



Francis Taylor Building

RTPI Young Planners' Virtual Conference

Planning Law Update

Merrow Golden
Michael Brendan Brett
Jonathan Welch

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Introduction

Merrow Golden

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

1. Use classes and permitted development rights



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Use classes

- The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 No. 757, in force from 1 September 2020;
- New Classes E, F1, and F2:
 - E: 'town centre uses' (A1, A2, A3, B1, D1, and D2 etc)
 - F1: education/cultural;
 - F3: community uses (including small local shops);
- 4. Sui generis uses (drinking establishment, takeaways, cinemas etc).



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



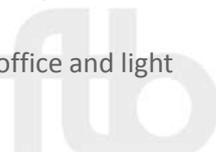
(Use classes cont.)

- Changes of use within classes is not “development” (s.55(2)(f) of the Town and Country Planning Act 1990) so totally outside planning control;
- Local planning authorities given significant less power to regulate changes of use in town centres – flexibility and responsiveness, or free-for-all?
- Conditions to planning permissions restricting changes of use?



Permitted development rights

1. The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 No. 755, in force from 9am on 31 August 2020; The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 No. 756, in force from 10am on 31 August 2020;
2. Upwards extensions:
 1. Existing dwellings to provide additional floorspace
 2. Existing blocks of flats and terraces of 3+storeys to provide new self-contained dwellings
3. Demolition and rebuilding of “vacant and redundant” office and light industrial buildings





(PDR cont.)

- Building up: increasing densities and also will stimulate local planning authorities to permit taller buildings
- But local communities tend to be strongly resistant to increased heights of buildings
- Demolition / rebuilding – is this not better done through properly controlled process, especially if has the potential to deliver considerable volumes of homes in urban areas?



2. Decision Making

- Development “in accordance with the development plan”
 - Corbett v Cornwall Council [2020] EWCA Civ 508
- The tilted balance
 - Gladman v SSHCLG [2020] EWHC 518 (Admin)
 - Paul Newman Homes Ltd v SSHCLG [2019] EWHC 2367 (Admin)
 - Peel Investments v SSHCLG [2020] EWCA Civ 1175
- Material considerations
 - Wright v Resilient Energy Severndale Ltd & FDDC [2019] UKSC 53
 - Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2020] UKSC 3





Francis Taylor Building

Corbett v Cornwall Council [2020] EWCA Civ 508

- “Accordance with the development plan as a whole”
- Important because of s.70(2) TCPA 1990 and s.38(6) PCPA 2004
- Policies may pull in different directions; There may be no hierarchy of policies
- As a matter of principle, breach of single policy *could* mean non-compliance with DP, conversely conflict with one single policy may be outweighed by accord with others
- Ultimately a matter of judgment for decision maker – weight to be accorded to competing policies

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Gladman v SSHCLG [2020] EWHC 518 (Admin)

- The tilted balance
- When applying, development plan policies are not to be disregarded, but must still be taken into account and weighed
- Nothing to indicate this had changed from the 2012 to the 2019 NPPF
- Court gave helpful summary of three situations where the tilted balance applies

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Paul Newman Homes Ltd v SSHCLG [2019] EWHC 2367 (Admin)

- Tilted balance
- Where first part of para 11(d) relied on, it is possible for a single relevant up-to-date policy in a time expired plan to prevent the application of the tilted balance.
- “Relevant” means anything greater than fanciful connection.
- Relevant policy need not be important to the decision.
- Reminder that what is crucial is not the age of the plan, but the up-to-date-ness (!) of the policies in question.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Peel Investments v SSHCLG [2020] EWCA Civ 1175

- Tilted balance
- Focus on what “out of date” means in NPPF context
- Nothing in para 11d of NPPF to suggest expiry of the plan period automatically renders the policies in the plan out-of-date
- Policies out-of-date for 11d purposes if they have been overtaken by events, either on the ground or national policy
- Whether out-of-date ultimately planning judgment

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Wright v Resilient Energy Severndale Ltd & FDDC [2019] UKSC 53

- Material considerations
- Helpful statement of planning orthodoxy: materiality depends on whether consideration serves a purpose relating to use of the land
- Promise of annual donation to local community fund
- The fact something is desirable does not render it material
- Planning policy cannot convert something immaterial into a material consideration
- Reliance on immaterial consideration is error of law

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2020] UKSC 3

- Material considerations
- Whether error of law to fail to have regard to a material consideration
- DM only fails if he fails to take into account a relevant consideration if it was one that he was under an obligation to take into account. ... Whether the matter was so obviously material, that it was irrational not to have taken it into account
- Rejection of some competing principles

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

3. Heritage



Francis Taylor Building

1. Dill v Secretary of State [2020] UKSC 20

Key case for statutory scheme for listed building control: centres on definition in section 1(5) Planning (Listed Building and Conservation Areas) Act 1990:

In this Act "listed building" means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act (a) any object or structure fixed to the building; (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1 July 1948, shall . . . be treated as part of the building."





(Dill cont.)

- Concerned enforcement action taken against the removal and sale of two large, ornamental, leaden urns located in grounds of country house
- Supreme Court (per Lord Carnwath):
 - When appealing against listed building enforcement notice, appellant can argue that the “listed building” in question is not a building at all.
 - What is a “building” for these purposes? Section 1(5) LBCAA make distinction between items which are listed in their own right and items which derive protection from the “extended definition” of building:



(Dill cont.)

- “Building”:
 - If a thing is listed in its own right, then the same definition of building applies as in section 336 TCPA 1990 and case law in Skerritts v Secretary of State (No 2) [2000] JPL 1025 and Barvis v Secretary of State (1971) 22 P&CR 710 – the “three-fold test which involved considering size, permanence and degree of physical attachment”.
 - Restrictive (?) approach taken:

“It is not enough that an object may be of special artistic or historic interest in itself; the special interest must be linked to its status as a building.[...] But it is relevant in my view also to the concept of historic interest. The historic interest must be found not merely in the object as such, but in its “erection” in a particular place.” [54]



(Dill cont.)

- ‘Extended definition’ of “building”:
 - “fixed” to a listed building or “within curtilage” so as to “form part of the land”
 - Tied to real property concepts under the common law, so need look to those authorities (Debenhams plc v Westminster City Council [1987] AC 396)
 - Carnwath: “a statue or other ornamental object, which is neither physically attached to the land, nor directly related to the design of the relevant listed building and its setting, cannot be treated as a curtilage structure and so part of the building within the extended definition”



2. Hampshire County Council v Secretary of State

- Case relating to the deregistration of common
- Two different legal meanings of “curtilage”:
 - *Narrower* meaning of curtilage for planning purposes: Methuen Campbell v Walters [1979] QB 525: whether the land is “so intimately associated *with a building* that it forms *part and parcel of the building*”; and
 - *Broader* meaning when dealing with listed building control: A.G. ex rel Sutcliffe v Calderdale MBC (1983) 46 P & CR 399 The key question is whether “land is associated with a building in such a way *that the land and building comprise part and parcel of the same entity*, a single unit, or an integral whole”, looking at physical layout, ownership (past and present) and use and function



Francis Taylor Building

Liverpool Open and Green Spaces Community Interest Co) v Liverpool City Council [2020] EWCA Civ 861

- Planning officer failed to refer to formal consultation response from internal heritage consultee
- The response was an obviously material consideration, where permission included conversion of two Grade II listed buildings into apartments;
- Although reference to duty in report, the absence of consultation response was “sufficiently powerful contraindication on its own to displace the presumption that the section 66(1) duty was discharged”.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

4. Environmental issues

- EIA – Continued litigation, potential changes on horizon
 - Kenyon v SSHCLG [2020] EWCA Civ 302
 - Girling v East Suffolk County Council [2020] EWHC 2579 (Admin)
 - Gathercole v Suffolk CC [2020] EWCA Civ 1179
 - Swire v SSHCLG [2020] EWHC 1298 (Admin)
- Climate Change
 - Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214
 - ClientEarth v SSBEIS and Drax Power Ltd [2020] EWHC

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Kenyon v SSHCLG [2020] EWCA Civ 302

- EIA – challenge to LPAs negative screening opinion
- CA affirmed established position that likelihood of significant effects is a matter for the decision-maker. The breadth of judgment was emphasised.
- The mere possibility of an effect (in that case, proximity to an AQMA) does not require a finding of likely significant effects
- The detail of reasoning required in EIA explained by the CA: there was no need for the decision maker to set out all information and statistics relied on; emphasised the courts should not impose too high a burden on planning authorities in relation to EIA

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Girling v East Suffolk County Council [2020] EWHC 2579 (Admin)

- EIA regulation 26 requires information to be “up to date” if relied on for decision
- Sizewell C Nuclear Power Station
- Impact on breeding birds
- High Court held the question of whether information was “up to date” depended on quality of information which was ultimately a matter for the decision maker, whose judgment could only be impugned if irrational

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Gathercole v Suffolk CC [2020] EWCA Civ 1179

- EIA duty to consider alternatives
- Case had to do with a school granted planning permission close to a USAF air base
- Second ground of challenge concerned sufficiency of information contained in Environmental Statement
- Court of Appeal held the information in the ES was sufficient.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Swire v SSHCLG [2020] EWHC 1298 (Admin)

- EIA screening direction by Secretary of State.
- Former BSE carcass rendering site – possibility of contamination.
- Planning permission granted subject to conditions for scheme of investigation and remediation.
- Held: Insufficient evidence before decision maker of extent of contamination or how or whether it could be resolved, in order to make an informed decision.
- Insufficient information to screen out likely significant environmental effects of development.
- Cannot simply rely on conditions to avoid assessment and simply assume mitigation would be successful.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214

- Climate Change
- NSIP regime – Challenge to National Policy Statement
- Heathrow Third Runway
- S.5(8) PA 2008: “...government policy relating to the mitigation of, and adaption to, climate change.”
- Paris Agreement

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

ClientEarth v SSBEIS and Drax Power Ltd [2020] EWHC

- Climate Change
- NSIP regime – Energy NPS EN-1
- Need for development already established
- Interpretation of EN-1
- Balancing exercise under s.104(7) of Planning Act 2008
- Reliance on other regimes and mechanisms
- Net zero

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

5. Green Belt



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

1. R (Samuel Smith Old Brewery) v Yorkshire CC [2020] UKSC 3

- Key Green Belt concept of “openness” (NPPF para.133);
- Some forms of development are not inappropriate “provided they preserve its openness”, including mineral extraction (NPPF para. 146);
- Did Yorkshire CC have to consider visual impact of opencast quarry when considering whether permission complied with para.146 (then para.90)?
- In the context of tension between openness as a spatial concept (i.e. absence of presence of development) and as visual concept (i.e. absence of sense of being ‘built up’)



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



(Samuel Smith cont.)

- “Openness” is a “broad policy concept”, and the assessment of impact on openness is one of planning judgment
- Clear that not a matter of absence of development: some forms of development are definitional compatible (as “appropriate” in GB) and some may be (i.e. those in para. 146)
- Not limited to spatial / volumetric approach: a number of factors may be relevant to application
- This may include visual impacts, but assessment of visual impact is not a necessary part of openness analysis – openness is not about landscape quality, but is rather “counterpart of urban sprawl”



(Samuel Smith cont.)

- Yorkshire’s approach perfectly acceptable; and quarry might have just as good role in fulfilling Green Belt purposes as agricultural fields.
- These comments were shortly followed by other summaries of “openness” related principles in:
 - Hook v Secretary of State [2020] EWCA Civ 486 at [7]
 - R. (Liverpool Open and Green Spaces Community Interest Co) v Liverpool City Council [2020] EWCA Civ 861 at [33]



Francis Taylor Building

2. Compton Parish Council v Guildford Borough Council [2019] EWHC 3242 (Admin)

- Challenge to adoption of Local Plan (under section 113 PCPA 2004) that released land from Green Belt;
- Meaning of “exceptional circumstances” (NPPF para. 135):
 - Lesser test than “very special circumstances”;
 - “The “exceptional circumstances” can be found in the “accumulation or combination of circumstances” or in a single circumstance – what matters is a planning judgment that sufficient to warrant altering Green Belt boundary;
 - General planning needs (i.e. demand for ordinary housing) not excluded;
 - No assessment of whether a factor is “exceptional” singularly or in combination is required – “does not mean that they have to be unlikely to recur in a similar fashion elsewhere”.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

(Compton cont.)

- NPPF [47] (now [11](b)(i)) – elision with “exceptional circumstances”?
 - Where Green Belt release is justified on exceptional circumstances, “it [is] inevitable that that lawful conclusion would also constitute a lawful and adequate explanation for why the OAN had not been restrained at the policy-on stage” (at [82]);
 - A strategic level decision to meet unconstrained OAN can be sufficient to constitute exceptional circumstances;
 - Danger of circularity?

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

R. (Lochailort Investments Ltd) v Mendip DC [2020] EWCA Civ 1259

- Neighbourhood plan adoption challenged by JR:
- NP included a policy for local green spaces; LGSs are green areas of particular importance where management of development is “consistent with Green Belt policy” – i.e. “very special circumstances”;
- NP contained a policy which on a proper construction was more restrictive than national policies re: development on Green Belt;
- NP must be “consistent with national planning policy” (TCPA 1990 Sch4B para.8) – non-compliance with national policy would not automatically render a NP policy unlawful, but any departure had to be given reasoned justification, which was lacking here.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

6. Conditions and Descriptions

- Interpretation of conditions
 - DB Symmetry Ltd v Swindon Borough Council & Anor [2020] EWCA Civ 1331
- Section 73, description of development and conditions
 - Finney v Welsh Ministers [2019] EWCA Civ 1868

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

DB Symmetry Ltd v Swindon Borough Council & Anor [2020] EWCA Civ 1331

- Planning permission granted subject to apparently unlawful condition requiring dedication of land as a highway
- Court construed condition with reference to reasonable reader
- Validity/validation principle
- Condition and permission saved



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Finney v Welsh Ministers [2019] EWCA Civ 1868

- Section 73
- Conditions
- Operative part of permission
- Description of development cannot be changed by s.73
- S.96A still available if change non-material
- Requirements for description?



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Thanks for watching!

The oral presentation including answers given in any question and answer session (“the presentation”) and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Merrow Golden, Michael Brendan Brett, Jonathan Welch and Francis Taylor Building will not accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk