [*"The validity of a listed building enforcement notice shall not, except by way of an appeal under section 39 , be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."*].'

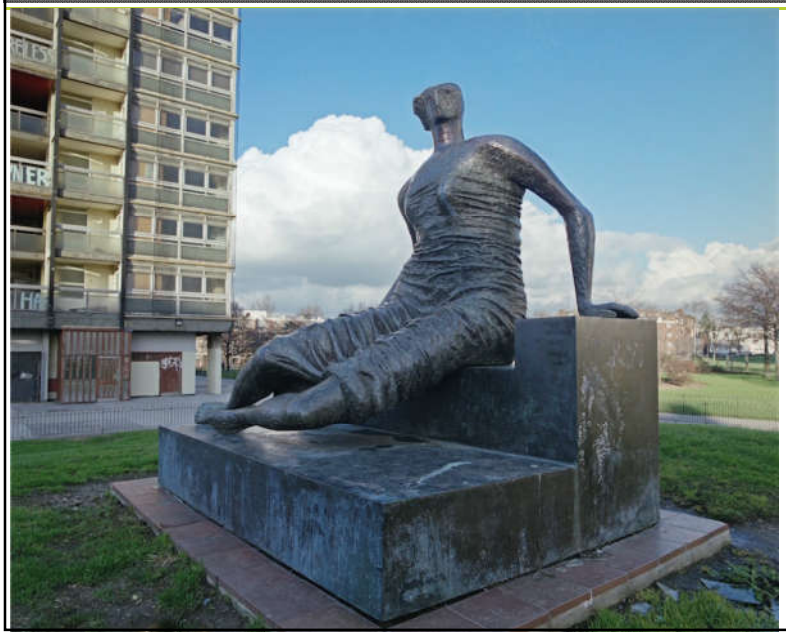
# Heritage – *Dill* (8)

HELD (Lord Carnwath JSC):
(2) The test for whether an item was a curtilage structure forming part of a listed building was to be determined in the same manner as it is for the purpose of real property law.

[43]: '"…an object resting on its own weight can be a fixture if it is part of the overall design of the property has been approved: *Berkley v Poulett* [1977] 1 EGLR 86, 89." Although that is not a precise formulation, it follows in my view that a statue or other ornamental object, which is neither physically attached to the land, nor directly related to the design of the relevant listed building and its setting, cannot be treated as a curtilage structure and so part of the building within the extended definition.

[44] Further confirmation of that approach can be found in a much more recent judgment of the High Court. It was held that a Henry Moore bronze sculpture "Draped Seated Women", weighing 1,500 kg and resting on a plinth, which in 1962 had been placed by the London County Council in a new housing estate, under its policy of promoting works of art in public places, remained a chattel rather than part of the land ( *Tower Hamlets London Borough Council v Bromley London Borough Council* [2015] LGR 622) . The judge (Norris J) noted as material that the sculpture was "an entire object in itself", resting by its own weight on the ground, and able to be removed without damage, and that it did not form part of an integral design of that estate (para 17).'

# Heritage – *Dill* (8)



Henry Moore, Draped Seated Woman (1957)

# Heritage – *Dill* (8)

[52]… 'As has been seen, real property concepts are relevant to the extended definition, but there is nothing to import them into the basic definition of building. *Skerritts* [2000] JPL 1025 provides clear authority at Court of Appeal level for the threefold test, albeit imprecise, of size, permanence and degree of physical attachment. No preferable alternative has been suggested in this court. Given that the same definition of "building" is adopted in the Listed Building Act, it is difficult to see any reason in principle why the same test should not apply…

[53] In the listed building context that need for something akin to a building operation when the structure is installed can be seen as the counterpart to the reference to "works for the demolition" as the relevant contravening act under section 7 of the Listed Buildings Act , which clearly envisages some form of dismantling (i e "pulling down or taking to pieces" in the words of Jenkins J in the Cardiff case [1949] 1 KB 385 ) when the item is removed from the site.

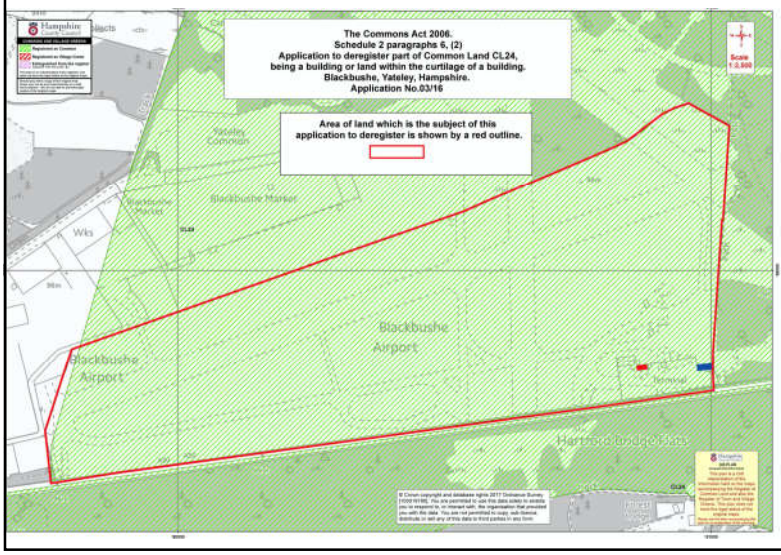
[54]. It is also important to keep in mind the purpose of listed building control, which is to identify and protect buildings of special architectural or historic interest. It is not enough that an object may be of special artistic or historic interest in itself; the special interest must be linked to its status as a building. That is implicit in the reference to "architectural" interest. But it is relevant in my view also to the concept of historic interest. The historic interest must be found not merely in the object as such, but in its "erection" in a particular place.'

# Heritage – *Dill* (8)

[56] '…the Crystal Palace dinosaurs, having regard to their relative size and permanence (whether or not physically attached to the land) could reasonably have been seen as buildings in their own right… most ordinary forms of garden vases or seats would be unlikely to have become part of the land in real property terms, nor would they naturally be regarded as "buildings" under any of the tests considered above.
[57] I return finally to the two items at issue in this case….Not only had they been placed on the land after July 1948, but also, being freely movable, there is no suggestion that they were related in any relevant way to the design of that particular listed building and its setting. The applicable real property tests were not satisfied.
[58] How then might they fare under the *Skerritts* criteria: size, permanence and degree of physical attachment?...There are arguments both ways. On the one hand…they comprised a set of elements which had to be assembled together (a "structure"), required a small crane to move them and to assemble them (as an "erection"), and were intended to occupy a stable and near permanent position in situ (with greater permanence than the marquee in *Skerritts* ). On the other hand, they are not particularly large…[and the] vases themselves, which are the real focus of the special interest, are physically separate. If they had been resting on the ground, rather than a plinth, I doubt if it would have occurred to anyone that they might qualify as buildings. Relevant also is the apparent ease of their installation and removal (as compared for example to the works in *Skerritts* ). These are issues which can only be satisfactorily investigated and determined in the context of a renewed appeal.'

# Heritage- *Hants v SSEFRA* (1)

***Hampshire County Council v SSEFRA & oths*** **[2020] EWHC 959 (Admin)**
Blackbushe Airport



# Heritage- *Hants v SSEFRA* (2)

***Hampshire County Council v SSEFRA & oths*** **[2020] EWHC 959 (Admin)**

FACTS:
Application made under paragraph 6(1) of sched.2 to the Commons Act 2006 to de-register operational land comprising Blackbushe Airport's runway and taxiways, fuel storage depot, terminal building and car-park. The area had been registered as part of Yateley Common in 1967. The site had been requisitioned for an airfield in WW2. The SoS's Inspector had de-registered it on grounds that the airport land was all within the curtilage of the airport terminal.
LAW:
'6
(1) If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove that land from its register of common land.
(2) This paragraph applies to land where-
(a) the land was provisionally registered as common land under section 4 of the 1965 Act;
(b) on the date of the provisional registration **the land was covered by a building or was within the curtilage of a building**;
(c) the provisional registration became final; and
(d) since the date of the provisional registration the land has at all times been, and still is, covered by a building or within the curtilage of a building.'

# Heritage- *Hants v SSEFRA* (3)

Inspector's findings:

*'The evidence before me is that the operation of the airport and the use of the facilities on its land is and has been controlled and directed from the Terminal Building which is, as the OSS point out, a relatively small building on the south-eastern side of the Application Land. Although the claimed curtilage may appear wholly disproportionate to the physical size of the Terminal Building, when consideration is given to the land and the building in the context of an operational airport, the relative size of the application land to the Terminal Building is proportionate to the function and purpose to which the building and land are put…*

*… In addition to co-ordinating the safe arrival and departure of aircraft it is evident that the Terminal Building provides administrative and technical support to the various activities at the airport. Those functions performed within the Terminal Building (the co-ordination of on-site fire and safety provision, the medical assessment of airport staff, customs and quarantine services for international flights for example) which are not directly related to the safe take-off and landing of aircraft are nonetheless part and parcel of the safe and efficient operation of the airport…such relationships indicate that whilst there may be an ancillary relationship of the building to the land, there is also an ancillary relationship of the land to the building… I consider that the operational land of the airport and the Terminal Building are part and parcel of the same unit and that they are integral parts of the same unit.'*

# Heritage- *Hants v SSEFRA* (3)

SUBMISSIONS:

Airport's and SSEFRA's submissions were that identifying curtilage had simply been a question of fact and degree having regard to the following factors:
- Physical layout;
- ownership, past and present;
- the use or function of the land or buildings, past and present.
- extent to which the land or buildings in the claimed curtilage are ancillary to the main building
- the relative size of the land and main building.
- extent to which the claimed curtilage and main building fall within one enclosure.

Argued entitled to find serving the building in a useful way or being 'part and parcel' of a unit (Airport) brought land within the curtilage.
Council: misunderstood concept of 'ancillariness' and unreasonably treated size of claimed area non-determinative on the facts. OSS submitted that this precedent would allow extensive golf courses or parks to be de-registered.

# Heritage- *Hants v SSEFRA* (4)

HELD (Holgate J):

[44]…'I do not consider that the potential effects on property rights would justify taking either a wider or narrower approach to "curtilage" as that term is used in the 2006 Act. This factor has an entirely neutral effect on the approach which should be adopted by the court. Furthermore, it will be seen below that dispropriatory or expropriatory considerations have not had a substantial influence on the decisions in relevant authorities on what legal principles should be adopted.'

[87] [Analysing *Methuen-Campbell v Walters* [1979] QB 525, C.A. ] 'the issue is whether an area of land is so intimately associated with a building that that land forms part and parcel *of the building*…In the same vein, I note from another of its decisions cited by the Court of Appeal, *Clymo v Shell-Mex & BP Limited (1963) 10 RRC 85; [1963] RVR 471*, that the legal concept of "appurtenance" is something belonging to a house or building…'

# Heritage- *Hants v SSEFRA* (5)

***Hampshire County Council v SSEFRA & oths*** **[2020] EWHC 959 (Admin)**

[Analysing *Dyer v Dorset County Council* [1989] QB 346 –right to buy house on edge of agricultural college's grounds]:

'[92] The Court of Appeal upheld the judge's decision that the house did not fall within the curtilage of any of the college's buildings (whether taken individually or as a whole) and so was not excluded from the tenant's right to buy. The judge added that he would have reached the opposite conclusion if the exclusion had been expressed by Parliament so as to refer to the curtilage of the college or institution (i.e. the overall site used for that purpose or function) rather than the curtilage of a college "building" ([ 1989] QB at p. 353F ).

[93] Lord Donaldson MR based his decision on *Methuen-Campbell…* He emphasised that the question was whether Mr. Dyer's house was within the curtilage of the buildings of the college, not the curtilage of the college (p.357G). Mann LJ took the same approach, adding that the exclusion from the right to buy had not been phrased so as to relate to the grounds of an institution (p.359D).
[94] Nourse LJ also regarded the exposition by Buckley LJ in Methuen as authoritative (p.358D-E). He stated that "an area of land cannot properly be described as a curtilage unless it forms part and parcel of the house or building which it contains or to which it is added"…'

# Heritage- *Hants v SSEFRA* (6)

[104] In *Attorney General ex rel. Sutcliffe v Calderdale Borough Council* (1982) 46 P&CR 399 the Court of Appeal decided that a terrace of cottages attached to a mill included on the statutory list of buildings of special architectural or historic interest formed part of that listed building, either because the terrace was a structure "fixed" to the mill or, if not so fixed, was a structure within the curtilage of the mill. In *Debenhams* [*Debenhams plc v Westminster City Council* [1987] AC 396] the House of Lords was not prepared to accept the width of the reasoning in Calderdale . They considered the decision to have been correct solely on the basis that the terrace of cottages was ancillary to the mill, thereby satisfying the additional test which they held should qualify "structures" ([1987] AC at 403G and 411C ).
[103] 'In *Debenhams* the House of Lords only decided that objects or structures cannot fall within the extended definition of a listed building unless they are ancillary to that building. It did not lay down an "ancillariness" criterion for the concept of "curtilage"…
[125] The wider approach to curtilage in *Calderdale* is justified for listed building control, which is concerned to bring within its ambit structures or objects which are closely related to the building which has been listed such that their removal or alteration could adversely affect its interest. Even so, the approach in *Calderdale* was qualified in *Debenhams* by the addition of a test which requires those additional structures or objects to be ancillary to the building identified in the statutory list.
[126] …There is no justification for adopting for the 2006 Act the "broad approach" to defining curtilage which the court expressly employed in Calderdale in order to promote the efficacy of listed building control.'

# Heritage- *Spitfire* (1)

***Spitfire Bespoke Homes Ltd v SSHCLG* [2020] EWHC 958 (Admin)**

Proposal to redevelop a non-designated heritage asset, a Victorian villa called Huntley Lodge, in the Royal Leamington Spa Conservation Area. Originally conceived as half of a pair of semi-detached houses, no counterpart built. Several unsympathetic extensions. Proposal to demolish and replace with 2 houses and 6 apartments.
Inspector found:
'If the whole of the historic Huntley Lodge, together with the alterations and extensions to the south are considered together, then the overall composition detracts from the character and appearance and thus the significance of the RLSCA. However if it is just the historic Huntley Lodge, then this acts as a positive building for the reasons stated above, and because of its presence in the street scene. Given that by definition a building includes part of a building, the correct approach would be to conclude that this consideration should relate only to the more historic building, and therefore it should be considered as a positive building in the RLSCA…overall, the proposal would be harmfully out of keeping with the appearance of the street scene and thus with the character and appearance of the RLSCA. I will consider this further in the planning balance below. As the proposal would not preserve or enhance the character or appearance of the RLSCA it would be contrary to policy HE2 of the WLDP as set out above, and would not, for the purposes of this policy, represent a justification for the loss of the existing positive building in the RLSCA'.

# Heritage- *Spitfire* (2)

***Spitfire Bespoke Homes Ltd v SSHCLG* [2020] EWHC 958 (Admin)**

Submission: [27] Inspector 'failed to consider the impact of the removal of the building as a whole from the conservation area, which was what the application proposed, and only took account of the impact of the removal of the part of Huntley Lodge that made a positive contribution. He submitted that nowhere in the decision is there a comparison between the overall effect of the built form on the significance of the conservation area, and the effect of the proposed development in that regard. All that the Inspector considered was whether part of the building made a positive contribution to the conservation area, and that was a legally erroneous approach'…[29] Mr Tucker submitted that if the Inspector had considered the contribution made by the existing building *as a whole* , he would have concluded that the overall character and appearance of the existing building detracts from the character and appearance, and thus the significance of the RLSCA…Comparing that state of affairs with the proposed development, even if the latter also detracted from the character and appearance of the conservation area, could have meant that at the very least the overall impact on the RLSCA was neutral. [30] Indeed…it was possible that replacing an existing overall unsympathetic development with another unsympathetic development could produce a benefit in conservation terms.'

# Heritage- *Spitfire* (3)

***Spitfire Bespoke Homes Ltd v SSHCLG* [2020] EWHC 958 (Admin)**

HELD (Andrews J):
'[31] …It is not unusual for a heritage building to have unsympathetic extensions. When forming a view of the current character and appearance of the conservation area, the decision maker must surely be entitled to take into consideration the positive as well as the negative or neutral elements of the existing building or buildings. The degree to which each element contributes to the overall assessment is a matter of planning judgment…
[35] …I am not persuaded that there is any legal principle that, when discharging the duty under s.72 , the decision-maker is constrained to look only at the impact of the existing buildings taken as a whole on the conservation area, and cannot take account of any positive contribution made by individual components, if he or she considers that contribution to be of significance and relevance to the overall assessment. An overall assessment of character and appearance involves taking into consideration anything the decision maker reasonably considers to be relevant in making that assessment. It was a matter for the Inspector to decide how to gauge the overall effect on the conservation area of losing the existing building and replacing it with the proposed houses and apartments.'
Inspector had properly conducted a holistic assessment.

# Environmental impacts (1) - *Swire*

*R(Swire) v SSHCLG* [2020] EWHC 1298 (Admin)
FACTS:
Application to redevelop a contaminated site used to dispose of animal carcasses during the BSE outbreak, in order to build housing. Permission granted subject to conditions requiring a scheme of investigation and remediation for the contamination issues prior to works progressing. Secretary of State had issued a screening direction finding that contamination would be cleared and mitigation measures would ensure no likely significant effect.
HELD Lang J ([90]–[111]:

- Planning authority had very little evidence before it of the extent of prion contamination or how it could be resolved in respect of groundwater contamination or the occupiers of the homes, insufficient to make an 'informed decision'.
- Could not rely on conditions to avoid assessment and simply assume all mitigation measures would succeed.
- Insufficient information to 'screen out' potential impacts.

# Environmental impacts (2) - *Kenyon*

***Kenyon v SSHCLG* [2020] EWCA Civ 302**

Screening direction from SoS that no EIA required for a proposal to redevelop
For 150 new homes the site of a former brickworks quarry that had been infilled and used as a recreation ground. Submissions made that there was insufficient evidence for findings, and an insufficiently precautionary approach was taken to air quality impact assessment.

HELD (Coulson LJ):
[39]: 'On an appeal, it is incumbent upon an appellant to demonstrate that the judge erred in law in reaching such a conclusion. That requires considerably more than an attempt to reargue the case from the documents all over again'.
[48] 'this was, on any view, a routine development of residential houses'
[54] '…respondents were not required to set out in detail all the information and statistics… which might be relevant to the question of air pollution. I am thinking in particular of the published data as to trip frequency, standard emissions and exceedances, and the like. The first and second respondents must be taken to be familiar with all such information. Armed with that knowledge, they concluded that, in this case, the increase in traffic was not likely to have a significant effect on the environment. This was because of the comparatively modest scale of the development. That was a matter for them, and not something that had to be justified by reference to lengthy written reasons in respect of concepts, formulae and other matters which were very familiar to them.'

# Environmental impacts (3) *Kenyon*

[56] …The effect on the environment, and whether it is likely to be significant or not, must depend on the facts of each case, and in particular the nature, scale and size of the development, its proximity to the AQMA and the like. It is a sliding scale, or spectrum. It cannot be right that, as a matter of principle, every development close to an AQMA should automatically be regarded as likely to have a significant effect on the environment, without any specific evidence to point to that conclusion. In my judgment, proximity to an AQMA is not some sort of trump card which will always give rise to the need for an EIA.

# Environmental impacts (4) *Kenyon*

'[64] The appellant's submission was that, because there was what he describes as "inevitable uncertainty" about the air pollution created by the proposed development, the decision-maker, and the judge, failed to have proper regard to the precautionary principle. [65] I consider that this argument to be misconceived. … [66] The precautionary principle will only apply if there is "a reasonable doubt in the mind of the primary decision-maker" (see Beatson LJ in Evans ). It is contrary to the principle outlined there to argue that, merely because somebody else has taken a different view to that of the primary decision-maker, it cannot be said that there was no reasonable doubt.
[67]. In the present case, neither the first nor the second respondent had any doubt that the proposed development was not likely to lead to significant effects. In circumstances where there was no doubt in the mind of the relevant decision-maker, there is no room for the precautionary principle to operate…. [69] A decision-maker in this situation has three options: they can decide that an EIA is necessary; they can decide that an EIA is not necessary; and finally, they may not know whether an EIA is necessary or not. It is in that third situation that the precautionary principle applies. It is difficult to see how it could apply to the second option, save perhaps for the rare case where, although the decision-maker had no doubt, the absence of any such doubt was irrational on Wednesbury principles. But that would just bring the debate back to the lawfulness or otherwise of the underlying decision and, for the reasons I have given, I do not doubt the lawfulness of the screening decision in this case.'

# Environmental impacts (5) *Ross*

***R (Ross and another (on behalf of Stop Stansted Expansion)) v Secretary of State for Transport*** **[2020] EWHC 226 (Admin) [2020] P.T.S.R. 799**

Facts: Decision by SSfT that an extension to Stansted Airport's taxiways and construction of additional aircraft stands did not amount to NSIP and so fell to be determined under TCPA 1990. The test was whether the alteration would .'increase by at least ten million per year the number of passengers for whom the airport is capable of providing air passenger transport services'
HELD:
Correct to attempt to assess what the realistically achievable likely utilization of the airport could be and not assume a theoretical or arithmetically possible number of flights or passengers.

Cf *Mooreland and Owenvarragh Residents' Association's Application* [2014] NIQB 130: Planning Service sought to assess the effects of a capacity crowd attending the new ground based on the difference between 32,600 spectators attending the old Casement Park and 38,000 spectators at the new Casement Park. Evidence (at [10]) was that attendance was rarely above 5,000. So the fall-back or baseline was not a realistic prospect. See [71] and [77]-[81].

# Environmental impacts (6) *Plan B*

*R (Plan B Earth) v SSfT* [2020] EWCA Civ 214

Airports National Policy Statement:
*Noise impacts assessed using 'indicative flight paths'. Held to be a lawful, reasonable approach [175].
* 'alternative solutions' for purposes of Habitats Directive art.6(4) must meet all the 'core policy objective[s]' of the proposed plan or project, whereas 'reasonable alternatives' for the purpose of the SEA Directive may include alternatives to the plan or project which do not meet those objectives since the object of the SEA process at least initially is to consult on whether to go down the proposed route with those objectives at all ([111]– [116]).

# Questions

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