INTRODUCTION

Jonathan Darby

Welcome to this week's Planning, Environment and Property newsletter. With so much happening (and at such a pace), it is difficult to know where to start! New Use Classes; new guidance published on the implications of Covid-19 to certain consultation and publicity requirements of the NSIP regime; draft guidance for the Business and Planning Bill, including as to pavement licences, construction working hours, availability of spatial strategies, and extending the life of permissions. We will try to digest as much as we can in forthcoming editions, but it will be interesting to see whether deregulation equates to progress through flexibility, or whether it leads us into high street homogeneity. Time will tell.

This week's edition features articles from Andrew Tabachnik QC and Kelly Stricklin-Coutinho (on zero-VAT rating for "construction of new

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buildings"); Richard Harwood QC (with a look at the number of planning High Court challenges there are, or how few); Stephen Tromans QC (an environmental case law update); and John Pugh-Smith (on the policy concept of "openness"). The second part of Victoria Hutton's round up of changes that have occurred over the summer will feature in next week's edition, with a view to taking in a number of the developments that have occurred this week.

As ever, we hope that you enjoy the read!

WHEN IS A NEW HOUSE TREATED AS A NEW HOUSE FOR VAT ZERO-RATING PURPOSES?

Andrew Tabachnik QC and Kelly Stricklin-Coutinho

The A long-standing exemption zero rates the supply of goods and services relating to the construction of a new house for VAT purposes. But when is a new house constructed? This question gives rise to no practical problem where a residential consent is implemented on a greenfield or fully cleared site. But difficulty can arise where an existing house is re-developed in a dense urban environment, with heritage and construction complexities preventing the initial step of razing everything to the ground, before starting again from scratch.

Instructed by Meeta Kaur and Ricardo Gama at Town Legal LLP, we recently assisted a client overturn an adverse HMRC determination where just such problems had arisen. The client's site is located in a Central London conservation area. The planning authority required retention of the two façade walls on heritage grounds, as well as the two party walls, but permissions existed to remove the roof, "gut" the interior, and re-construct with an additional above-ground storey and a new basement. HMRC initially took the view that zero rating was inapplicable in circumstances where the construction sequence was as follows: (i) remove roof and erect temporary structure over site; (ii) demolish all internal parts of the building, but retain the first floor; (iii) construct new first floor, above the original one; (iv) remove the original first floor; (v) complete the consented works. The reason for this construction sequence was to brace the retained facades, where external bracing had been banned by the local planning authority (due to narrow surrounding streets) and because interim internal bracing would have added substantial costs to the project. Focusing on the order in which the new first floor was installed before the old was removed, HMRC argued at first that there was no single moment when the existing building had (apart from the walls which were required to be retained) ceased to exist, and therefore it continued to exist.

Section 30(2) of the VAT Act 1994 ("VATA") provides that a supply of goods or services is zero-rated if the goods or services or the supply are of a description specified in Schedule 8. Item 2 of Group 5 of Schedule 8 sets out:

> "The supply in the course of the construction of:
>
> A building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or
>
> …
>
> Of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."

Section 96(9) VATA provides that schedule 8 must be interpreted in accordance with its notes.

Note 16 to Group 5 of Schedule 8 provides:

> "For the purpose of this Group, the construction of a building does not include:
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> a) The construction, reconstruction or alteration of an existing building …".

Note 18 to Group 5 of Schedule 8 provides:

> "A building only ceases to be an existing building when:
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> a) Demolished completely to ground level; or
>
> b) The part remaining above ground level consists of no more than a single façade or where a corner site, a double façade, the retention of which is a condition or requirement of statutory planning consent or similar permission."

Retention of façade(s) is thus not an obstacle to claiming zero rating (and, for understandable reasons, the same is accepted as applicable to party walls, per HMRC's VAT Notice 708), so long as this "is a condition or requirement" of the consent. In our case there was no explicit condition to this effect, but consistent with a line of Upper Tribunal cases, HMRC accepted that the necessary obligation was implicit in a condition requiring adherence to approved plans, on which notations had stipulated retention of the walls.

This was not a case (of which the Upper Tribunal has seen a number) where (apart from the – specifically exempted – facades and walls) some part of the old building had been absorbed into the new. The determinative issue, therefore, related to the construction sequence adopted. On this, HMRC was persuaded that the new dwelling was to be regarded as a new building, and not an extended version of the old building. HMRC accepted that the opening words of Note 18(b) – "the part remaining above ground level" – referred to the remaining part of the "existing building". Thus, the "existing building" ceased to exist for relevant purposes when the final above-ground vestige of it was removed (apart from walls), with no part retained in the new building. And it was irrelevant that this occurred after the new first floor had been installed. This interpretation reflected a purposive construction of Note 18(b), taking into account the statutory encouragement for replacement dwellings, which incorporate no relevant works or components of the old.

This reading of Note 18(b) also gave effect to:

- The principle of tax neutrality. A tax is neutral if it avoids distortions of the market where inconsequential but different choices are made. Here, requiring the developer to proceed by way of expensive internal bracing to ensure every joist of the first floor was removed before the new installed would distort the market for no discernible purpose.
- The principle of equity and fairness in taxation matters, which requires that those in materially identical circumstances should pay an equal amount of tax. Again, it would be illogical and would serve no useful purpose for the choice of internal bracing methodology to determine the level of VAT payable.

The net result is that the proper question to ask is whether, at the end of the project, any forbidden part of the old remains.

One further final point of interest for practitioners is worth mentioning. The developer proceeded by way of a number of separate planning permissions for works of "extension" to the existing building. Ultimately HMRC was persuaded that these permissions cumulatively amounted to a qualifying project, were not inconsistent with each other, and did not comprise an "extension" of the existing building. The developer may have found this aspect easier and swifter to navigate if it had chosen to proceed by way of a single umbrella consent, with a description of development that avoided potential misunderstanding.

HOW COMMON ARE HIGH COURT PLANNING CHALLENGES?

Richard Harwood QC

One gripe which appears from time to time about the planning system is the extent to which desirable, lawful development is held up by legal challenges. Whilst court cases tend to be high profile within the planning professions and are sometimes newsworthy, it is worth asking how numerous they are in the overall quantum of planning decisions.

The statistics publicly available on High Court challenges are imprecise and incomplete, particularly as to the outcome of the case. The analysis which follows can only be considered as a general guide, but provides some context for the debate.

High Court planning challenges fall into two broad categories: judicial review; and statutory applications to the High Court and appeals. Judicial reviews are mainly against the grant of planning permission by local planning authorities. However a significant minority will be on other planning matters such as grants of reserved matters and details under conditions by local authorities; prior approval; the making of national policy statements, supplementary planning documents and neighbourhood plans; decisions on nationally significant infrastructure projects; and decisions to take or decline to take enforcement action. Statutory applications are generally against decisions by Ministers and Inspectors in planning appeals, but also include local plan challenges. In planning, statutory appeals to the High Court concern enforcement notices.

The number of judicial review proceedings which are categorised by the Court Service as 'Town and Country Planning' in 2017 was 244. This is around the recent average: 234 in 2016; 273 in 2015; 250 in 2014. It does show an increase on the historic levels, which before 2010 were around 150 per annum.[1]

To put these totals in context in 2016/7 English districts and unitaries granted 386,000 planning permissions and 378,000 in the following year.[2] There are in addition permissions granted by county councils and by authorities in Wales, and many of the proceedings would not have been against the grant of planning permission at all. Making the exaggerated assumption that all of these judicial reviews were against planning permissions granted by English districts then the chances of such a permission being challenged is about 1 in 1600. Put another way, only 0.06% of planning permissions face judicial review proceedings. Given all the points above, the actual propensity to challenge will be much less, I suspect around 1 in 2000.

No breakdown is available on the subject matter of the proceedings. It is a reasonable conclusion that larger schemes are more likely to be challenged, but even then the proportions will be small. There are around 15,000 planning applications for major development (such as 10 dwellings or more) made to local authorities each year, about 88% of which are approved.[3] Even if all of the planning judicial reviews were against major developments, only about 1 in 50 would be challenged. Since many challenges are against non-major schemes, such as household extensions (think the Kensington basement type cases), single dwellings in the countryside and small wind turbines, the chance of a major development being subject to judicial review is probably less than 1%.

Success rates are harder to gauge. One of the difficulties is that the Ministry of Justice figures usually only record final outcomes which were achieved at a substantive hearing. These would not include cases where the defendant has

1 See the tables in Hansard 26 Nov 2012: Column 60W (Jeremy Wright MP).

2 MHCLG table 120P.

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875032/Planning_Application_Statistics_October_to_December_2019.pdf

agreed to the decision being quashed (submitted to judgment). Additionally there will be a variety of cases where a settlement has been reached without the Court making a substantive order. That settlement might or might not amount to a success for the claimant.

The only published figures for the total of planning judicial reviews being allowed seem to be in a Parliamentary written answer on 26 November 2012. Frank Dobson MP asked 'how many applications for judicial review related to planning or infrastructure proposals have been made in each year since 1998; and how many of those applications were ***(a)*** allowed to proceed to a hearing and ***(b)*** granted'. For the latter years, the answer by Jeremy Wright MP provided, omitting permission outcomes:

Year	Judicial Review applications received	Cases determined by Court (including cases determined by consent without a substantive hearing)
2006	142	44
2007	151	77
2008	184	111
2009	165	116
2010	148	87
2011	191	122

There is an important caveat about these figures. The question was how many applications had been allowed. The response is headed 'cases determined' and whilst that includes orders made by consent, it is not apparent that all of these determinations are claims being allowed. A few years ago I had looked at the outcomes in about 200 planning judicial reviews that I had acted in (for claimants, defendants and interested parties). Half of the claims were allowed, and settlements reached which amounted to wins for the claimants in a further 10% of cases.

Challenges to Planning Inspectorate decisions run at similar totals. The number of section 288 applications[4] and 289 enforcement notice appeals brought in the last four years in the Royal Courts of Justice are: 2016, 215; 2017, 192; 2018, 164; 2019, 158.[5] With around 15,000 planning, enforcement and lawful development certificate appeals each year,[6] the propensity to challenge is higher than for local authority decisions. Between 1 and 1.5% of Inspectorate decisions become the subject of legal proceedings. Whilst no breakdown by type of claimant appears to have been published, I suspect the majority of claims are by disgruntled appellants. Data on success rates is only made available patchily. In 2014/2015 172 Inspectorate decisions were challenged in the High Court and of those 51 decisions were quashed by the Court after a hearing or by consent.[7]

All in all, only a tiny minority of planning decisions face legal challenges. A sizeable number of those challenges are successful and many of the proceedings brought against appeal decisions are by developers objecting to planning permission being refused. Even fewer therefore are grants of planning permission which are unsuccessfully challenged. Being the subject of unsuccessful proceedings will cause delay, but such delay is a consequence of having public authorities subject to the law and the ability for a concerned to have access to justice. Enabling courts to resolve legal issues allows the law to be interpreted, explained and applied; and promotes a consistency of approach which benefits developers amongst others.

4 Town and Country Planning Act 1990, s 288. Usually against decisions on planning appeals, call-in applications and lawful development certificate appeals.

5 Royal Courts of Justice Annual Tables, table 3.31. https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020

6 See: https://www.gov.uk/government/statistics/planning-inspectorate-statistics and: https://gov.wales/sites/default/files/publications/2020-04/planning-inspectorate-wales-performance-statistics-2019-to-2020.pdf

7 Planning Inspectorate 2014/2015 annual report.

ENVIRONMENTAL CASE LAW ROUND-UP

Stephen Tromans QC

Before we all depart for whatever summer break awaits us, here is round up of some cases of interest for environmental lawyers. Have a good rest of the summer, and stay safe.

Waste shipment offences

The issue of waste exported from the UK being treated (or not) to unacceptable environmental standards overseas has been in the news a number of times over recent months.

In *R v Biffa Waste Services Ltd* [2020] EWCA Crim 827 the Court of Appeal provided guidance on the evidence which may be adduced by a defendant charged with making illegal exports of domestic waste contrary to the Transfrontier Shipment of Waste Regulations 2007, reg. 23. The case related to the export of what was claimed to be waste paper to China. China being a non-OECD country, the export of paper waste there was lawful under EU Regulation 1013/2006. However, the waste was found to be contaminated with household waste. The nature of the contamination as summarised by the Court of Appeal was that it included soiled nappies and incontinence pads, sanitary towels, sealed bags containing faeces, items of underwear, other items of clothing, plastic bags, a recycling bag issued by a local authority, plastic bottles, food packaging, electric cable, pieces of wood, metal items, hot water bottles and hi-vis jackets. The question was whether this household waste was more than "a small amount". The defendant was convicted and appealed on two grounds.

The first was that the trial judge had misdirected the jury in excluding expert and factual evidence for the defendant that the waste met Chinese standards of acceptability as paper waste and could be recycled in China in an environmentally sound manner. On this point the Court of Appeal upheld the judge's direction. The essential point was that the ban on waste to OECD countries was a blanket one, with no differentiation between countries, and the categorisation of the waste was to be determined at the point the waste began its journey. What might happen at its destination was irrelevant. The question was at that point whether the level of contaminants was so small as to be minimal, and in deciding that question it could be important to consider whether the nature and quantity of the contaminants was so small as not to impede environmentally sound recycling of the waste, regardless of its destination. If the defendant wished to argue that point, and adduce expert evidence, the point would have to be identified in the defence case statement and at the plea and trial preparation hearing. The evidence had to be general and not related specifically to processes used in a particular country of destination. Even then it would not be determinative of the jury's evaluation. The defendant could also adduce evidence of its own processes for sorting and testing processes, and the results of such testing. However, again, evidence of testing carried out in the country of destination or compliance with national standards there was not relevant.

Ultimately the jury had to be directed that there was no specific proportion or level of contamination which should be treated as sufficiently small. The evidential task facing a company charged with the offence is therefore a daunting one.

The second ground of appeal also failed. This was that the judge had wrongly allowed evidence of previous convictions for environmental offences, including health and safety offences, in order to correct a false impression given by the defendant during evidence in chief that it would be inconsistent with its business standards and ethics to have committed the alleged offence. The defendant's Chief Operating Officer gave evidence in chief to the effect that the management of waste is essential to the protection of the environment and of human health. He referred to awards which the defendant had won in relation to health and safety and innovation, and

to the company's charitable works. In answer to questions on whether he regarded the defendant as a business that takes its environmental responsibilities seriously, he said it would be "nonsensical" for the defendant not to take its responsibilities seriously. The Court of Appeal held that the question of whether a defendant had given a false impression was fact-specific, and the judge had been entitled to find that the defendant's evidence in chief could have conveyed the false impression that it was not the sort of company to commit environmental offences. The judge was found to have been careful to limit the extent of the bad character evidence which was admitted, and to avoid any risk of unfair prejudice arising from the previous convictions for health and safety offences, particularly those involving fatalities.

Companies charged with environmental offences, which have in place environmental and social governance policies, are often keen that these be drawn to the attention of the court. This case provides an illustration that this exercise will not be without risks.

Waste Exemptions

The Court of Appeal decision in *R v Mustafa and others* [2020] EWCA Crim 597 clarifies a short but important point on reliance on exemptions from the requirement for an environmental permit for waste operations as regulated facility. Mustafa, along with other directors of a company, Prime Biomass Limited, had been charged and convicted in respect of offences committed by the company on the basis of their consent, connivance or neglect. Mustafa's appeal was on the ground that the trial judge had erred in directing the jury on the law relating to the offence, and in particular on the question of whether, at the relevant time, the company's operation was an "exempt facility" as defined in the legislation.

The company had relied on an exemption in respect of its waste wood treatment operations. The exemption, referred to as a "T6 exemption", allowed up to 500 tonnes of waste wood to be stored or treated at the site over any seven-day period. On a number of visits to the site Environment Agency officers found that the waste wood on the site exceeded 500 tonnes. The Environment Agency had received complaints from several neighbouring business owners about nuisance caused by emissions of wood dust from the site. The company then went into voluntary liquidation.

The company had registered an exemption under the Environmental Permitting Regulations. It was argued for the defendant that until the Agency removed the exemption from the register it remained and could be relied upon. The Agency argued that an offence would be committed unless three requirements are met – registration of an exemption, compliance with specific conditions of the exemption, and consistency with the objectives of the Waste Framework Directive.

The defendant sought to counter this by an argument based on the need for legal certainty. It was argued that a situation where the risk of prosecution would arise intermittently as the quantity of the waste on the site fluctuated, particularly if that was in dispute, would be inimical to "legal certainty", which was an important protection not only for the operator but also for third parties, and the public. It was said that the register should be capable of being relied upon as an accurate record of the status of the operation and that the process as a whole would be undermined if the public register showed illegal waste sites as exempt facilities.

The Court of Appeal rejected that submission. The nub of its judgment was at paras. 70-72:

> **70.** On a straightforward interpretation of the legislative provisions, in our view, a waste operation will only be an "exempt facility" if it fully meets the requirements of paragraph 3(1) of Schedule 2 . If it does not meet those requirements in full, it cannot be an "exempt facility", and it must be a "regulated facility"; there is no other status it can then have. And if, as a "regulated facility", it is operated without an environmental permit, there is a breach of

regulation 12 , and an offence under regulation 38 has been committed. That, it seems to us, is this case.

71. The "requirements" that have to be met for an operation to be an "exempt waste operation", and thus an "exempt facility", are clearly set out in paragraph 3(1) of Schedule 2 . There are three of them: first, that the operation satisfies "the general and specific conditions" specified in Part 1 of Schedule 3 for the relevant description of the operation (paragraph 3(1)(a); and chapter 2, section 1 , paragraph 3 and paragraph 6(3) of Schedule 3); second, that it is registered (paragraph 3(1)(b) of Schedule 2); and third, that the type and quantity of waste, and method of disposal or recovery, are consistent with the relevant objectives of the Waste Framework Directive – that it does not endanger human health or harm the environment (paragraph 3(1)(c) of Schedule 2).

72. Those three requirements are mandatory, and cumulative. None of them is said to be optional or discretionary. None of them is said to override or displace the other two. They must all be satisfied. If any of them is not met, or ceases to be met, the operation cannot be an "exempt waste operation", and thus cannot be an "exempt facility" (regulation 5), but can only be a "regulated facility" (regulation 8)."

The judgment makes good sense. It does however carry the consequence that a third party cannot simply assume that because a waste operation is registered as exempt that is in fact exempt and is being undertaken lawfully.

Legal advice privilege

The issue of legal advice privilege can be a highly relevant one in some environmental cases, both in relation to advice sought by a company subject to criminal or enforcement proceedings, and also sometimes advice sought by a regulator. The Court of Appeal in *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35 considered the latter. The litigation concerned criticisms made by the CAA of the airline in a press release. When the airline wrote to the CAA to take issue with the content of the press release, the CAA sent the claimant a letter reiterating its criticisms and leaked all the correspondence between the parties to a national newspaper. The airline sought judicial review of the CAA's decisions to issue the press release and to leak the correspondence. The airline sought specific disclosure of the previous drafts of the CAA's letter and records of any discussions on those drafts. Despite claiming legal advice privilege, the CAA was ordered to disclose various internal e-mails, including some to which its in house lawyers were addressees.

The Court of Appeal reviewed the difficult jurisprudence on legal advice privilege and the "dominant purpose" test, usefully summarising it in a series of propositions. It held that that there were no good grounds for not following the preponderance of authority, which accepted that the dominant purpose test applied to legal advice privilege, and there were good grounds for doing so, including the fact that the dominant purpose test undoubtedly applied to litigation privilege and the fact that generally other common law jurisdictions applied the test to legal advice privilege. If the dominant purpose of the communication was commercial, it would not be privileged, even if also sent to lawyers for the purpose of getting legal advice.

In summary, the Court held that:

1) Where a communication had been sent simultaneously to multiple addressees, including a lawyer, the communication would be subject to legal advice privilege if its dominant purpose had been to settle the instructions to the lawyer, even if that communication had been sent to the lawyer himself by way of information or was part of a rolling series of communications.
2) However, if the dominant purpose had been to obtain the commercial views of the non-lawyer addressees, the communication would not be privileged, even if a subsidiary purpose had been to obtain legal advice from the lawyer addressee.

3) The response from the lawyer, if it contained legal advice, would almost certainly be privileged, even if copied to more than one addressee.
4) Where a communication disclosed or was likely to disclose the nature and content of legal advice, then it would in any event be privileged.
5) In order to determine whether a document disclosed or might disclose the nature and content of legal advice it was necessary to look at the document in the context of the communications which preceded and followed it.

The Court of Appeal concluded that the judge had properly applied the dominant purpose test in the context of multi-addressee communications and that there were no grounds to interfere with the conclusion that the documents did not attract legal advice privilege.

It is possible to see how these principles might well be of relevance for example in the situation where enforcement proceedings are preceded by correspondence between a regulator and a regulated company. Care will need to be taken in how such correspondence is drafted and discussed, as it does not follow that simply because external or in-house lawyers have been involved or copied in, that legal advice privilege will automatically apply.

THE CONCEPT OF "OPENNESS" – 2020 VISION AT LAST?

John Pugh-Smith

It is, perhaps, one of the many oddities as well as ironies of 2020, so far, that having been in national "lockdown" the Higher Courts have produced more planning jurisprudence on the concept of "openness" this year than ever before.

In early February 2020 it was thought by many practitioners that the Supreme Court had given a sufficiently clear statement of the correct approach in *R (on the application of Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] UKSC 3. There, the issue of "openness" arose in the context of a challenge to the extension of the Jackdaw Crag Quarry in the Green Belt and the application of the former paragraph 90 of the initial National Planning Policy Framework,[8] now paragraph 146 of the current NPPF (Feb. 2019 version). Disagreeing with the approach taken by the Court of Appeal,[9] the Supreme Court held that for the purposes of the NPPF, the visual quality of the landscape was not in itself an essential part of the "openness" for which the green belt was protected (see para.5 of judgment). The concept of "openness" in para.90 was a broad policy concept. Naturally read, it referred back to the underlying aim of the green belt policy "to prevent urban sprawl by keeping land permanently open". As the former Planning Policy Guidance (PPG)2 made clear, it was not necessarily a statement about the visual qualities of the land, though in some cases that might be an aspect of the planning judgement involved.

8 "90. 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;
- engineering operations;
- local transport infrastructure which can demonstrate a requirement for a Green Belt location;
- the re-use of buildings provided that the buildings are of permanent and substantial construction; and
- development brought forward under a Community Right to Build Order." (Emphasis added. I shall refer to the words so emphasised as "the openness proviso".

9 [2018] EWCA Civ 489; Lewison & Lindblom, LJJ

Giving the Court's judgment Lord Carnwath remarked (my emphases added in bold):

> ***22.*** *The concept of "openness" in para 90 of the NPPF seems to me a good example of such a broad policy concept.*[10] *It is naturally read as referring back to the underlying aim of Green Belt policy, stated at the beginning of this section: "to prevent urban sprawl by keeping land permanently open …". Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt. As PPG2 made clear, it is 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. Nor does it imply freedom from any form of development. Paragraph 90 shows that some forms of development, including mineral extraction, may in principle be appropriate, and compatible with the concept of openness. A large quarry may not be visually attractive while it lasts, but the minerals can only be extracted where they are found, and the impact is temporary and subject to restoration. Further, as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land.*
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> ***23.*** *It seems surprising in retrospect that the relationship between openness and visual impact has sparked such legal controversy. Most of the authorities to which we were referred were concerned with the scope of the exceptions for buildings in para 89 (or its predecessor). In that context it was held, unremarkably, that a building which was otherwise inappropriate in Green Belt terms was not made appropriate by its limited visual impact (see R (Heath and Hampstead Society) v Camden London Borough Council [2007] EWHC 977 (Admin), upheld at R (Heath and Hampstead Society) v Vlachos [2008] EWCA Civ 193; [2008] 3 All ER 80). As Sullivan J said in the High Court:*
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> > *"The loss of openness (ie unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness …" (para 22).*
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> *To similar effect, in the Lee Valley case,*[11] *Lindblom LJ said:*
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> > *"The concept of 'openness' here means the state of being free from built development, the absence of buildings - as distinct from the absence of visual impact." (para 7, cited by him in his present judgment at para 19).*
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> ***24.*** *Unfortunately, in Timmins v Gedling Borough Council [2014] EWHC 654 (Admin) (a case about another familiar Green Belt category - cemeteries and associated buildings), Green J went a stage further holding, not only that there was "a clear conceptual distinction between openness and visual impact", but that it was:*
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> > *"wrong in principle to arrive at a specific conclusion as to openness by reference to visual impact." (para 78, emphasis in original).*
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> ***25.*** *This was disapproved (rightly in my view) in Turner v Secretary of State for Communities and Local Government [2016] EWCA Civ 466; [2017] 2 P & CR 1, para 18. This concerned an inspector's decision refusing permission for a proposal to replace a mobile home and storage yard with a residential bungalow in the Green Belt. In rejecting the contention that it was within the exception for redevelopment which "would not have a greater impact on the openness of the Green Belt", the inspector had expressly taken account of its visual effect, and that it would "appear as a dominant feature that would*

10 Referencing back to his previous comments (@ para. 21) about too much time being spent discussing previous court authorities on the relevance of visual impact under Green Belt policy and to the warning Lord Carnwath gave in the *Hopkins Homes* case [2017 UKSC 37 (@ paras. 23-34) over "over-legislation" of the planning process.

11 *R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404; [2016] Env LR 30 ("the Lee Valley case").

have a harmful impact on openness here". The Court of Appeal upheld the decision. Sales LJ said:

> *"The concept of 'openness of the Green Belt' is not narrowly limited to the volumetric approach suggested by [counsel]. The word 'openness' is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs … and factors relevant to the visual impact on the aspect of openness which the Green Belt presents." (para 14).*

Before us there was no challenge to the correctness of this statement of approach. However, it tells one nothing about how visual effects may or may not be taken into account in other circumstances. That is a matter not of legal principle, but of planning judgement for the planning authority or the inspector.

Given the degree to which the Supreme Court seemingly differed from the approach taken by the Court of Appeal on the merits it is also informative to record the following (my emphases again added in bold):

> ***39.*** *With respect to Lindblom LJ's great experience in this field, I am unable to accept his analysis. 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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> ***40.*** *Lindblom LJ criticised the officer's comment that openness is "commonly" equated with "absence of built development". I find that a little surprising, since it was very similar to Lindblom LJ's own observation in the Lee Valley case (para 23 above). It is also consistent with the contrast drawn by the NPPF between openness and "urban sprawl", and with the distinction between buildings, on the one hand, which are "inappropriate" subject only to certain closely defined exceptions, and other categories of development which are potentially appropriate. I do not read the officer as saying that visual impact can never be relevant to openness.*
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> ***41.*** *As to the particular impacts picked out by Lindblom LJ, the officer was entitled to take the view that, in the context of a quarry extension of six hectares, and taking account of other matters, including the spatial separation noted by her in para 7.124, they did not in themselves detract from openness in Green Belt terms. The whole of paras 7.121 to 7.126 of the officer's report address the openness proviso and should be read together. Some visual effects were given weight, in that the officer referred to the restoration of the site which would be required. Beyond this, I respectfully agree with Hickinbottom J that such relatively limited visual impact which the development would have fell far short of being so obviously material a factor that failure to address it expressly was an error of law. For similar reasons, with respect to Mr Village's additional complaint, I see no error in the weight given by the officer to the fact that this was an extension of an existing quarry. That again was a matter of planning judgement not law.*

Nevertheless, on 3rd April, in an early example of a remotely "handed down" planning judgment during the Lockdown the Court of Appeal[12] revisited the issue in *Hook v Secretary for Housing, Communities and Local Government* [2020] EWCA Civ 486. The context, here, was a statutory appeal under Section 288 of the TCPA 1990 against an

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Inspector's finding that alterations to a building amounted to inappropriate development within the Green Belt because it was not a "building for agriculture", in consequence of which he had not needed to consider the imposition of an agricultural occupancy condition. Addressing the issue, Lindblom LJ set out the basic points from the relevant cases in the following terms:

1) *The concepts referred to in NPPF policy for the Green Belt – "inappropriate development", "very special circumstances", the preservation of the "openness" of the Green Belt, the impact of development on "the purposes of including land within it", and so on – are not concepts of law. They are broad concepts of planning policy, used in a wide range of circumstances (see the judgment of Lord Reed in Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13; [2012] 2 P. & C.R. 9, at paragraph 19). Where a question of policy interpretation properly arises, understanding those concepts requires a sensible reading of the policy in its context, without treating it as if it were a provision of statute. Applying the policy calls for realism and common sense.*

2) *In dealing with the "threshold" question of whether a proposal is for "inappropriate development" in the Green Belt, and then in deciding whether the proposal is acceptable and ought to be given planning permission, the decision-maker must establish relevant facts and exercise relevant planning judgment. If called upon to review the decision, the court will not be drawn beyond its limited role in a public law challenge (see the speech of Lord Hoffmann in Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 W.L.R. 759, at p.780G-H). The interpretation of planning policy falls ultimately within that role, but the decision-maker's application of policy will only be reviewed on traditional public law grounds (see the judgment of Lord Reed in Tesco v Dundee City Council, at paragraphs 18 and 19). As this court has emphasized more than once, excessive legalism must be avoided (see, for example, East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2017] EWCA Civ 893, [2018] P.T.S.R. 88, at paragraph 50). The court will not second-guess the decision-maker's findings of fact unless some.*

3) *The nature of the decision-maker's task will differ from one kind of development to another. For example, whether a proposal is for "buildings for agriculture and forestry" – the first category of "new buildings" that are not to be regarded as "inappropriate development" under the policy in paragraph 89 of the NPPF – will be largely if not wholly a matter of fact. There is no proviso in that category (see Lee Valley, at paragraph 19). By contrast, assessing whether a proposed "[facility] for outdoor sport" – the second category in paragraph 89 – would "preserve the openness of the Green Belt" is largely a matter of planning judgment. The same applies to proposals for "mineral extraction" or "engineering operations" – two categories of "other forms of development" that are potentially "not inappropriate" under the policy in paragraph 90, which are subject to the same proviso. The requisite planning judgment will turn on the particular facts. It is not predetermined by the general statement in paragraph 79 that one of the "essential characteristics" of Green Belts is their "openness" – meaning, in that context, the mere presence of buildings, regardless of any visual impact they might have (see Lee Valley, at paragraph 7). In the context of a development control decision, as Sales L.J. observed in Turner (at paragraph 14), "[the] word "openness" is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case", and (at paragraph 15) "[the] question of visual impact is implicitly part of the concept of [the] "openness of the Green Belt" as a matter of the natural meaning of the language used in para. 89 of the NPPF.*

So, there we should have had it; but for the implications of Lord Carnwath's judgment in *Samuel Smith*, published on 5th February 2020 shortly after *Hook* had been heard in the Court of Appeal on 28th January 2020.

Seemingly, this reconciliation has arisen through the Court of Appeal's further consideration of "openness" in the recent case of *R (Liverpool Open and Green Spaces Community Interest Company) v Liverpool City Council* [2020] EWCA Civ 81. Although in the context of a permission to build 39 dwellings on land within a "green wedge" The Court acknowledged that, although local rather than national, the policy position was analogous to situations concerned with national policy for green belts. The points identified in *Hook* could be extended to include that the imperative of preserving the "openness" of the green belt was not a concept of law but a broad policy concept with its meaning to be derived from the words used by the policy-maker in their context,

Perhaps, re-establishing his position as the premier judicial planning specialist following Lord Carnwath's retirement on 12th March 2020, Lindblom LJ now summarises the current case law principles as follows (my emphases, once again, added in bold):

> ***22.*** *To enlarge on the basic points recently identified by this court in Hook v Secretary of State for Housing, Communities and Local Government [2020] EWCA Civ 486 (at paragraph 7):*
>
> ***1)*** *The imperative of preserving the "openness" of the Green Belt – a basic component of government policy for the Green Belt in the NPPF, as in previous statements of national policy – is not a concept of law; it is a broad concept of policy (see Hook, at paragraph 7(1)). As with other formulations of planning policy, its meaning is to be derived from the words the policy-maker has used, read sensibly in their "proper context", and not as if they were the provisions of a statute or contract (see the judgment of Lord Reed in Tesco Stores Ltd. v Dundee City Council [2012] 2 P. & C.R. 9, at paragraphs 18 and 19).*
>
> ***2)*** *Applying the policy imperative of preserving the "openness" of the Green Belt requires realism and common sense. As was emphasised both by this court in Samuel Smith (at paragraphs 33, 38 to 40 and 50), and by the Supreme Court (at paragraphs 22 and 25), it involves the exercise of planning judgment by the decision-maker. When it considers whether the decision-maker has exercised a lawful planning judgment in applying a planning policy, the court will not be taken beyond its limited role in a public law challenge (see the speech of Lord Clyde in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447, at p.1458G to p.1459D). As this court has often said, an unduly legalistic approach must be avoided (see, for example, East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] P.T.S.R. 88, at paragraph 50; and Hook, at paragraph 7(2)). But if an error of law is shown – such as a misinterpretation of policy leading to a failure to exercise a planning judgment that the policy requires – the court will intervene.*
>
> ***3)*** *The courts' reasoning in Lee Valley, Turner and Samuel Smith dispels the fallacy that the visual effects of a development cannot be relevant to the question of whether it will preserve the "openness" of the Green Belt. In both Turner (at paragraphs 13 to 18 and 26) and Samuel Smith (at paragraphs 19 to 22) the Court of Appeal accepted that, in principle, such effects can be relevant to this question, as a matter of planning judgment. And this was accepted by the Supreme Court in Samuel Smith (see paragraphs 22, 25 and 40).*
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> ***4)*** *Those three cases demonstrate the importance of context to a true understanding of the policy being considered. Context governs the policy's meaning. Thus, for example, the aim of preserving the "openness" of the Green Belt was not limited by the proposition in paragraph 79 of the NPPF that one of the "essential characteristics" of Green Belts is their "openness" – a concept whose meaning, in that context, goes to the mere physical presence, or otherwise, of buildings, regardless of any*

visual impact they might have (see Lee Valley, at paragraph 7; and Hook, at paragraph 7(3)). As this court said in Lee Valley (at paragraph 7), specifically in the context of paragraph 79, "[the] concept of "openness" here means the state of being free from built development, the absence of buildings – as distinct from the absence of visual impact". But this does not mean that, in the context of the development control policies in paragraphs 87 to 90, harm to "openness" cannot be caused by forms of development other than buildings – such as those referred to in paragraph 90, which contains a proviso that they "preserve the openness of the Green Belt"; or cannot be caused by a development's visual impact on "openness". If it were otherwise, those policies would not make sense.

5) T*here was no indication in paragraphs 87 to 90 of the NPPF that the aim of preserving the openness of the Green Belt excludes consideration of visual as well as physical or spatial impact. On the contrary, as Sales L.J. said in Turner, "[the] word "openness" is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case" (paragraph 14); "[the] question of visual impact is implicitly part of the concept of [the] "openness of the Green Belt" as a matter of the natural meaning of the language used in para. 89 of the NPPF" (paragraph 15); and "it does not follow from the fact that there may be other harms with a visual dimension apart from harm to the openness of the Green Belt that the concept of openness of the Green Belt has no visual dimension itself" (paragraph 16). The correctness of those observations was not doubted by the Supreme Court in Samuel Smith".*

So, is the application of the concept now clear and beyond further judicial doubting? Hopefully so, given that where the Higher Courts lay emphasis on "planning judgment" Nonetheless, as my colleague, Richard Harwood, concludes his commentary on *Samuel Smith* in the current issue of the Journal of Planning & Environment Law:[13] The Supreme Court's view *"points towards the range of factors which could, but did not have to be taken into account in considering whether a scheme preserved openness. However, it also illustrates the nuanced meaning of openness, and meaning is a matter of law for the court. Legal debates over whether Green Belt policy has been correctly understood are likely to continue".* Whether these debates will be confined by the Higher Courts to local, fact specific challenges in the Planning Court await an equally uncertain future like the future health of the Nation during the remainder of 2020 and beyond.

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13 Commentary by Richard Harwood QC at [2020] JPL 916-7
14 https://www.thewall.org.uk/

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