# England and Wales Court of Appeal (Civil Division) Decisions



**Neutral Citation Number: [2008] EWCA Civ 193**
Case No: C1/2007/1041

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM QUEEN'S BENCH DIVISION,**
**ADMINISTRATIVE COURT**
**MR JUSTICE SULLIVAN**
**CO/1454/2006**

Royal Courts of Justice
Strand, London, WC2A 2LL
19/03/2008

B e f o r e :

**LORD JUSTICE WALLER**
**Vice President of the Court of Appeal, Civil Division**
**LORD JUSTICE SEDLEY**
**and**
**LORD JUSTICE CARNWATH**

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**Between:**

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| **The Queen on the Application of Heath & Hampstead Society** | **Respondent** |
| **- and -** | |
| **Messrs Alex and Thalis Vlachos** | **First and Second Appellants** |
| **- and -** | |
| **London Borough of Camden** | **Third Appellant** |

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**David Elvin QC & Charles Banner (instructed by Messrs David Cooper & Co) for the First and Second Appellants**
**Peter Harrison QC (instructed by London Borough of Camden Legal Services) for the Third Appellant**

**Anthony Porten QC (instructed by Messrs Hunt & Lisners) for the Respondent**
**Hearing date: Tuesday 26th February, 2008**

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**HTML VERSION OF JUDGMENT**

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**Carnwath LJ :**

**Introduction**

1. This appeal raises a short question on the interpretation of the Metropolitan Open Land ("MOL") policy. It concerns a planning permission granted by Camden Council on 23 January 2006 for -

> "demolition of the existing part 1, part 2-storey dwellinghouse with associated terraces and brick shed and erection of a part 2, part 3-storey dwellinghouse with associated landscaping."

2. The existing dwellinghouse is known as The Garden House in the Vale of Health, London, NW3. It is on a backland site to the rear of 7-12 Heath Villas. The site slopes down towards the Hampstead pond to the east. The house itself is a 1950s dwelling-house with two storeys and a pitched roof, described as "modest and unassuming" and "architecturally uninspiring". There is a high brick wall separating the house from the houses in Heath Villas, the top floors of which overlook the site. On the other side in front of the house facing the pond, there is a raised patio with steps down to the substantial garden.

3. The new building would on any view be substantially larger than the existing, although no higher (because much of the increase would be below ground level). Depending on how the calculations are done, there would be a three-fold increase in floor space; perhaps a four-fold increase in built volume; and between two and two-and-a-half times increase in its footprint. However, the council were apparently satisfied that the proposal was consistent with the relevant policies, because it would not be "materially larger". They were advised by their planning officer that the limited increase to the existing residential use was acceptable in planning terms (para 6.4), that the extension would not have any impact on the buildings in Heath Villas (para 6.5.5), that the proposed architectural treatment would "significantly break down the perceived bulk of the building in views across the pond" (para 6.6.1), and that:

> "… the enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL ..... "

4. The officer's reasoning was specifically incorporated into the statutory reasons for the grant of permission, and accordingly must be taken as representing the formal view of the council itself.

5. The Society contends that this advice and the decision based on it reflected a misinterpretation of the applicable policy. The judge agreed, and quashed the permission.

**Green Belt and MOL policy**

6. The applicable planning policies were described in detail by Sullivan J, and it is unnecessary to repeat them. Most importantly, in the present context the site is on land designated as Metropolitan Open Land. On such land new development is strictly limited, but less restrictive policies apply to what is known as "appropriate development".

7. The concept of "appropriate development" is well-established in the context of Green Belt policy. It reflects a distinction between two stages of the analysis: whether development is "appropriate" in the Green Belt and how much harm to the Green Belt a particular proposal will do (see e.g. per Keene LJ, *Kemnal Manor Memorial Garden v Secretary of State* [2005] JPL 1568 para 28). Certain categories of

development, such as agricultural buildings, recreational facilities, and cemeteries, have traditionally been regarded as acceptable in principle, subject to other planning considerations. "Inappropriate development", which includes most forms of residential or commercial development, is unacceptable in principle, and is permitted only in "very special" circumstances. The same policy approach is applied to land in the MOL. It follows that an important first step, or "threshold" question (as the judge described it), in relation to an application for development in the Green Belt or the MOL, is to decide on which side of the appropriate/inappropriate line it falls.

8. The relevant Green Belt policy is found in PPG 2: Green Belts. There is a general presumption against "inappropriate development" which should not be approved "except in very special circumstances". Paragraph 3.3 states:

> "Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations." (para 3.2)

Under paragraph 3.4, construction of new buildings in the Green Belt is "inappropriate", unless it is for certain purposes, which are defined with varying degrees of specificity. They include, for example, "agriculture and forestry"; and -

> "- essential facilities for outdoor sport and outdoor recreation, for cemeteries, and for other uses of land which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in it .....;"

9. The relevant category for present purposes is:

> "- limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below);"

The expression "not materially larger" comes in paragraph 3.6, to which the latter category is said to be "subject":

> "3.6 Provided that it does not result in disproportionate additions over and above the size of the *original* building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

10. Even when a building has been accepted as "appropriate", there remains a second question whether it is acceptable on other grounds. Thus, paragraph 3.15 of PPG 2 deals with "visual amenity":

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

11. In relation to MOL policy, the corresponding definition is found in Policy N1 in the revised Camden Unitary Development Plan, which states that the council "will only grant planning permission for appropriate development on Metropolitan Open Land". The categories are similar, but not identical, to those defined by PPG2 for Green Belts, but they include in the same words:

> "g) the limited extension, alteration or replacement of existing dwellings."

It is not in dispute that this, like the same category in PPG2, is to be interpreted by reference to paragraph 3.6 of the PPG. It is also accepted that, since PPG2 is a national policy document, the criterion should be given a consistent interpretation across the country.

12. Accordingly, it is common ground that the relevant test, to decide whether a proposed replacement dwelling is "appropriate", is whether it would be "not materially larger than the dwelling it replaces".

**The Issue**

13. The issue is a short one: whether the "materially larger" test imports, solely or primarily, a simple comparison of the size of the existing and proposed buildings; or whether it requires a broader planning judgment as to whether the new building would have a materially greater impact than the existing building on the interests which MOL policy is designed to protect. Mr Elvin's case, in a nutshell, is that, in the context of policies designed to protect the MOL, the development cannot said to be "materially" larger, if the increase has no "material" impact on the objectives of the MOL; or at least that the authority could reasonably take that view.

14. The approach of the court to such issues was explained by Brooke LJ in *R v Derbyshire CC ex p Woods* [1997] JPL 958, 967 (a case concerning the application of Departmental Planning Guidance Note of Minerals):

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy… If there is room for dispute about the breadth of the meaning the words may properly bear, then there may in particular cases be material considerations of law which will deprive a word of one of its possible shades of meaning in that case as a matter of law. "

15. He referred to this as "the underlying principle of law" which had been the basis of the decision of Auld J in *Northavon DC v Secretary of State for the Environment* [1993] JPL 761. He had been concerned with the meaning of the expression "institutions standing in extensive grounds", in an earlier version of PPG 2 on Green Belt policy, of which he had said (at p 763):

> "The words spoke for themselves and were not readily susceptible to precise legal definition. Whether a proposed development met the description was in most cases likely to be a matter of fact or degree and planning judgment. He [the judge] said 'in most cases' because it was for the Court to say as a matter of law whether the meaning given by the Secretary of State or one of his Officers or Inspectors to the expression when applying it was outside the ordinary and natural meaning of the words in their context…. The test to be applied by the court was that it should only interfere where the decision-maker's interpretation was perverse in that he has given to the words in their context a meaning that they could not possibly have or restricted their meaning in a way that the breadth of their terms could not possibly justify."

16. There is perhaps a slight difference of emphasis between the two statements, in that Brooke LJ places more weight on the role of the court in determining the "breadth of meaning" of the words. This may reflect the fact that Auld J was concerned with a decision of the Secretary of State interpreting his own policy. In that context it is understandable that, short of perversity, the court will respect his interpretation of his own words. By contrast, where, as in *Derbyshire* and in the present case, the decision is that of a local authority applying national policy, the importance of consistency of interpretation as between different authorities becomes a significant, additional factor.

**The judgment below**

17. Sullivan J rejected Mr Elvin's argument (paras 19-22). He thought that the exercise was "primarily an objective one by reference to size". Adopting what he understood to be the reasoning of Deputy Judge Christopher Lockhart-Mummery QC in *Surrey Homes Limited v Secretary of State for Environment* (unreported) CO/1273/2000, BAILII: [2000] EWHC 633 (Admin), he said:

> "Which physical dimension is most relevant for the purpose of assessing the relative size of the existing and replacement dwellinghouse, will depend on the circumstances of the

particular case. It may be floor space, footprint, built volume, height, width, etc. But, as Mr Lockhart-Mummery said in *Surrey Homes*:

> ' ..... In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion.'

It is one thing to say that in a case where the increase in dimensions is marginal in quantitative terms, some regard may be had to other matters 'such as bulk, height, mass and prominence'; it is quite another thing to set consideration of the physical increase in size to one side altogether, and, in effect, to substitute a test such as 'providing the new dwelling is not more visually intrusive than the dwelling it replaces' for the test in paragraph 3.6: 'providing the new dwelling is not materially larger than the dwelling it replaces.'

Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact…"

18. Applying this approach to the facts of the present case he said (para 24-5):

> "Since the exercise is primarily an objective one by reference to size rather than visual impact, the replacement dwelling is 'plainly materially' larger than the existing dwelling….
>
> … looking simply at the replacement building, it was, depending on whether one measured footprint, floor space or volume, between two and four times as large as the existing dwelling. This increase in size was so substantial that there could be no doubt whatsoever that the replacement dwelling was 'materially larger' than the dwelling it was to replace. The only way in which one could come to a contrary conclusion would be to set aside all measurements and approach the question 'is the replacement dwelling materially larger than the existing dwelling?' solely by reference to a qualitative judgment as to its visual impact. That was the erroneous approach that was adopted in the officer's report and subsequent advice to the committee."

**The *Surrey Homes* case**

19. Mr Elvin contended that the judge was wrong to think that his approach was consistent with reasoning in *Surrey Homes* , BAILII: [2000] EWHC 633 (Admin), and that the latter is to be preferred. To examine that contention it is necessary to consider the decision in that case in a little more detail.

20. The case concerned the refusal of permission, on appeal, for a replacement dwelling in the Green Belt. The new building would be larger by only 7.9 per cent than the existing, and it was accepted that "in purely floor space terms", there would not be a material increase. The Council argued that floor space was not the only factor, but that "bulk and massing" were also important. The inspector directed himself (following an earlier decision) that it was reasonable to "assess the term in the context of what Green Belt policies are seeking to achieve" and that accordingly a replacement buildings should be regarded as "materially larger" –

> "if it would conflict with those statements of policy, rather than by any quantitative criteria" (para 13).

21. Applying that approach, he considered that the proposal failed the test. The new building would have "a much more bulky form"; its greater height would make it appear "far larger in terms of bulk and massing than the existing building", an impression which would be "accentuated" by its location. It would be "very large by any standards", and would have "a far greater prominence in the street scene" than the existing building; and its effect would be "to reduce the openness of the Green Belt in this location" (para 16).

22. The judge was faced with the (to my mind) extreme submission that the term "materially larger" was to be judged "exclusively" by reference to "floor space", so that such matters as height, bulk and massing, and positioning on the site, were irrelevant. Not surprisingly, be rejected that submission:

> "In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion."
>
> But I entertain no doubt that the concept of whether the dwelling is 'materially larger' can be assessed by reference to matters such as bulk, height, mass and prominence. These are all matters going to the openness of the Green Belt. They are plainly all material considerations relevant to deciding on the meaning of the term in the context in which it arises, namely Green Belt policy.
>
> Indeed, were it otherwise, absurd results could arise. One could have equivalent or possibly even reduced floor space, but disposed within a tower-like structure, having far more impact on the Green Belt. It would give a strange result, in my judgment, if an inspector were debarred from concluding that the proposed structure harmed openness and was inappropriate development." (para 23-3)

23. That decision seems to me with respect undoubtedly right, but it is of little help in the present case. In that case it was held that a *small* increase in floor space in absolute terms could be judged "material" in planning terms, because of the design of the building and its position on the site. The converse does not necessarily follow. The case is no authority for the proposition that design and location can procure the result that a very *large* increase in absolute terms, as here, is to be treated as "not material".

**The officer's report**

24. Before coming back to the interpretation of the policy, it is helpful to consider how the officer dealt with the issue.

25. Her first reference to MOL policy comes under the heading "Residential Use" (para 6.4) where she states:

> "The replacement single-family dwellinghouse raises no land use policy issues. Where existing dwellings do occur in MOL, it seems right to acknowledge that extensions etc, may be appropriate, and this is specifically referred to in PPG 2 on Green Belts. This guidance in paragraph 3.6 specifically states: [the guidance is then set out]. The proposed residential use and its limited extension in size are therefore considered to be appropriate. This is further discussed in paragraph 6.8 below..."

Under the same "residential use" heading, she notes also that in terms of habitable rooms there would be only "a marginal increase in density", which was acceptable under housing policies.

26. There is then a separate section dealing with "Bulk, height, footprint and layout" (para 6.5). This contains no specific reference to MOL policy. She accepts that "the overall size and bulk of the front elevation visible from the pond" would be greater than the existing front elevation. However, earthworks on the pond side would result in the basement storey and the part of the ground floor being obscured from views across the pond. Most of the increased bulk would be directed towards the rear of the site, and which is "not visible from the public realm". The increased footprint would cover part of the existing hard surface and raised terracing, and "would not result in a material loss of front garden space". The new building would appear from the pond as –

> "… an essential 2-storey flat roofed building, located to the rear of the site and partially screened by greenery".

27. She concludes on this aspect (para 6.5.6):

> "On balance, it is considered that, in the light of the existing part 1, part 2-storey pitched roof building, the proposed massing and bulk of the new building together with its form and design in the sensitive location, would not cause demonstrable harm to the character and appearance of this part of Hampstead Conservation Area."

28. The report next deals with "Design" and "Impact on Hampstead Conservation Area and the Heath". On the latter, she concludes that "the perception of a greater mass of building bulk in respect of the front

elevation" would not "seriously harm" views from the fringes of the Heath or its setting; and that the green roof would assist in assimilating the new building into the natural setting in this view.

29. The next section (para 6.8) deals with "Development on Metropolitan Open Land and Private Open Space". Having commented on the purposes of the MOL designation, and the general need to protect openness, she notes that "residential extensions/alterations" may be appropriate development if "they would not result in a significant *(sic)* increase in size of the original dwelling" (referring to Policy N1). She continues (para 6.8.4-5):

> "The MOL in question is the private garden of the existing residential property, which is not available to the public for general enjoyment and recreation. The contribution that this private garden makes to the MOL as a whole is not considered to change as a result of the proposed replacement scheme, although the footprint of the new building will result in a minor decrease in the area designated MOL (i.e. the existing building occupies less MOL). However, it is considered that the enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL and the Heath. The replacement house is not considered to cause demonstrable harm to the existing openness or setting of the site and the surrounding land, or to the nature and form of development and land uses in the vicinity of the MOL. The proposed house is not considered to alter the balance between built and open space and, on balance, the proposed replacement house on MOL & POS is therefore considered acceptable.
>
> On balance, it is considered that the extent of the 'loss' of MOL is not significant and it will not harm the integrity of the MOL nor result in demonstrable harm to the character and appearance of the Heath at Hampstead Conservation Area."

30. In her final Conclusion (para 7.1), she considers that on balance the proposal complies with the relevant policies. There is no specific reference to MOL policy, but I take that as encompassed in her first sentence:

> "There is no objection in principle to the replacement of the existing 4-bedroom dwellinghouse with a 5-bedroom dwellinghouse."

The remainder of the concluding paragraph summarises her views on the design and the limited impact on the surroundings and adjacent occupiers (without reference to MOL policy as such), leading to her recommendation to approve.

31. We were rightly urged not to read the report like a statute (see *South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953, para 36, per Lord Simon Brown). I also bear in mind that we are focussing, with the spectacles of hindsight, on one particular issue of many. However, it is noteworthy that, in an otherwise admirably clear and comprehensive report, her treatment of the MOL issue is at best incomplete. In the body of the report, MOL policy is referred to in only two places, first in relation to residential use, secondly in a passage leading to a conclusion about "loss" of MOL. Inferentially, one may add the "Conclusion", where again the emphasis is on the limited extension of residential use. It is striking that nowhere does she ask or answer the critical question whether the replacement building would be "materially larger".

32. I would not attach great weight to the fact that she misstates the relevant policy criterion, by substituting the word "significant" for "material". In most contexts, there may well be no real difference. The problem is that in the report she never answers the relevant question in either form.

**Discussion**

33. Mr Elvin's case can be simply and attractively stated. The word "material" is deeply embedded in planning law as meaning "material in planning terms". It is a settled principle that matters of planning judgment, including the weight if any to be given to "material" considerations are for the local planning authority not the courts (see Lord Hoffmann's discussion of "Materiality and planning merits" in *Tesco Stores v Secretary of State* [1995] 1 WLR 759 para 13). The authority correctly identified the increased size of the building, in all its aspects, as a relevant consideration in accordance with the MOL

policy, but they decided that on the facts of the case it was not "material". That was a judgment for them, and involves no issue of law justifying the intervention of the court.

34. Although I see the force of that submission, it ignores the context in which the word is used. The words "materially larger" in paragraph 3.6 should not be read in isolation. There are two important aspects of the context. First is that paragraph 3.6 is concerned with the definition of "appropriate development", as contrasted with inappropriate development, which is "by definition harmful to the Green Belt" (see para 8 above). This first stage of the analysis is concerned principally with categorisation rather than individual assessment.

35. As Mr Elvin points out, the distinction is far from clear-cut. He is able to point, for example, to the sports and cemeteries category (see para 8 above), where one part of the test is whether the particular uses "preserve the openness of the Green Belt" and "do not conflict with the purposes of including land in it". Even more pertinent, perhaps, is the category of "redevelopment of major existing developed sites". There "appropriateness" depends on meeting the criteria set out in Annex C1 para C4, including a requirement that redevelopment should –

> "… have no greater impact than the existing development on the openness of the Green Belt and the purposes of including land in it".

To my mind, however, those examples point a contrast with the narrower language of paragraph 3.6. The test is whether the replacement is "materially larger". Had it been intended to make appropriateness dependent on a broad "no greater impact" test, as in Annex C1, the same words could have been used. Instead the emphasis is on relative size, not relative visual impact.

36. That leads to the second aspect of the context, which is that of paragraph 3.6 itself. It is part of the test for a category which covers "limited extension, alteration or replacement…" "Limited" to my mind implies a limitation of size. Paragraph 3.6 deals with both extension and replacement. An extension must be "proportionate" to the size of "the *original* building". The emphasis given to the word "original" shows how tightly this is intended to be drawn, in order presumably to avoid a gradual accretion of extensions, each arguably "proportionate". It would be impossible, in my view, to argue that "proportionate" in this context is unrelated to relative size. For example, an extension three times the size of the original, however beautifully and unobtrusively designed, could not, in my view, be regarded as "proportionate" in the ordinary sense of that word.

37. The words "replacement" and "not materially larger" must be read together and in the same context. So read, I do not think that the meaning of the word "material", notwithstanding its use in planning law more generally, can bear the weight which the authority sought to give it. Size as Sullivan J said is the primary test. The general intention is that the new building should be similar in scale to that which it replaces. The *Surrey Homes* case, BAILII: [2000] EWHC 633 (Admin), illustrates why some qualification to the word "larger" is needed. A small increase may be significant or insignificant in planning terms, depending on such matters as design, massing and disposition on the site. The qualification provides the necessary flexibility to allow planning judgment and common sense to play a part, and it is not a precise formula. However, that flexibility does not justify stretching the word "materially" to produce a different, much broader test. As has been seen, where the authors of PPG2 intend a broader test, the intention is clearly expressed.

**Conclusion**

38. For these reasons, which are in line with those of Sullivan J, I conclude that the council misunderstood and misapplied MOL policy. Had they properly understood the policy, in my view, they could not reasonably have concluded that a building more than twice as large as the original (in terms of floor space, volume and footprint) was not "materially larger".

39. I would dismiss the appeal, and uphold the order of the judge.

**Lord Justice Sedley :**

40. I agree.

**Lord Justice Waller :**

41. I also agree.

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