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RECENT GREEN BELT CASES

Openness

- *R (Samuel Smith Old Brewery) v Yorkshire CC* [2020] UKSC 3
- *R (Isabel Haden) v Shropshire C* [2020] EWHC 33

Designation

- *R (Bond) v Vale of White Horse DC* [2019] EWHC 3080 (Admin)
- *Wedgewood v City of York* [2020] EWHC 780 (Admin)
- *Leech Homes v Northumberland CC* [2020] UKUT 0150 (LC)
- *Compton Parish Council v Guildford Borough Council* [2019] EWHC 3242 (Admin)

Policy reach

- *R (Lochailort Investments Ltd) v Mendip DC* [2020] EWHC 1146 (Admin)
- *The Mayor of London v SSHCLG and Harrow School* [2020] EWHC 1176 (Admin)

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Part 1: Openness

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R (Samuel Smith Old Brewery) v Yorkshire CC

Application

- Jackdaw Crag Quarry in Yorkshire
- Quarry 25 hectares
- Proposal to extend about six hectares
- 2 million tonnes crushed rock over seven years
- Reliance on para 90 NPPF 2012

Officers report

- Landscape section considered visual impact
- No express consideration of visual impact on GB openness
- Concluded proposal preserved openness

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Sam Smith (2)

Court of Appeal

- Was the report defective in not referring to visual impact on openness?
- Lindblom LJ:
  - Defective "in failing to make clear to the members that…in para 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor in their approach to the effect…on the "openness of the Green Belt…"
  - "On the officers own assessment of the likely effects on the landscape, visual impact was quite obviously relevant to its effect on the openness of the Green Belt"
  - "So the consideration of this question could not reasonably be confined to spatial impact"

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Sam Smith (3)

Supreme Court

- "openness" is a "broad policy concept"
- openness not necessarily a statement about visual quality but this may in some cases be relevant to applying the broad concept
- Some forms of development eg mineral extraction may in principle be appropriate and compatible with openness
- Openness not a matter of legal principle but for planning judgment
- Concept of openness is not narrowly limited to volumetric approach. It is "open-textured" and a number of factors are capable of being relevant to application (*Turner)*
- Para 90 does not expressly refer to visual impact as a necessary part of analysis, nor is it made so by implication
- Impact of development fell far short of being so obviously material a factor that failure to address it was an error of law

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Sam Smith (4)

Comment

- Range of potentially material considerations is very wide
- Weight for decision maker (absent irrationality or illegality)
- Insufficient simply to say that a decision-maker did not take into account a legally relevant consideration
- A decision-maker does not fail to take a relevant consideration into account unless under an obligation to do so
- Necessary to show that the decision-maker was expressly or impliedly required by legislation (or by policy) 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 (see *CreedNZ, Derbyshire Dales* and *Drax)*

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R (Isabel Haden) v Shropshire C

Application

- 44 hectares of agricultural land
- Proposal to extract, process and export 4 million tonnes of sand and gravel
- Reliance on para 146 of NPPF 2019

Report

- Referred to permanent change “only apparent at local level”
- *"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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Haden (2)

Challenge to decision:

- Report approached “preservation” incorrectly because it wrongly understood that “specific localised impacts” could not result in failure to preserve openness (ie only widespread impacts could be harmful)
- Report did not consider whether screening measures themselves might have a harmful effect

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Haden (3)

Held

- *"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".*
- *"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."*
- *Members were not materially misled*

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Haden (4)

Comments

- Warning against mere "cataloguing of specific impacts"
- Officers reports not to be read with undue rigour but with reasonable benevolence (*Mansell)*
- Court should resort to good sense and fairness, not adopt a "hypercritical approach" (*Pagham)*
- Claimant's criticism "based upon an inappropriately hypercritical approach that has no part to play in a planning case such as this"

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Part 2: Designation

Michael Brendan Brett

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Designation: outline

1. LPA power to amend adopted policies map

2. The ‘designation gap’

3. Releasing land from the Green Belt

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1. R (Bond) v Vale of White Horse DC

- [2019] EWHC 3080 (Admin)
- VWH DC Local Plan Part 1 proposed release of land from Green Belt at North Hinksey (CP13, and submission policies map);
- At examination, Inspector found no exceptional circumstances;
- Main modification amended text of CP13;
- LPP1 adopted, but, due to error, adopted policies map not updated accordingly;
- CP13 did not release land from Green Belt but adopted policies map showed land outside of Green Belt boundary.

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- Regulation 9, Town and Country Planning (Local Planning) (England) Regulations 2012:

  adopted policies map must "illustrate geographically the application of the policies in the adopted development plan"
- LPA passes motion at Full Council "to make a factual correction" to the map
- Owner of land issues judicial review, claiming:
  - Only procedure available to LPA was that in 2012 Regulations for amending the Local Plan itself
  - Until that done, presumption of regularity applies to map, and land therefore lies outside Green Belt.

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- Lang J refused claim.
- Adopted policies map is a local development document but not a development plan document, and does not form part of the Local Plan (see [42])
  - Regulations 5 and 6 of 2012 Regulations (Cf: Fox Land [2015] EWCA Civ 298; Jopling [2019] JPL 830)
- LPA has power to correct map by resolution:
  - Section 23(1) PCPA : "may adopt a local development document (other than a development plan document) either as originally prepared or as modified";
  - Section 23(5): "A document is adopted for the purposes of this section if it is adopted by resolution of the authority;
  - Section 26(1): LPA "may at any time prepare a revision of a local development document"

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2. "Designation gap"

- Sometimes strategic level plans (e.g. former regional strategies) set the "general extent" of the Green Belt around particular settlements, leaving detailed boundary to be set by local plans.
- Where detailed boundaries never (or not yet) set, do Green Belt policies apply to land identified within "general extent"?
- Two different approaches:

  2(a) Wedgewood v City of York [2020] EWHC 780 (Admin)

  2(b) Leech Homes v Northumberland CC [2020] UKUT 0150 (LC)

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2(a) Wedgewood v City of York

- Challenge to the grant of planning permission – key point was that defendant failed to treat application site as within Green Belt.
- No current local plan. Only part of applicable development plan respecting York Green Belt are retained policies of 2008 regional spatial strategy ('RSS'):
  - Requiring Green Belt to be defined by local plans, with outer boundary "about 6 miles from York city centre";
  - Indicating on a diagram a hatched circular area described as the "general extent of Green Belt".
- Emerging (publication draft) York Local Plan shows site outwith Green Belt.

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- Claimant: all land within area indicated as the "general extent" is subject to Green Belt policies unless and until local level plan says otherwise;
- Stuart-Smith J characterised the judicial 'bind' he was in (at [38]):
  - If RSS not enough to impose Green Belt policies on land in general extent, then York has no Green Belt;
  - If RSS is enough to do so, then land is covered by Green Belt policies which has none of the characteristics of the Green Belt – including site itself;
- Solution? – planning judgement (!)
  - "whether the site was or should have been treated as being within the Green Belt … is a planning judgment" (see [5]);
  - BUT cites Bloor: interpretation of policy is a matter of law.

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- LPA was correct to "apply the high-level policy rationally in order to determine what land… is and is not to be treated as Green Belt land"(see [40] and [44]), taking into account:
  - Emerging local plan (which did not propose site in Green Belt);
  - Site specific features (i.e. extent to which fulfils Green Belt purposes).
- Expressly rejected claimant's position – looked at York appeal cases, including *Avon Drive*, which "does not say or imply that all land within the general extent of the Green Belt is to be treated as Green Belt [land]" (at [45])

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2(b) Leech Homes v Northumberland CC

- Same question arises, but in CAAD appeal:
  - DCO related to construction of Morpeth bypass, including CPO powers over land, including appellant's;
  - Appellant sought CAAD for residential development of 135 dwellings;
  - Tribunal must ask itself whether a reasonable LPA would have granted an application for planning permission determined on or after the valuation date.
- Situation in Morpeth very similar to in York ("no obvious relevant difference" [87])
  - Northumberland County and National Park Joint Structure Plan (2005) – policy S5 - extension to Green Belt (with indicative diagram) with precise boundaries to be defined in Local Plans

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- Key issue: whether or not Green Belt policies should apply to appellant's land, which falls within "general extent" of GB? (see [43]-[97].
- Lands Tribunal
- Section 38(6) PCPA 2004 applies, and S5 is part of development plan;
- Land is either within the GB or without it: there is no "indeterminate category where the application of green belt policy is a matter of discretion" (at [83]);
- Until boundaries are fixed in local plans, not possible to say with certainly whether a site is within or without.

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- "To proceed, in that state of uncertainty, on the basis that green belt policies do not apply, would in a sense be to pre-empt the plan making process." ([85])
- Must adopt a "precautionary approach", which is to apply a "presumption against granting consent unless consent would be granted if the site was known to be within the green belt."
- Green Belt policies apply, unless there is a "good reason for concluding that the site is not within the green belt".
- Rejects submission that applicability of Green Belt policy is a matter of planning judgment: may come into assessment of whether there are good reasons why a site is not in Green Belt.

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Striking differences

- Approach in Leech directly taken from the approach of S of S and inspectors in respect of York – rejected in Wedgewood;
- Wedgewood approach of using planning judgment where uncertainty expressly rejected in Leech;
- Divergence briefly dealt with in Leech at [95]-[97]:
  - "Difference in emphasis";
  - BUT unlikely that a different conclusion would have been reached if either case had applied the other approach;
  - *Vide* the Tribunal's consideration of the characteristics of the site when considering whether "good reason" why Green Belt policies should not apply;
- Permission to appeal granted in Leech.

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3. Compton PC v Guildford PC

- [2019] EWHC 3242 (Admin)
- Challenge to adoption of Local Plan (section 113 PCPA 2004);
- Challenged release of land from Green Belt:
  - Improper consideration of whether housing requirement should be reduced to account for Green Belt constraints – NPPF [47];
  - Exceptional circumstances for release
- Claim dismissed (Sir Duncan Ouseley)

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- Exceptional circumstances (at [68]-[72]):
  - Lesser test than "very special circumstances"
  - "The "exceptional circumstances" can be found in the accumulation or combination of circumstances, of varying natures, which entitle the decision-maker, in the rational exercise of a planning judgment, to say that the circumstances are sufficiently exceptional to warrant altering the Green Belt boundary."
  - General planning needs (i.e. demand for ordinary housing) not excluded;
  - No assessment of whether a factor is "exceptional" singularly or in combination is required – "does not mean that they have to be unlikely to recur in a similar fashion elsewhere".
- Emptying concept? All that is necessary if for there to a rational conclusion that Green Belt boundaries should be altered.

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- NPPF [47] (now [11](b)(i)) – elision with "exceptional circumstances"?
  - Where Green Belt release is justified on exceptional circumstances, "it [is] inevitable that that lawful conclusion would also constitute a lawful and adequate explanation for why the OAN had not been restrained at the policy-on stage" (at [82]);
  - A strategic level decision to meet unconstrained OAN can be sufficient to constitute exceptional circumstances;
  - Danger of circularity?
- Message? Courts will not intervene in Green Belt releases unless clearly perverse.

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Part 3: Policy reach

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R (Lochailort Investments Ltd) v Mendip DC

- Norton St Philip, an historic village in Somerset
- The NSP NP examination
- Judicial review of decision to accept Examiner's recommendations into draft NSP NP and to proceed to referendum
- Policy 5 designated Local Green Spaces:

  "Development on Local Green Spaces will only be permitted if it enhances the original use and reasons for the designation of space"

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Mendip (2)

NPPF 2019

- LGSs "green areas of particular importance"
- Designation only to be used where green space is:
  - in reasonable close proximity to community
  - demonstrably special…holds a particular local significance eg beauty, historic significance, recreational value (including as a playing field, tranquillity or richness of wildlife)
  - "local in character and is not an extensive tract of land"
- Paragraph 101: "Policies for managing development within a Local Green Space should be consistent with those for Green Belts"

PPG

- Designation should not be proposed as a "back door" to GB by another name

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Mendip (3)

Judgment:

- Policy 5: "Development on Local Green Spaces will only be permitted if it enhances the original use and reasons for the designation of space"
- Argued that Examiner failed to take into account that the level of constraint was more restrictive than policies for managing development in GB, contra para 101 NPPF.
- Held: policy was sufficiently broad in scope to be interpreted and applied consistently with GB policy. With reference to para 145 NPPF - some policies suitable for vast areas of GB will not be appropriate for small LGSs. Landscaping, buildings and other structures relating to e.g. agriculture, community use, recreation and sport could all potentially enhance the use and reasons for designation

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Mayor of London v SSHCLG and Harrow School

- Substantial development at Harrow School
- Proposal included demolition of sports building and construction of new sports building
- Eastern part of site designated MOL – where new sports building proposed
- Nearby heritage assets including listed and non-listed buildings
- On appeal SoS found harm to setting of listed buildings
- Concluded overall that VSC clearly outweighed the harm to MOL
- Complaint that SoS was legally obliged to conclude harm to GB "historic towns" purpose (NPPF 134(d)); and failed to put heritage harm into VSC balance as "other harm" (NPPF 144)

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Harrow (2)

Judgment

- SoS, in agreeing with HE's report, was not obliged to find that the proposal would cause harm to a "historic town[s]". None of HE's correspondence suggested that the school or its conservation area should be equated to a historic town
- SoS had not left heritage harm out of account when considering the test for VSC. Clear that he had looked at the case as a whole. His decision letter had to be read in a reasonably flexible way, bearing in mind also that it was addressed to parties who were well aware of all the issues involved and the arguments deployed at the inquiry (*Seddon* et al)

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Questions

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Thank you

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