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About this document

This document forms part of a series of 4 documents providing updates on case law in the plan-making sphere, accompanied by the relevant Official Transcripts. The documents are summaries only and are no substitute for seeking qualified internal or external advice, in what remains a highly complex, fast-moving and litigious area.

In summarising the cases, we do not rehearse the facts at any length. These are complex in every case and there is no better description than the text of the judgments. However we have provide lengthy citations from the ratio of the decisions to encourage consideration of the particular way in which the High Court and the Court of Appeal interprets policy. All references to the [National Planning Policy Framework \(NPPF\)](#) are in the format, NPPF x (with x being the paragraph number).

This paper was prepared by No 5 Chambers on behalf of PAS.

Italics and emphasis are our own.

Introduction

1. Green Belt policy gives rise to the following main practical issues:
 - The correct interpretation of national planning policy: NPPF, paragraphs 79-91, and specifically:
 - The test to be applied for changes to Green Belt boundaries: "exceptional circumstances" (NPPF, paragraph 83), plus:
 - The relationship between objective assessment of need and Green Belt constraints.

2. The three principal cases which mark out the landscape in the NPPF era (post-March 2012) have been:
 - [*R \(Hunston Properties Ltd\) v SSCLG and St Albans City and District Council*](#) [2013] EWHC 2678 (5 September 2013) [2013] EWCA Civ 1610 (12 December 2013): aka *Hunston*

 - [*Gallagher Estates Ltd v Solihull MBC*](#) [2014] EWHC 1283 (Admin) (30 April 2014) aka *Gallagher*

- [*R\(IM Properties\) v Lichfield DC and others*](#) [2014] EWHC 2440 (Admin) (18 July 2014) aka *IM Properties*
3. Green Belt issues have arisen, more obliquely in other section 113 challenges, namely *Grand Union Investments Ltd v Dacorum BC* [2014] EWHC 1894 (Admin) (12 June 2014) and *R(Chalfont St Peter Parish Council) v Chiltern DC* [2013] EWHC 1877 (Admin) (22 August 2013) and [2014] EWCA Civ 1393 (28 October 2013). The case of *Hundal v South Bucks District Council* [2012] EWHC 791 (Admin), is a more direct consideration but its reasoning has largely been overtaken and absorbed by *Gallagher*.

Correct Interpretation of National Planning Policy

4. As set out in earlier papers, it is now firmly established that the correct interpretation of national planning policy is a matter for the courts: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. The Supreme Court nonetheless made clear that there was extensive scope for the application of planning judgement provided that the decision-maker correctly informed themselves in respect of the policy. Paragraphs 17-23 are required reading for any case officer or planning policy officer.
5. In *Hunston*, the Court of Appeal confirmed at [4] that *Tesco v Dundee* applies to the interpretation of the NPPF. It is now clear that the approach also applies to Planning Practice Guidance (PPG): see *Lark Energy Ltd v SSCLG* [2014] EWHC 2006 (Admin), [70].
6. In the section 288 sphere/judicial review sphere, this has led to a number of significant challenges in respect of the "very special circumstances" and "other harm" tests: see notably, *R (Holder) v Gedling BC* [2014] EWCA Civ 599 (8 May 2014), *Europa Oil and Gas Ltd v SSCLG* [2014] EWCA Civ 825, 19 June 2014; *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386 (24 October 2014) (amongst others).
7. At the plan-making level, the amount of litigation has been more concentrated, but remains a significant issue that Local Planning Authorities must pay close regard, by informed reference to the relevant national policy wording.

Hunston v SSCLG

8. *Hunston v SSCLG* is concerned principally with the correct identification of objectively assessed needs as part of the assessment of the very special circumstances test. Its principal importance lies in setting the context for *Gallagher v Solihull MBC*.

9. The High Court (HHJ Pelling QC) observed at [28]:

"Where it is being contended that very special circumstances exist because of a shortfall caused by the difference between the full objectively assessed needs for market and affordable housing and that which can be provided from the supply of specific deliverable sites identified by the relevant planning authority, I do not see how it can be open to a LPA or Inspector to reach a conclusion as to whether that very special circumstance had been made out by reference to a figure that does not even purport to reflect the full objectively assessed needs for market and affordable housing applicable at the time the figure was arrived at..."

10. The Court of Appeal (Sir David Keene) observed at [6]:

"6. There is no doubt, that in proceeding their local plans, local planning authorities are required to ensure that the "full objectively assessed needs" for housing are to be met, "as far as is consistent with the policies set out in this Framework". Those policies include the protection of Green Belt land. Indeed, a whole section of the Framework, s.9, is devoted to that topic, a section which begins by saying "The Government attaches great importance to Green Belts": para.79. The Framework seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that "the general extent of Green Belts across the country is already established." It seems clear, and is not in dispute in this appeal, that such a Local Plan could properly fall short of meeting the "full objectively assessed needs" for housing in its area because of the conflict which would otherwise arise with policies on the Green Belt or indeed on other designations hostile to development, such as those on Areas of Outstanding

Natural Beauty or National Parks. What is likely to be significant in the preparation of this Local Plan for the district of St Albans is that virtually all the undeveloped land in the district outside the built up areas forms part of the Metropolitan Green Belt."

11. He further observed at [21]:

"21. In essence, the issue is the approach to be adopted as a matter of policy towards a proposal for housing development on a Green Belt site where the housing requirements for the relevant area have not yet been established by the adoption of a Local Plan produced in accordance with the policies in the Framework. Such development is clearly inappropriate development in the Green Belt and should only be granted planning permission if "very special circumstances" can be demonstrated. That remains government policy: para.87 of the Framework. In principle, a shortage of housing land when compared to the needs of an area is capable of amounting to very special circumstances. None of these propositions is in dispute."

12. And further at [28] onwards:

28. ... The crucial question for an inspector in such a case is not: is there a shortfall in housing land supply? It is: have very special circumstances been demonstrated to outweigh the Green Belt objection? As Mr Stinchcombe recognised in the course of the hearing, such circumstances are not automatically demonstrated simply because there is a less than a five year supply of housing land. The judge in the court below acknowledged as much at [30] of his judgment. Self-evidently, one of the considerations to be reflected in the decision on "very special circumstances" is likely to be the scale of the shortfall.

29. But there may be other factors as well. One of those is the planning context in which that shortfall is to be seen. The context may be that the district in question is subject on a considerable scale to policies protecting much or most of the undeveloped land from development except in exceptional or very special circumstances, whether because such land is an

Area of Outstanding Natural Beauty, National Park or Green Belt. If that is the case, then it may be wholly unsurprising that there is not a five year supply of housing land when measured simply against the unvarnished figures of household projections. A decision-maker would then be entitled to conclude, if such were the planning judgment, that some degree of shortfall in housing land supply, as measured simply by household formation rates, was inevitable. That may well affect the weight to be attached to the shortfall.

30. I therefore reject Mr Stinchcombe's submission that it is impossible for an inspector to take into account the fact that such broader, district-wide constraints exist. The Green Belt may come into play both in that broader context and in the site specific context where it is the trigger for the requirement that very special circumstances be shown. This is not circular, nor is it double-counting, but rather a reflection of the fact that in a case like the present it is not only the appeal site which has a Green Belt designation but the great bulk of the undeveloped land in the district outside the built-up areas. This is an approach which takes proper account of the need to read the Framework as a whole and indeed to read para.47 as a whole. It would, in my judgment, be irrational to say that one took account of the constraints embodied in the policies in the Framework, such as Green Belt, when preparing the local plan, as para.47(1) clearly intends, and yet to require a decision-maker to close his or her eyes to the existence of those constraints when making a development control decision. They are clearly relevant planning considerations in both exercises.

Gallagher Estates v Solihull Ltd

13. Gallagher Estates challenged the inclusion of their site within the Green Belt as part of the Solihull Local Plan. The High Court (Mr Justice Hickinbottom) observed the following common ground principles:

*"124. There is a considerable amount of case law on the meaning of "exceptional circumstances" in this context. I was particularly referred to *Carpets of Worth Limited v Wyre Forest District Council (1991) 62 P & CR 334 ("Carpets of Worth")*,*

Laing Homes Limited v Avon County Council (1993) 67 P & CR 34 ("Laing Homes"), COPAS v Royal Borough of Windsor and Maidenhead [2001] EWCA Civ 180; [2002] P & CR 16 ("COPAS"), and R (Hague) v Warwick District Council [2008] EWHC 3252 (Admin) ("Hague").

125. From these authorities, a number of propositions are clear and uncontroversial.

i) Planning guidance is a material consideration for planning plan-making and decision-taking. However, it does not have statutory force: the only statutory obligation is to have regard to relevant policies.

ii) The test for redefining a Green Belt boundary has not been changed by the NPPF (nor did Mr Dove suggest otherwise).

a) In Hunston, Sir David Keene said (at [6]) that the NPPF "seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that 'the general extent of Green belts across the country is already established'". That appears to be a reference to paragraphs 83 and 84 of the NPPF. Paragraph 83 is quoted above (paragraph 109). Paragraph 84 provides:

"When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development..."

However, it is not arguable that the mere process of preparing a new local plan could itself be regarded as an exceptional circumstance justifying an alteration to a Green Belt boundary. National guidance has always dealt with revisions of the Green Belt in the context of reviews of local plans (e.g. paragraph 2.7 of PPG2: paragraph 83 above), and has always required

"exceptional circumstances" to justify a revision.
The NPPF makes no change to this.

b) For redefinition of a Green Belt, paragraph 2.7 of PPG2 required exceptional circumstances which "necessitated" a revision of the existing boundary. However, this is a single composite test; because, for these purposes, circumstances are not exceptional unless they do necessitate a revision of the boundary (COPAS at [23] per Simon Brown LJ). Therefore, although the words requiring necessity for a boundary revision have been omitted from paragraph 83 of the NPPF, the test remains the same. Mr Dove expressly accepted that interpretation. He was right to do so.

*iii) Exceptional circumstances are required for any revision of the boundary, whether the proposal is to extend or diminish the Green Belt. That is the ratio of *Carpets of Worth*.*

iv) Whilst each case is fact-sensitive and the question of whether circumstances are exceptional for these purposes requires an exercise of planning judgment, what is capable of amounting to exceptional circumstances is a matter of law, and a plan-maker may err in law if he fails to adopt a lawful approach to exceptional circumstances. Once a Green Belt has been established and approved, it requires more than general planning concepts to justify an alteration."

14. The Court then continued:

"130. Mr Lockhart-Mummery particularly relied on COPAS, in which Simon Brown LJ, after confirming (at [20]) that, "Certainly the test is a very stringent one", said this (at [40]):

"I would hold that the requisite necessity in a PPG 2 paragraph 2.7 case like the present – where the revision proposed is to increase the Green Belt – cannot be adjudged to arise unless some fundamental assumption

which caused the land initially to be excluded from the Green Belt is thereafter clearly and permanently falsified by a later event. Only then could the continuing exclusion of the land from the Green Belt properly be described as 'an incongruous anomaly'".

In other words, something must have occurred subsequent to the definition of the Green Belt boundary that justifies a change. The fact that, after the definition of the Green Belt boundary, the local authority or an inspector may form a different view on where the boundary should lie, however cogent that view on planning grounds, that cannot of itself constitute an exceptional circumstance which necessitates and therefore justifies a change and so the inclusion of the land in the Green Belt (see Hague at [32] per Collins J. Collins J in Hague held that, in addition to the undoing of an assumption on which the original decision was made, a clear error in excluding land from the Green Belt is sufficient, no such error is suggested here; and I need not consider that aspect of Hague further.)

131. COPAS is, of course, binding upon me. Mr Dove said that these cases are fact-sensitive, and the facts of that case were very different from this. That is true; but, in the passage I have just quoted from Simon Brown LJ's judgment, he was clearly and deliberately determining, as a matter of principle, what "exceptional circumstances" required, as a matter of law, in a case such as this. It is expressly a holding, with which the whole court agreed. I am consequently bound by it. In any event, it seems to have been consistently applied for over ten years; and, in my respectful view, is right.

132. In this case, following two inquiries, the 1997 UDP defined the Green Belt to exclude the Sites. Although there were uncertainties as to when and even if either site would be brought forward for housing development, the Green Belt boundary then determined and approved through the statutory machinery was not in any way provisional or uncertain. Mr Dove was wrong to describe the Green Belt boundary – as opposed to development of the sites – as "contingent". As the Inspector found in 2005, despite the change in policy that meant that it was unlikely that these sites would be brought

forward unless and until there was a change in (then) regional strategic policy, there was no justification for any change to the Green Belt boundary. That reflected the fact that Green Belt boundaries are intended to be enduring, and not to be altered simply because the current policy means that development of those sites is unlikely or even impossible. Indeed, where the current policy is to that effect, the amenity interests identified in the sites will be protected by those very policies as part of the general planning balance exercise. A prime character of Green Belts is their ability to endure through changes of such policies. For the reasons set out in Carpets of Worth (at page 346 per Purchas LJ) it is important that a proposal to extend a Green Belt is subject to the same, stringent regime as a proposal to diminish it, because whichever way the boundary is altered "there must be serious prejudice one way or the other to the parties involved".

133. Those are the principles. Applying them to this case, what (if anything has occurred since the Green Belt boundary was set in 1997 that necessitates and therefore justifies a change to that boundary now, to include the Sites?

....

135. I am persuaded by Mr Lockhart-Mummery that the Inspector, unfortunately, did not adopt the correct approach to the proposed revision of the Green Belt boundary to include the Sites, which had previously been white, unallocated land. He performed an exercise of simply balancing the various current policy factors, and, using his planning judgement, concluding that it was unlikely that either of these two sites would, under current policies, likely to be found suitable for development. That, in his judgment, may now be so: but that falls very far short of the stringent test for exceptional circumstances that any revision of the Green Belt boundary must satisfy. There is nothing in this case that suggests that any of the assumptions upon which the Green Belt boundary was set has proved unfounded, nor has anything occurred since the Green Belt boundary was set that might justify the redefinition of the boundary."

15. At the time of writing, the judgment has been appealed to the Court of Appeal and judgment is anticipated at the end of 2014, or very early 2015.

IM Properties V Lichfield

16. The most up-to-date judgment on Green Belt is *R(IM Properties) v Lichfield DC* which provides a thorough assessment of the “exceptional circumstances” test:

“87 The claimant contends that the defendant has persistently misunderstood the approach to the revisions of the green belt. He relies on the case of Copas v Royal Borough of Windsor and Maidenhead [2001] EWCA Civ 180 which dealt with previous guidance on green belt in PPG2. There, Simon Brown LJ made it clear that, the terms of the guidance were clear, so that unless there were exceptional circumstances which necessitated a revision of the green belt boundary a single composite test would not be satisfied. Further, from paragraph 40 of the judgment the claimant derives a proposition which he describes as the falsification doctrine. Paragraph 40 reads,

“I would hold that the requisite necessity in a PPG 2 paragraph 2.7 case like the present — where the revision proposed is to increase the Green Belt — cannot be adjudged to arise unless some fundamental assumption which caused the land initially to be excluded from the Green Belt is thereafter clearly and permanently falsified by a later event. Only then could the continuing exclusion of the land from the Green Belt properly be characterised as “an incongruous anomaly”. The Secretary of State’s 1991 objection to development was neither sufficiently long-term nor sufficiently clearly applicable to all possible development on all parts of the site to be capable of constituting such an event, still less when it seemed of itself to demonstrate the sufficiency of existing planning controls to safeguard the various amenity interests identified.”

88 From that it is said that a revision proposed to increase a green belt cannot arise unless the fundamental basis upon which the land was originally excluded from the green belt was subsequently falsified. The converse must also apply when the green belt is to be rolled back.

89 The defendant and interested parties assert that the falsification doctrine does not exist. It is a misreading of the case of Copas on the part of the claimant. In any event it is not the relevant test. That is whether a necessity has been established as a result of the exceptional circumstances to bring about a boundary alteration.

90 The case of Gallagher Homes v Solihull Metropolitan Borough Council [2014] EWHC 1283 deals with the test for redefining a green belt boundary since the publication of the NPPF. Paragraphs 124 and 125 of Gallagher read:

[See paragraph 124 - 125 cited in full above]

91 From that review it can be seen that there is no test that green belt land is to be released as a last resort. It is an exercise of planning judgment as to whether exceptional circumstances necessitating revision have been demonstrated.

92 The interested parties emphasise the importance of section 39 of the Planning and Compulsory Purchase Act 2004 which imposes a duty upon the defendant and the inspector when exercising their functions under part 2 of the Act in relation to local development documents. The section demonstrates that the achievement of sustainable development is an ongoing duty upon any body exercising its function under part 2 of the Act. Sustainable development is a concept which is an archetypal example of planning judgment.

93 The duty to contribute to sustainable development imports a concept which embraces strategic consideration about how best to shape development in a district to ensure that proper provision is made for the needs of the 21st century in terms of housing and economic growth and for mitigating the effects of climate change. Inevitably, travel patterns are important. Both the SEA and the sustainability appraisal are important

components in forming a judgment to be made under Section 39(2) .

94 As a result it is submitted that the green belt designation is a servant of sustainable development.

Discussion and conclusions

95 In my judgement to refer to a falsification doctrine is to take the words of Simon Brown LJ out of context. To elevate the words that he used into a doctrine is to overstate their significance.

96 What is clear from the principles distilled in the case of Gallagher is that for revisions to the green belt to be made exceptional circumstances have to be demonstrated. Whether they have been is a matter of planning judgment in a local plan exercise ultimately for the inspector. It is of note that in setting out the principles in Gallagher there is no reference to a falsification doctrine or that any release of green belt land has to be seen as a last resort.

97 The only statutory duty is that in Section 39 (2) (supra). In that regard the contents of paragraph 84 of the NPPF are relevant. That says,

"84. When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development. They should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt or towards locations beyond the outer Green Belt boundary."

98 That is clear advice to decision makers to take into account the consequences for sustainable development of any review of green belt boundaries. As part of that patterns of development and additional travel are clearly relevant.

99 Here, the release from the green belt is proposed in Lichfield which is seen by the defendant as consistent with the town focused spatial strategy. The further releases have been the subject of a revised sustainability appraisal by the defendant. That found that no more suitable alternatives existed for development.

100 The principal main modifications endorsed by the defendant expressly referred to the green belt review and to the supplementary green belt review as informing the release of green belt sites. They contained advice as to the relevant tests that members needed to apply. Both documents were available to the decision making committees and were public documents. Ultimately, the matter was one of planning judgment where the members had to consider whether release of green belt land was necessary and, in so determining, had to be guided by their statutory duty to achieve sustainable development.

101 The members were aware that they had originally been presented with the Deans Slade and Cricket Lane sites as directions of growth at a much earlier stage of the local plan development. As the sites were to the south of Lichfield members were advised that development there would have little impact on the setting of the city overall and there were few limitations beyond the policy constraint of green belt. However, the extent of concern about loss of green belt at that time meant that the plan was revised to reduce the amount of growth in that direction. The inspector had found that the defendant had failed to produce a sound plan with that approach. An alternative strategy of a new village had been considered by the inspector as a first stage of the examination process and he had found that that failed to outperform the council's preferred strategy. The members were entitled to take all of those factors into account in concluding whether there was a necessity to propose to release sites from the green belt.

102 In my judgment, the members were aware of the test which they had to apply through the content of the documents before them together with their experience and knowledge as members of a council where a significant amount of its land was within the green belt. They were entitled to take into

account the genesis of the plan and the inspector's findings in concluding that in their view there were exceptional circumstances for a green belt revision. The main modifications endorsed show, in my judgment, that the defendant grappled with matters set out in the NPPF, their duty under Section 39 and the request by the Inspector to remedy shortcomings in their Development Plan.

103 Further, the letter from Deloitte of the 6th January 2014 which was sent to members of the Environment and Development (Overview and Scrutiny) Committee, albeit on the part of the claimants, was absolutely clear as to the correct approach to adopt. It rightly said that exceptional circumstances had to be demonstrated. It is odd, in those circumstances, for the claimant to make the submission that the defendant throughout misunderstood, misinterpreted and/or was misled as to the relevant test to apply. This ground fails."

17. In the current context, Green Belt extensions are comparatively rare, so the principal target is considered, properly justified removals are the primary issue. The judgment speaks for itself: the exceptional circumstances test requires a planning judgment, and direct reference to the test, and close regard to the *Gallagher* observations (subject to the OAN position), will generally provide a sound, policy-compliant route to Green Belt alterations.

Prepared by No5 Chambers

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