



EDITORIAL COMMENT

The Editorial Board

The pace of planning law reform continues apace. This week just as the new Housing and Planning Act 2016 was signed into law, the Government announced plans for another planning act in the new Queen's Speech to strengthen the neighbourhood planning regime. The courts meanwhile strive to keep up. This month's edition of the 39 Essex Chambers Newsletter examines several of the most topical issues.

The Court of Appeal handed down its much-awaited judgment in *West Berkshire DC v SSCLG* this month. It is a wide-ranging decision of significant political, as well as legal, importance. John Pugh-Smith takes an extended look at some of the most important issues to emerge from the judgment, in particular asking whether it has opened a can of worms rather than produced a neat resolution to the tensions between national and local policy.

Richard Harwood QC, with his usual keen insight into developments, considers the messy state of the law on planning conditions. In a constructive article, Richard presents a compelling case for the introduction of some welcome simplicity into this area, where for too long unhappy appellants have been forced into inappropriate appeal procedures.

Finally this month, Ned Helme and Victoria Hutton each discuss the latest in a long series of judicial pronouncements on the interpretation and application of national Green Belt Policy. Ned explores the impact

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JONATHAN DARBY PHILIPPA JACKSON
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of *Turner v SSCLG*, while Victoria considers *R (Lee Valley) v Epping Forest DC*. The pieces complement each other and help to make further sense of an always controversial area.

We hope that you enjoy the read!

ONLY A PARTIAL VICTORY?

John Pugh Smith

In this article John Pugh-Smith considers the recent successful appeal by the Government in *Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council* [2016] EWCA Civ 441 and its future implications. He also considers some of the overlapping implications of the Government's "Starter Homes" Initiative.

Last year's sensational decision by Mr Justice Holgate ([2015] EWHC 2222 (Admin)) led to the immediate withdrawal of the relevant section of the national Planning Practice Guidance (PPG) advising that small housing sites of ten units or less than 1,000 square metres of floor-space were exempt from providing affordable housing on-site or through a commuted payment. On 19th May 2016, following the 'handing-down' of the Court of Appeal's judgment on 11th May 2016, that PPG advice was re-instated in the following terms:

Reference ID: 23b-031-20160519 Planning obligations
Are there any circumstances where infrastructure contributions through planning obligations should not be sought from developers?

As set out in the Starter Homes Written Ministerial Statement of 2 March 2015, starter homes exception sites should not be required to make affordable housing or tariff-style section 106 contributions. There are specific circumstances where contributions for affordable housing and tariff style planning obligations (section 106 planning obligations) should not be sought from small scale and self-build development. This follows the order of the Court of Appeal dated 13 May 2016, which give legal effect to the policy set out in the Written Ministerial Statement of 28 November 2014 and should be taken into account. These circumstances are that:

- *Contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1000sqm.*
- *In designated rural areas, local planning authorities may choose to apply a lower threshold of 5-units*

or less. No affordable housing or tariff-style contributions should then be sought from these developments. In addition, in a rural area where the lower 5-unit or less threshold is applied, affordable housing and tariff style contributions should be sought from developments of between 6 and 10-units in the form of cash payments which are commuted until after completion of units within the development. This applies to rural areas described under section 157(1) of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty.

- *Affordable housing and tariff-style contributions should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home.*

In a strongly worded Press Release issued on 11th May 2016 the Planning Minister, Brandon Lewis MP, was clear as to his views:

We're committed to building more homes, including record numbers of affordable homes – key to this is removing unnecessary red tape and bureaucracy that prevents builders getting on sites in the first place.

Today's judgment by the Court of Appeal restores common sense to the system, and ensures that those builders developing smaller sites – including self-builders - don't face costs that could stop them from building any homes at all.

This will now mean that builders developing sites of fewer than 10 homes will no longer have to make an affordable homes contribution that should instead fall to those building much larger developments.

He added:

This case was a total waste of taxpayers' money and the uncertainty the case created amongst housebuilders stalled new development from coming through.

I hope councils focus their time and money on delivering the front line service that their residents rely on and helping support new housebuilding in their areas that is very much needed.

However, was the Minister right to be so “up-beat”? Whether or not the reasoning of the Court of Appeal will be the subject of scrutiny by the Supreme Court, not just local planning authorities, and, neighbourhood plan-making bodies but also the development industry are now faced with a number of challenging issues. First, there is the growing tension between the drive towards increased devolution, and, the localism agenda on the one hand and Governmental intervention on “failing authorities” on the other. This is evidenced by the mixed messages coming from the recently assented Housing and Planning Act 2016 and the further legislation proposed in the latest Queen’s Speech for neighbourhood planning. Secondly, there is the tension between the Government’s drive towards Local Plan coverage and its early 2017 “use it or lose it” deadline and a statutory plan-making system based on soundness. Thirdly, does the statutory undergirding of the plan-led development system provided by Section 38(6) of the Planning and Compulsory Purchase Act 2004 still have structural integrity faced with so many greater material considerations resulting from, now, Ministerial Statements finessing the NPPF?

In summary, the Court of Appeal’s judgment, jointly prepared by Lord Justice Laws and Lord Justice Treacy, with which the Master of the Rolls, Lord Dyson, was as follows. It reminded that the ability of government to make policy is a common law prerogative power and that it was entitled such policy in unqualified terms. Here, the Written Ministerial Statement (WMS), on its face, had not sought to countermand or frustrate the effective operation of Section 38(6) of the 2004 Act (and Section 70(2) of the TCPA 1990) although it had expressed the Secretary of State’s substantive planning policy in unqualified though trenchant terms. Once it was accepted that the articulation of planning policy in unqualified or absolute terms was not in principle repugnant to the proper operation of Section 38(6) of the 2004 Act, such use of language in the WMS was unobjectionable; so although the WMS was expressed in mandatory terms the policy outlined in it was not to be faulted on the grounds that it did not use language which indicated that it was not to be applied in a blanket fashion, or that its place in the statutory scheme of things was as a material consideration for the purposes of Section 38(6) of the 2004 Act (and Section 70(2) of the 1990 Act), and no more. It did not countermand or frustrate

the effective operation of those provisions. Subject to Secretary of State not introducing into planning policy matters which were not proper planning considerations at all his policy choices were for him. The planning legislation established a framework for the making of planning decisions: it did not lay down merits criteria for planning policy or establish what the policy-maker should or should not regard as relevant to the exercise of policy-making. Further, the Secretary of State was not obliged to go further than he did into the specifics, and in consequence was not to be faulted for a failure to have regard to relevant considerations in formulating the policy set out in the WMS. Another important issue, at the Court of Appeal hearing in mid-March 2016, was whether a non-statutory consultation process contravened the requirements of procedural fairness would always be fact and context sensitive. The Court held that the test was whether the process had been so unfair as to be unlawful. It found that the consultation in this instance had been fair, and, that appropriate consideration had been given to the consultation responses. Regarding the application of the Public Sector Equality Duty to the policy-making process, the Court found that while the considerations in Sections 149(1)(a)-(c) of the Equality Act 2010 had not been addressed prior to the making of the WMS a formal Equality Statement, produced on 5th February 2015, demonstrated a consideration of the potential for adverse impacts on protected groups. It held that the process required by Section 149 did not require a precise mathematical exercise to be carried out in relation to particular affected groups and whilst it could be said that the Equality Statement took a relatively broad brush approach, compliance with the terms of Section 149 had been achieved by what had been done in the instant case. As the Equality Statement satisfied the statutory requirements, the fact that it was not prepared as part of the policy decision, and post-dated it, did not warrant the quashing of the decision.

More specifically, on the application of the plan-led system Laws and Treacy LJ, commented as follows:

The Rule against Fettering Discretion – Flexibility

19. The rule against fettering discretion is a general principle of the common law. It is critical to lawful public decision-making, since without it decisions would be liable to be unfair (through failing to have regard to what

affected persons had to say) or unreasonable (through failing to have regard to relevant factors) or both. In the law of planning it is reflected in the description of planning policy by Sedley LJ as "not a rule but a guide": *First Secretary of State v Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520 at paragraph 16. It is given life by s.38(6) of the 2004 Act and s.70(2) of the 1990 Act, which show that neither the development plan (itself, of course, a policy) nor any other policy relevant to the matter in hand is to be applied rigidly or exclusively by the decision-maker. Here we are primarily concerned with s.38(6). Guidance as to its operation in practice is to be found in the decision of the House of Lords in *City of Edinburgh Council v Secretary of State* [1977] 1 WLR 1477, which was concerned with the statutory predecessor of s.38(6) in Scotland (s.18A of the Town and Country Planning (Scotland) Act of 1972) ...

[An extract from the speech of Lord Clyde is then set out]

20. We would draw two connected points from these observations. First, while the development plan is under s.38(6) the starting-point for the decision-maker (and in that sense there is a "presumption" that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations: see in particular Glidewell LJ's *dictum* in *Loup* [(1995) 71 P&CR 175 @ 186] cited by Lord Clyde. Secondly, policy may overtake a development plan ("... outdated and superseded by more recent guidance"). Both considerations tend to show that no systematic primacy is to be accorded to the development plan.

The Unqualified Articulation of Policy

21. The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion, or, in the planning context, consistently with s.38(6) or s.70(2). A policy may include exceptions; indeed the WMS did so, allowing a 5 unit threshold for certain designated areas in place of the 10 unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering and the provisions of ss.38(6) and 70(2) are not, of course, part of any

administrative policy. They are requirements which the law imposes upon the *application* of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions.

Limits

22. That is not to say that the potential contents of a public policy are subject to no legal constraints. The basic tests of reason and good faith apply; and where, as here, the policy is elaborated in a statutory context, the policy-maker cannot promote an outcome which contradicts the aims of the statute. Mr Forsdick characterised this limitation as an instance of the rule in *Padfield v Minister of Agriculture* [1968] AC 997, that a statutory discretion must be deployed to promote the policy and objects of the Act. In fact the power to make policy exercised by the Secretary of State in this case was not statutory, but an instance of the Crown's common law prerogative power. Still, the statutory context is plain; and it is plain (and uncontentious) that the Secretary of State was not entitled to seek by his policy to countermand or frustrate the effective operation of ss.38(6) and 70(2).

So, where does that leave certainty and consistency of decision-making, the two previous objectives of the plan-led development management system? First, is the ability of LPAs still to resist the national exemption through their plan-making process where local circumstances justify such an exemption. Such policies are, therefore, capable of being found "sound". However, the prudent Examining Inspector is now more likely than not to recommend that a modification is made in line with the WMS, resulting in further potential delay from the need to consult. Equally, Appeal Inspectors are more likely than not to give greater weight to the WMS particularly where the development plan pre-dates its November 2014 publication, and, where finally balanced viability issues engage.

The second consideration is when the Housing & Planning Act 2016 comes into force to under-gird the WMS as a matter of law rather just national policy. Section 159 (entitled "Enforceability of planning obligations regarding affordable housing") inserts a new Section 106ZB to the TCPA 1990. It provides as follows:

(1) Regulations made by the Secretary of State may

impose restrictions or conditions on the enforceability of planning obligations entered into with regard to the provision of –

- (a) affordable housing, or
- (b) prescribed descriptions of affordable housing.

(2) Regulations under this section –

- (a) may make consequential, supplementary, incidental, transitional or saving provision;
- (b) may impose different restrictions or conditions (or none) depending on the size, scale or nature of the site or the proposed development to which any planning obligations would relate.

Paragraph (b) is without prejudice to the generality of section 333(2A).

(3) This section does not apply in relation to a planning obligation if –

- (a) planning permission for the development was granted wholly or partly on the basis of a policy for the provision of housing on rural exception sites, or
- (b) the obligation relates to development in a National Park or in an area designated under section 82 of the Countryside and Rights of Way Act 2000 as an area of outstanding natural beauty.

(4) In this section “affordable housing” means new dwellings in England that –

- (a) are to be made available for people whose needs are not adequately served by the commercial housing market, or
- (b) are starter homes within the meaning of Chapter 1 of Part 1 of the Housing and Planning Act 2016 (see section 2 of that Act).

(5) “New dwelling” here means a building or part of a building that –

(a) has been constructed for use as a dwelling and has not previously been occupied, or

(b) has been adapted for use as a dwelling and has not been occupied since its adaptation.

(6) The Secretary of State may by regulations amend this section so as to modify the definition of “affordable housing”.

(2) In section 333 of that Act (regulations and orders), after subsection (3ZA) (inserted by section 150(4) above) insert –

“(3ZB) No regulations may be made under section 106ZB unless a draft of the instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament.”

However, while the Act itself received Royal Assent on 12th May DCLG may not be able to bring the Act into force until at least April 2017 due to the need for further consultation and subordinate regulations; and while the 2016 Act does include transitional provisions it is an unwise administration, after the *Cala* as well as the *West Berks* litigation, that attempts to implement anything too quickly. Although the proposed changes to the NPPF are expected to embrace the Government’s affordable housing policy regarding both “starter homes” and the “small sites exemption” these amendments are not currently scheduled to be published before “this Summer”.

Accordingly, uncertainty is likely to continue for another twelve months irrespective of any Supreme Court appeal by the two Councils.

Moreover, there remains the continuing challenge of actually achieving the construction of more new housing stock, particularly for those first-time buyers otherwise unable to purchase their own homes. Will the Starter Home initiative actually deliver this Election pledge? Last month’s Savills’ research article on *Starter Homes* (14th April 2016) reminds that the opportunity provided by the existing ‘exception sites’ policy has existed since March 2015 when the announcement was made by the previous Coalition Government with subsequent amendments to the PPG. However, the initiative has

not, so far, proved popular with developers due to the lack of tangible incentives. Whilst such proposals are exempt from Section 106 affordable housing and general infrastructure contributions, they remain liable for CIL and site specific infrastructure. Further, whilst there is also a £2.3bn funding package to support the development of 60,000 Starter Homes £1.2bn of that fund will be targeted at assembling and remediating brownfield land. It is anticipated that this initiative will provide some 30,000 Starter Homes through the Starter Homes Land Fund, equivalent to £40,000 per unit. Although the remaining £1.1bn (£37,000 per unit) was announced in last November's Spending Review how it will be used remains unclear. Accordingly, the mathematics suggests that if a total of 200,000 Starter Homes is to be provided then there must be a Government expectation that 140,000 Starter Homes will come forward through Section 106 obligations.

Further, there is, perhaps, the harder question as to how many Starter Homes will be truly additional. Again, Savills' article advises that there has been no substantive movement on buyer qualification (i.e. first time buyers aged under 40) leaving huge overlap in many markets with the much expanded shared ownership programme and Help to Buy. Recent research for DCLG found that 57 per cent of the homes bought through Help to Buy would have been built anyway. Given the currently broad buyer qualification criteria and the nature of the discount (20 per cent for five to eight years), Savills conclude that, currently, it seems unlikely that Starter Homes will fare any better in terms of additionality.

There is a range of further questions that currently remain unresolved. What will people pay for a Starter Home? What happens if that Starter Home is repossessed within the five or eight year restricted period? Will new housing sites be rendered unviable or the quality and size of Starter Homes be compromised where prevailing new homes values are substantially above the maximum value caps of £450,000 in London and £250,000 for the rest of England? All have serious implications for mortgage lenders trying to understand the value of their security.

The Technical Consultation on the Housing & Planning Bill (which closed on 18th May 2016) proposes a commuted sum could be paid where the discount

would need to be substantially greater than 20% for the sales values to fall beneath the maximum value caps. The Starter Homes requirement would then need to be provided elsewhere. However, as Savills point out, while the option to pay a commuted sum potentially solves the viability problem it still leaves the LPA with a need to build Starter Homes somewhere else. Further, there is likely to be a political imperative in many areas to spend the commuted sum within local authority boundaries but, particularly in the highest value districts, there may not be available development land on which Starter Homes can viably be built. Local authority resourcing is also a constraint and many have made little progress to date in spending commuted sums paid in lieu of affordable housing contributions amounting to £6.2b, during the year to March 2015.

In conclusion, while the Court of Appeal's decision is a short-term victory for the Government it is certainly not the end of the battle being fought by beleaguered LPAs, nor, the practical consequences of this policy hiatus on the development industry to bring forward a deliverable and viable supply of built housing units. Contrary to the expectations of the Planning Minister there is no certainty that this case's outcome will now lead to a sudden release of small housing sites or, necessarily, new homes. Real life, contrary to the political soundbite, does not always turn out in the way that Marsham Street would wish, nor, does the current outcome of this case relieve this Government of the continuing effects of the law of unintended consequences.

John Pugh-Smith's previous articles "A Comprehensive Defeat?" (September 2015) and "Repealing Sections 106BA to BC – yet another example of the law of unintended consequences" (April 2016) can be accessed through the following link: <http://www.39essex.com/category/newsletters/>

BRINGING A BIT OF ORDER TO PLANNING CONDITIONS

Richard Harwood OBE QC

Planning conditions are often a necessary control, but like many good intentions, have a risk of going too far. I spent most of last week dealing with a planning permission where the decision notice itself is 273 pages long. That was for an exceptional scheme, but consents with dozens or scores of conditions are commonplace.

It is a long established principle of policy, now contained in the National Planning Policy Framework, that planning conditions should only be imposed if they are necessary. Yet the feeling is too often that too many are imposed and require too many details, too early.

A planning consultant criticised the 'sheer volume of pre-commencement conditions attached to outline permissions'. There are broadly two problems: too many details having to be approved and approvals being required earlier than is necessary, holding up the start of development.

Ministers have already amended the Development Management Procedure Order to require reasons to be given as to why conditions were pre-commencement. The 2016 Budget signalled further action. More measures will be in the Neighbourhood Planning and Infrastructure Bill. The background notes to the Bill in the Queen's Speech say:

- To ensure that pre-commencement planning conditions are only imposed by local planning authorities where they are absolutely necessary.
- Excessive pre-commencement planning conditions can slow down or stop the construction of homes after they have been given planning permission.
- The new legislation would tackle the overuse, and in some cases, misuse of certain planning conditions, and thereby ensure that development, including new housing, can get underway without unnecessary delay.

A comment in the Daily Telegraph has prompted concern amongst archaeological interests that the use of planning conditions to require archaeological excavations will be curtailed by the Bill. The newspaper

article seems to be misplaced. What topics are covered by conditions are matters of policy, not legislation. The National Planning Policy Framework says (at para 141) that local planning authorities should:

"require developers to record and advance understanding of the significance of any heritage assets to be lost (wholly or in part) in a manner proportionate to their importance and the impact, and to make this evidence (and any archive generated) publicly accessible."

That continues the approach introduced by the Planning Policy Guidance Note 16 in 1990, which led to a dramatic increase in archaeological funding by the development industry. Archaeological consultancies owe their existence to PPG16 and the continuation of its principles, as discussed by John Pugh-Smith and the late John Samuels in *Archaeology in Law* and in my *Historic Environment Law*. There has been no suggestion from Ministers that the policy on the use of conditions, or in particular archaeological works conditions will change or is under review. Indeed, my sense from practice is that archaeological conditions have not been seen as particularly problematic. Developers are often personally quite interested in what is under their land.

The Bill will seek to grapple with how the planning system should give effect to the long established policy that conditions should only be imposed where they are necessary.

In the absence of publication of the Bill, I do make one suggestion as to what could be done.

It should be made a lot easier to appeal against conditions.

At present an applicant can appeal against the grant of planning permission subject to conditions but this puts the whole of the application back into play. On such an appeal the Inspector could refuse planning permission. Even if that outcome is not likely to happen, third party participants can argue that the scheme should be rejected and the developer will have to answer that challenge. For these reasons a developer who wishes to challenge conditions but will not appeal on that permission, will make a section 73 planning application to the local planning authority seeking the

same permission but with different conditions and then appeal against the refusal or non-determination of that application.

The procedure for appeals against the grant of permission subject to conditions is also the same as for the refusal of planning permission.

There is no good reason why an applicant who wishes to appeal against conditions on the permission should be at risk of losing its planning permission or be forced into the expense and delay of a making a section 73 application and appeal. The Town and Country Planning Act 1990 can be amended to provide that when planning permission is granted subject to conditions, the applicant may appeal against the conditions and the Secretary of State and Inspectors on appeal should just consider whether the conditions on the permission should be changed. The developer would be able to proceed with the permission (subject to its original conditions) pending the resolution of the appeal.

Appeals against conditions fall into two types: those which raise substantive issues (for example, whether highway improvements are required, the duration of temporary permissions or limits on opening hours) which may require site visits, evidence beyond the application itself, a hearing or inquiry and third party participation; and those whether the necessity of conditions can be decided on principle and on the application documents. These will include whether details are required to be approved pre-commencement or at a later time and could be dealt with by a simple written procedure.

A new simplified procedure could be established for appeals against conditions. As with the householder appeals regime, an inspector could consider just the material produced in the planning application process (including the council report and third party comments) along with the appellant's statement of case. There would though be no site visit. If the Inspectorate considered that the simplified procedure was not suitable, then the appeal would proceed by the normal written representation, hearing or inquiry routes.

This would allow a quick and inexpensive means for applicants to challenge conditions, including pre-commencement conditions. It will be cheaper and

quicker and more likely to be used than the present section 73 option. Provided that the Inspectorate deal with such appeals expeditiously, a development could proceed uninterrupted.

RELIEVING THE EYE AND THE SPIRIT – COURT OF APPEAL AFFIRMS THE VISUAL DIMENSION OF OPENNESS IN TURNER V SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2016] EWCA CIV 466

Ned Helme

Hot on the heels of the Lee Valley Regional Park Authority case (described by Victoria Hutton in this edition of the Newsletter) has come a further judgment of the Court of Appeal on openness in the Green Belt. The Turner case involved an application for planning permission for a proposal to replace a mobile home and storage yard (both lawful through effluxion of time) with a three bedroom residential bungalow and associated residential curtilage. In the application, the Appellant contended that the volume of the bungalow would be less than the volume of the mobile home and 11 lorries lawfully parked on the site and that, accordingly, the proposed redevelopment "would not have a greater impact on the openness of the Green Belt" than the existing lawful use of the site, with the result that it should not be regarded as inappropriate development in the Green Belt under 89 of the NPPF. The local planning authority refused permission and an Inspector dismissed the Appellant's appeal. The Appellant brought section 288 proceedings, but the claim failed in front of Mrs Justice Lang on 7 October 2015.

The Appellant appealed to the Court of Appeal, contending that Mrs Justice Lang had erred in dismissing two of the Appellant's grounds: (i) that the Inspector failed to treat the existing development on the site as a relevant material factor to be taken into account in considering whether the sixth bullet point of paragraph 89 was applicable; and (ii) that the Inspector wrongly conflated the concept of openness in relation to the Green Belt with the concept of visual impact.

Giving the judgment of the Court, Lord Justice Sales addressed both grounds together. He found that the concept of openness of the Green Belt was not narrowly limited to the volumetric approach suggested by the

Appellant. 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 (in the context of which, volumetric matters may be a material concern, but are by no means the only one) and factors relevant to the visual impact on the aspect of openness which the Green Belt presents. Lord Justice Sales then continued at paragraph 15 as follows:

"The question of visual impact is implicitly part of the concept of "openness of the Green Belt" as a matter of the natural meaning of the language used in para. 89 of the NPPF. I consider that this interpretation is also reinforced by the general guidance in paras. 79-81 of the NPPF, which introduce section 9 on the protection of Green Belt Land. There is an important visual dimension to checking "the unrestricted sprawl of large built-up areas" and the merging of neighbouring towns, as indeed the name "Green Belt" itself implies. Greenness is a visual quality: part of the idea of the Green Belt is that the eye and the spirit should be relieved from the prospect of unrelenting urban sprawl. Openness of aspect is a characteristic quality of the countryside, and "safeguarding the countryside from encroachment" includes preservation of that quality of openness. The preservation of "the setting ... of historic towns" obviously refers in a material way to their visual setting, for instance when seen from a distance across open fields. Again, the reference in para. 81 to planning positively "to retain and enhance landscapes, visual amenity and biodiversity" in the Green Belt makes it clear that the visual dimension of the Green Belt is an important part of the point of designating land as Green Belt."

Although Lord Justice Sales accepted that there may be other harms with a visual dimension apart from harm to openness (for example, harm to visual amenity of neighbouring properties), he considered that it did not follow from this fact that the concept of openness of the Green Belt has no visual dimension itself.

Having set out these principles, Lord Justice Sales proceeded to analyse a passage from the judgment of Mr Justice Green in *R (Timmins) v Gedling Borough*

Council [2014] EWHC 654 (Admin) at [67]-[78] addressing the relationship between openness and visual impact. Mr Justice Green referred to the judgment of Mr Justice Sullivan (as he then was) in *R (Heath and Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin), which related to previous policy in relation to the Green Belt as set out in PPG 2, and drew from it the propositions that "there is a clear conceptual distinction between openness and visual impact" and "it is therefore wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact": paragraph [78]. The case went on appeal, but this part of Mr Justice Green's judgment was not in issue on the appeal: [2015] EWCA Civ 10.

Lord Justice Sales considered that Mr Justice Green had erred in setting out those propositions and that that section of his judgment should not be followed. He found that there were three problems with it. First, it did not focus sufficiently on the language of section 9 of the NPPF, read as part of the coherent and self-contained statement of national planning policy which the NPPF is intended to be. Secondly, through his reliance on the Heath and Hampstead Society case Mr Justice Green had given excessive weight to the statement of planning policy in PPG 2 for the purposes of interpretation of the NPPF. He had not made proper allowance for the fact that PPG 2 is expressed in materially different terms from section 9 of the NPPF. And thirdly, for reasons set out by Lord Justice Sales in some detail at paragraphs 18-26 of his judgment, the conclusion drawn by Mr Justice Green in his propositions at paragraph 78 was not in fact supported by the judgment in the Heath and Hampstead Society case.

In applying these principles to the Appellant's case, Lord Justice Sales considered that there was no error of approach by the Inspector in his assessment of the issue of impact on the openness of the Green Belt. The Inspector had made a legitimate comparison of the existing position regarding use of the site with the proposed redevelopment. That was a matter of evaluative assessment for the Inspector in the context of making a planning judgment about relative impact on the openness of the Green Belt. His assessment could not be said to be irrational. It was rational and legitimate for him to assess on the facts of this case that there is a difference between a permanent physical structure in

the form of the proposed bungalow and a shifting body of lorries, which would come and go; and even following the narrow volumetric approach urged by the Appellant the Inspector was entitled to make the assessment that the two types of use and their impact on the Green Belt could not in the context of this site be directly compared, as had been proposed by the Appellant. The Inspector had also been entitled to take into account the difference in the visual intrusion on the openness of the Green Belt as he did.

For those reasons, with which Lord Justice Floyd and Lady Justice Arden agreed, the Appeal was dismissed.

R(OAO LEE VALLEY REGIONAL PARK AUTHORITY) V EPPING FOREST DISTRICT COUNCIL AND VALLEY GROWN NURSERIES LTD [2016] EWCA CIV 404

Victoria Hutton

The Lee Valley case is a recent addition to a series of decisions by the Court of Appeal on the proper interpretation of the Green Belt provisions within the NPPF. It follows *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2015] PTSR 274¹ and *Timmins v Gedling Borough Council* [2015] PTSR 837.²

It is also the latest in a longer list of Court of Appeal judgments in which the Court has been asked to interpret provisions within the NPPF; a policy document whose own Ministerial Forward claims that it is written '*simply and clearly*'.

The issue which the Court had to decide in Lee Valley was whether the development which did fall within one of the exceptions in paragraph 89 or 90 was by definition 'appropriate' in the Green Belt and therefore cannot engender harm to openness or conflict with the purposes of including land within it.

The basic facts were as follows: on 21 August 2014 Epping Forest District Council granted planning permission to the Interested Party for a large glasshouse which was around 92,000 square metres in area for the growing of tomatoes and peppers. The site was located

in the Green Belt, within the Lee Valley Regional Park. The Park Authority objected to the scheme on a number of grounds including: Green Belt harm, conflict with the NPPF and the development plan and the impacts of the scheme on the SPA. Following the grant of permission, the Park Authority brought judicial review proceedings on those three grounds, none of which were successful before Dove J at first instance.

The Park Authority sought to persuade the Court of Appeal that Dove J's decision was wrong in three respects. This article is concerned only with the first ground of challenge which broadly related to the Council's treatment of national Green Belt policy.

The Claimant's argument centred on the proper interpretation of certain paragraphs of Green Belt policy within the NPPF. The material parts provide:

'87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.

89. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:

- buildings for agriculture and forestry...'*

The Claimant argued that the reference to 'any planning application' in paragraph 88 meant any application for development in the Green Belt, whether inappropriate or not and the words 'any harm to the Green Belt' includes any type of harm, including harm to openness and harm to the purposes of the Green Belt.

¹ In *Redhill Aerodrome* the Court of Appeal confirmed that the reference to 'any other harm' in paragraph 88 includes any harm relevant for planning purposes and not only harm to the Green Belt.

² In *Timmins* the Court ruled that the exceptions to inappropriate development as found in paragraphs 89 and 90 NPPF are closed lists and there is no general test that development would be appropriate provided it preserves openness and does not conflict with the purposes of including land within the Green Belt.

The argument was unsuccessful. Lord Justice Lindblom re-iterated the principle that the interpretation of planning policy is a matter for the court and not the decision maker. This principle applies to the provisions of the NPPF.³ He stated that the first sentence of paragraph 88 NPPF cannot be read in isolation and that its correct interpretation:

*'...is that a decision-maker dealing with an application for planning permission for development in the Green Belt must give "substantial weight" to "any harm to the Green Belt" properly regarded as such when the policies in paragraphs 79 to 92 are read as a whole.... Reading these policies together, I think it is quite clear that "buildings for agriculture and forestry", and other development that is not "inappropriate" in the Green Belt, are not to be regarded as harmful either to the openness of the Green Belt or to the purposes of including land in the Green Belt.'*⁴

The Court highlighted that the relevant category of exception in paragraph 89 'buildings for agriculture and forestry' is entirely unqualified and therefore *'[A]ll such buildings are, in principle, appropriate development in the Green Belt, regardless of their effect on the openness of the Green Belt and the purposes of including land in the Green Belt, and regardless of their size and location.'* This is in contrast to the other five categories of exception in paragraph 89 which are each subject to some limitation.

Lindblom LJ affirmed the Court of Appeal's comments in both *Timmins and Redhill Aerodrome Ltd* where it emphasised the consistency of policy in the NPPF and previous policy contained in PPG 2.⁵

Therefore development which is not inappropriate in the Green Belt is by definition appropriate development. However, the Court was also keen to emphasise that this does not mean that proposals for agricultural buildings in the Green Belt will necessarily be granted planning permission. A proposal may fall foul of other development plan policies or provisions within the NPPF which, for example, protect against harmful visual impact or harm to the character of the countryside. The size and siting of any building is likely to be highly material when

a scheme is considered against such policies.

The lack of a limitation on the scale of agricultural buildings which will be appropriate development in the Green Belt is perhaps due to the fact that the relevant policies have remained unchanged for decades, and were developed at a time when such buildings were likely to be built on a smaller scale. Or, it can be seen as the Government's recognition that agricultural buildings have to be constructed in the countryside, including countryside in the greenbelt (as noted by the Court at para.20). Either way, if this or any future government wishes to limit the scale of those buildings which will be appropriate, it will be necessary for them to amend national policy. Hopefully in such a way which will not lead to protracted litigation over its meaning.

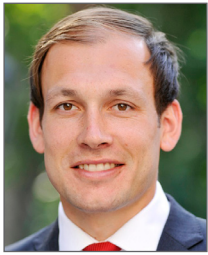
Peter Village QC and Ned Helme represented Valley Grown Nurseries Ltd.

3 para.17

4 para.18

5 para.22

EDITORIAL BOARD



Jonathan Darby

jon.darby@39essex.com

Jonathan's broad practice encompasses all aspects of public and administrative law. His planning, environmental and property practice encompasses inquiries, statutory appeals, judicial review, enforcement proceedings and advisory work. Jonathan is instructed by a wide variety of domestic and international clients, including developers, consultants, local authorities and the Treasury Solicitor. He is listed as one of the top junior planning barristers under 35 in the Planning Magazine Guide to Planning Lawyers. Before coming to the Bar, Jonathan taught at Cambridge University whilst completing a PhD at Queens' College. To view full CV [click here](#).



Victoria Hutton

victoria.hutton@39essex.com

Victoria's main areas of practice are planning, environmental and administrative law. Victoria acts in a wide range of planning and environmental law matters for developers, local authorities and other interested parties. She is also a qualified mediator and is able to mediate between parties on any planning/environmental dispute. Victoria is rated as one of the top planning barristers under 35 (Planning Magazine 2015). To view full CV [click here](#).



Philippa Jackson

philippa.jackson@39essex.com

Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents and challenges in the High Court. She acts for developers, local authorities, individuals and interest groups, and she has been listed for the past three years as one of the top planning juniors under 35 by Planning Magazine (2013, 2014 and 2015). Examples of recent cases include an appeal relating to an enabling development scheme for the restoration of a nationally important collection of historic buildings and a judicial review challenge to a local authority's decision to designate a sports stadium as a conservation area. To view full CV [click here](#).



Daniel Stedman Jones

daniel.stedmanjones@39essex.com

Daniel specialises in planning and environmental law and regularly acts in public inquiry, High Court and Court of Appeal proceedings. He is the co-editor of Sweet & Maxwell's Planning Law: Practice and Precedents and a contributory editor of The Environmental Law Encyclopedia. He is also a contributor to Shackleton on the Law of Meetings. Daniel also practices in public, regulatory and competition law, with a particular emphasis on the energy sector. Daniel is a member of the Attorney General's 'C Panel' of Counsel. Before coming to the bar, Daniel completed a PhD at the University of Pennsylvania including an Urban Studies Certificate. To view full CV [click here](#).

CONTRIBUTORS



Richard Harwood OBE QC

richard.harwood@39essex.com

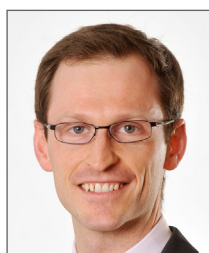
Richard specialises in planning, environment and public law, acting for developers, landowners, central and local government, individuals and interest groups. He appears in the courts, inquiries, examinations and hearings, including frequently in the Planning Court and appellate courts. Voted as one of the top ten Planning Silks in Planning magazine's 2014 and 2015 surveys, he has appeared in many of the leading cases of recent years. Richard is also a leading commentator, a case editor of the Journal of Planning and Environment Law and the author of books including Planning Enforcement, Historic Environment Law and the newly published Planning Permission. To view full CV click [here](#).



John Pugh-Smith

john.pugh-smith@39essex.com

John Pugh-Smith, MA, FSA, CEDR Accredited Mediator, practises in the fields of planning and environmental law with related local government and parliamentary work for both the private and public sectors. Much of his work is project and appeal related with a particular workload at present in strategic and retirement housing developments. John also practises as a mediator in a wider range of areas. He is a committee member of the Bar Council's ADRC and a founding member of the Planning Mediation Group of the RICS. He has been and remains extensively involved in various initiatives to use mediation to resolve a wider range of public law issues including as one of the mediator on the DCLG/HCA's joint panel of "Section 106 brokers". He is also one of the Design Council/Cabe's Built Environment Experts. To view full CV click [here](#).



Ned Helme

ned.helme@39essex.com

Ned has an extensive planning and environmental law practice encompassing appeals, enforcement, development plan examinations, High Court applications and appeals, and prosecutions. He has acted in cases involving large scale housing, industrial developments and infrastructure projects (including wind farms, other renewable energy facilities and a Strategic Rail Freight Interchange). Within environmental law, he has particular expertise in Environmental Impact Assessment, Strategic Environmental Assessment, Sustainability Appraisal, Habitats Regulations Assessment, green belt issues, heritage issues, and nuisance. In environmental law, he is ranked as a leading junior in The Legal 500. In planning law, he is ranked in Chambers & Partners. He is a General Editor of the Sweet & Maxwell Environmental Law Bulletin. To view full CV click [here](#).

Chief Executive and Director of Clerking: **David Barnes**

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Senior Practice Manager: **Andrew Poyser**

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085

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