

# Central Issues for the Central Region



**39 Essex Chambers Webinar**  
**20 October 2020: 2.30 to 4.00pm**

# Speakers |



**Stephen Tromans QC**



**Gethin Thomas**



**John Pugh-Smith**

# Programme

- **Stephen Tromans QC** – *Chair’s Introduction; Environmental issues; Challenges to major schemes*
- **Gethin Thomas** – *Changes of use*
- **John Pugh-Smith** – *Other Issues: The correct approach to the interpretation of s.106s and planning conditions; Five year HLS; Green Belt ‘openness’; LPAs and “neighbour disputes”*

# Environmental issues in Birmingham

## School climate strike



# Environmental issues in Birmingham

- Birmingham Clean Air Zone – now postponed till June 2021 but still on the cards
- Draft Birmingham Transport Plan 2031
- Climate emergency declaration 2019
- “A city that takes a leading role in tackling climate change” – Council Plan
- Route To Zero (R20) Taskforce 2019

# West Midlands Combined Authority

- Plan for GHG reduction 13% pa to 2041
- #WM2041
- £40bn cost
- Need for central government support
- Automotive industry “part of the region’s psyche”

# Challenges to major projects

Heathrow, HS2, etc



# Key themes

- Climate change
  - SEA
  - EIA
  - Habitats
- 
- Targets: major transport projects, energy projects



## *R (Plan B Earth & ors) v Secretary of State for Transport*

- Challenge to ANPS for third runway at Heathrow
- Climate change grounds: whether adoption of ANPS unlawful given UK commitment to the Paris Agreement
- Yes – for various reasons (s. 5(8) and s. 10(3) PA 2008) but in effect: government required to consider own policy
- Appeal to Supreme Court – judgment awaited



# *Packham v Secretary of State for Transport*

- Timing – 6 weeks and 3 days
- Rationality and “light touch”
- Climate change ground unarguable – Plan B Earth distinguished



# *R (ClientEarth) v Secretary of State for Business, Energy and Industry*

- JR of decision to grant DCO for two gas-fired generating units
- Panel recommended refusal on the basis of environmental impacts – SoS accepted adverse impacts but concluded outweighed by need
- Held that EN-1 did not require need to be addressed in quantitative terms
- Weight to be given to GHG emissions matter of planning judgment for SoS
- Appeal to CA pending

# Some other challenges

- Rivenhall Incinerator – heard in October
- Good Law Project challenge to energy NPS – Government has agreed to review but GLP seeks suspension of NPS in the meantime
- Good Law Project challenge on COVID-19 and precautionary principle
- Possible call-in of Woodhouse Colliery deep coal mine, Cumbria



# Points arising/lessons

- Growth in environmental JR – new players
- Generous rules on standing
- Low-risk rules on costs
- Timing
- Grounds and standard of review
- Current review



# Changes of use

STATUTORY INSTRUMENTS

**2020 No. 757**

TOWN AND COUNTRY PLANNING, ENGLAND

## The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020

*Made*

*20th July 2020*

*Laid before Parliament*

*21st July 2020*

*Coming into force*

*1st September 2020*

The Secretary of State, in exercise of the powers conferred by sections 55(2)(f), and 333(2A) and (7) of the Town and Country Planning Act 1990(1), (“the 1990 Act”) makes the following Regulations.

# Radical revolution?



# 'Commercial, business and service'

**CLASS A1:** Shop (other than less than or equal to 280sqm, mostly selling essential goods (including food) and at least 1km from a similar shop)

**CLASS D1:** Clinics, health centres, creches, day nurseries, day centres

**CLASS A2:** Financial and professional services

**CLASS D2:** Gyms, indoor recreations not involving motorized vehicles or firearms

**CLASS A3:** Café or restaurant

**CLASS E**

**CLASS B1a:** Office (other than A2)

**CLASS B1c:** Industrial process which can be carried out in a residential area without causing detriment to the amenity of the area

**CLASS B1b:** R&D of products or processes



# ‘Learning and non-residential institutions’

**CLASS D1:** Schools, non residential education and training centres, museums, public libraries, public halls, exhibition halls, places of worship, law courts

**CLASS F1**

# 'Local community'

**CLASS A1:** Shop less than or equal to 280sqm, mostly selling essential goods (including food) and at least 1km from a similar shop

**CLASS D2:** Hall or meeting place for the principal use of the local community

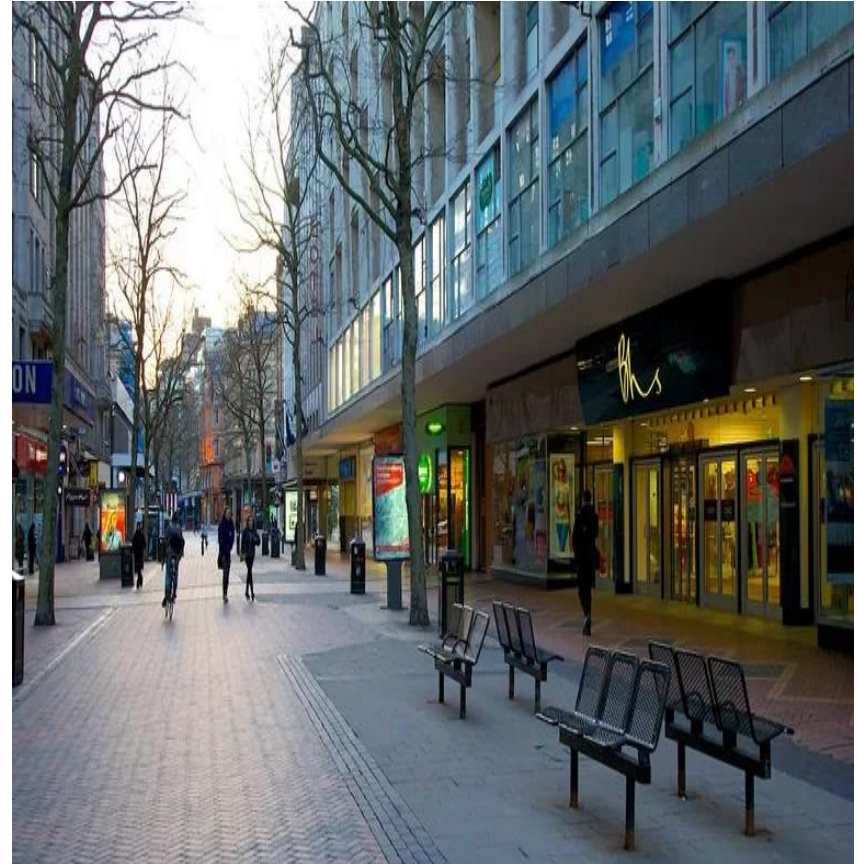
**CLASS F2**

**CLASS D2:** Indoor or outdoor pools, skating rinks and outdoor sports or recreations not involving motorized vehicles or firearms

# Implications

- From 1 September 2020 to 31 July 2021, permitted development rights enabling a change of use will continue to be applied based on the existing use classes, as they existed on 31 August 2020.
- Aim is deregulation.
- Potentially wide ranging secondary/indirect impact on other processes, such as valuation.
- Impact on local planning polices.

*These reforms are intended to give businesses greater freedom to change use so that they can adjust more quickly, and with more planning certainty, to changing demands and circumstances. The aim of the reforms is to support vibrant, mixed use high streets and town centres that will attract people and allow local businesses to thrive.*



# Taking back (some) control...?



- **Conditions?**
- **Role of local policies?**
- **Article 4 directions?**

# Future reforms and the GPDO

- Transitional provisions
  - The statutory instrument also makes transitional and savings provision with respect to other related planning legislation: the Town and Country Planning (General Permitted Development) (England) Order 2015 (S.I. 2015/596)
  - Apply from 1 September 2020 to July 2021

# Future reforms and the GPDO

- What to expect?

- *‘...we also propose to legislate to widen and change the nature of permitted development, so that it enables popular and replicable forms of development to be approved easily and quickly, helping to support ‘gentle intensification’ of our towns and cities, but in accordance with important design principles. There is a long history – in this country and elsewhere – of ‘pattern books’ being used to articulate standard building types, options and associated rules (such as heights and set-backs). They have helped to deliver some of our most popular and successful places, and in a way which makes it relatively easy for smaller development companies to enter the market. We want to revive this tradition, in areas suitable for development (Renewal areas), by allowing the pre-approval of popular and replicable designs through permitted development. The benefits are much more than fast delivery of proven popular designs – it will foster innovation and support industrialisation of housebuilding, enabling modern methods of construction to be developed and deployed at scale.’*

Planning Policy White Paper 2020

# In other news...

## The Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020

- These amended regulations introduce a new Class A into the GPDO – 'New dwellinghouses on detached blocks of flats' – which grants the right to extend purpose built blocks of flats upwards by two additional storeys. The blocks of flats must consist of three storeys or more before the extension and cannot have a total height of 30 metres or more with the additional two storeys.

# In other news...

## **The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755**

- Brings the enlargement of a dwellinghouse by the construction of new storeys on top of the highest existing storey of the dwellinghouse within permitted development for the purposes of the GDPO.

## **The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756**

- Class ZA allows for the demolition of a single detached building in existence on 12 March 2020 that was used for office, research and development or industrial processes, or a free-standing purpose-built block of flats, and its replacement by an individual detached block of flats or a single detached dwellinghouse within the footprint of the old building.



# RIGHTS : COMMUNITY : ACTION

Empowering climate change action

- Challenge to:
  - The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755;
  - The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756;
  - (The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020/757
- Grounds: (i) Failed to carry out a SEA, (ii) PSED, (iii) Failure to take account of consultation responses and other material considerations

# Other issues

- Interpretation of s.106s
- Interpretation of planning conditions
- Five Year HLS
- Green Belt ‘openness’
- LPAs and “neighbour disputes”

# Section 106 interpretation

- *Norfolk Homes Ltd v North Norfolk DC*
- Whether planning permission free of s.106 AH covenants after s.73 variations
- Principles of s.106 interpretation as deeds reaffirmed
- No leniency for LPAs and no “technical traps”
- Unintended consequences of implying terms to correct drafting oversights

# Interpretation of conditions

- *DB Symmetry Ltd v Swindon BC & SSHCLG*
- Planning condition requiring public to have lawful rights of passage over roads to be constructed
- No special set of rules compared with other legal documents
- On facts, condition did not require specific dedication of the roads as “public highway”

# More Five Year HLS jurisprudence

- *Peel Investments Ltd v SSHCLG*
- Expiry of development plan period does not mean that policies are automatically ‘out of date’ for the purposes of NPPF1 (para.14) or NPPF2/3 (para. 11(d)); and
- A local plan without strategic policies is not automatically out-of-date (either)
- On facts, ‘saved’ UDP policy EN2 prohibiting development which would fragment or detract from openness of a strategic “green wedge”

# That Green Belt principle of “Openness”

- *R (Samuel Smith Old Brewery) v NYCC*
- Quarry extension permission
- Visual quality of the landscape not an essential part of “openness”; though
- Visual qualities might be an aspect of the necessary planning judgment
- On facts, quarry extension could still preserve the openness of the Green Belt as matter of planning judgment not law

# That Green Belt principle of “Openness”

- *Hook v SSHCLG*
- Challenge to Inspector finding that alterations to buildings “inappropriate development”
- GB ‘speak’ of “inappropriate development”, “very special circumstances”, “preservation of openness” etc are not concepts of law but of planning policy
- Threshold of what is “inappropriate development” is a matter of planning judgment
- The nature of the decision-maker’s task will differ from one kind of GB development to another e.g. agricultural dwellings

# That Green Belt principle of “Openness”

- *R (Liverpool Open & Green Spaces CiC) v Liverpool City Council & Ors*
- Although “Green Wedge” development issue (39 dwellings) applicable GB principles re-stated (by Lindblom LJ) drawing from *Sam Smith* and *Hook*
- Applying the policy imperative of preserving openness requires “realism and common sense” to keeping designated land free of development including consideration of visual as well physical or spatial impacts

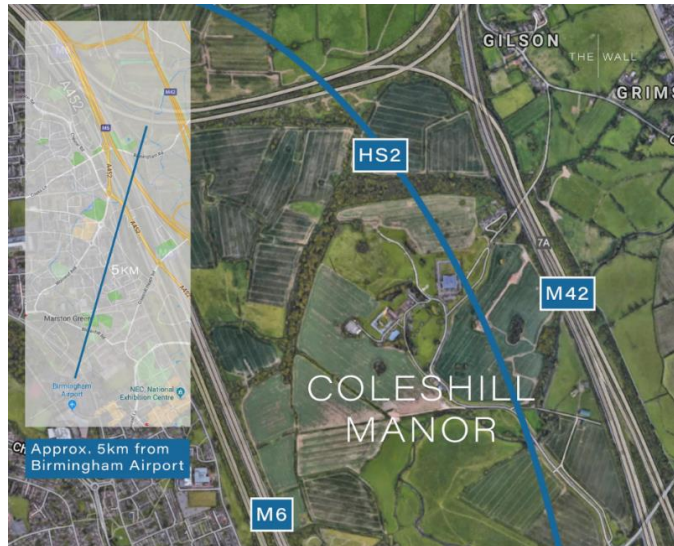


# That Green Belt principle of “Openness”

- *R (Lochairlort Investments Ltd) v Mendip DC & Norton St Philip PC*
- Local Green Space policy in NDP restricting development “*only if it enhances the original use and reasons for designation of the space*”
- As policy more restrictive than national GB policy it required a reasoned justification, and, none was provided even in the Examiner’s report despite being given the presumption of expertise although NDP Examiner’s role different from Planning Inspectors

# That Green Belt principle of “Openness”


- *The Eternal Wall of Answered Prayer (Coleshill)*



## WHO CAN SEE IT?

 With visibility from up to six miles away, Eternal Wall will be seen from the M6, M42 and M6.

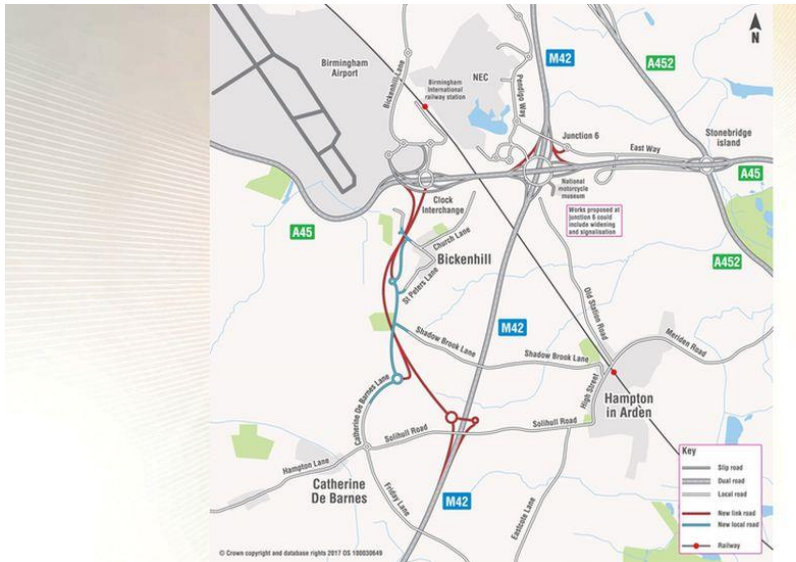
 Flights to and from nearby Birmingham Airport shall also have excellent views of Eternal Wall from every angle.

 And finally, any trains travelling on the HS2 will also get a glimpse of this magnificent monument.



# That Green Belt principle of “Openness”

- *M42 DCO for New Junction 5A etc.*



# LPAs and “neighbour disputes”

- *R (Hamms) v BANES Council & Chubb*
- Refusal of exercise of s.102 power to remove Ms Chubb’s (unlawful) cattle fence, despite AONB, as not expedient due PDR and stock control considerations
- S.102 power not solely restricted to planning considerations, and, that the amount of officer time would be better deployed elsewhere relevant factor
- All JR grounds found to be without merit

*N.B. PS and ADR plea! “A negotiated settlement would be to the public benefit, not just the benefit of these two parties”*

# The role of LPAs ?



# List of key cases

- *R (Plan B Earth & ors) v Secretary of State for Transport* [2020] EWCA Civ 214
- *Packham v Secretary of State for Transport* [2020] EWCA Civ 1004
- *R (ClientEarth) v Secretary of State for Business, Energy and Industry* [2020] EWHC 1303 (Admin)
- *Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265 (QB)
- *DB Symmetry Ltd v Swindon BC & SSHCLG* [2020] EWCA Civ 1331
- *Peel Investments Ltd v SSHCLG* [2019] EWHC 2143 (Admin)
- *R (Samuel Smith Old Brewery (Tadcaster) Ltd) v North Yorkshire County Council* [2020] UKSC 3
- *Hook v SSHCLG* [2020] EWCA Civ 486
- *R (Liverpool Open & Green Spaces CiC) v Liverpool City Council & Ors* [2019] EWHC 55 (Admin)
- *R (Lochairlort Investments Ltd) v Mendip DC & Norton St Philip PC* [2020] EWHC 1146 (Admin)
- *R (Hemms) v Bath & North East Somerset Council* [2020] EWHC 2721 (Admin)

# Questions?



39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.