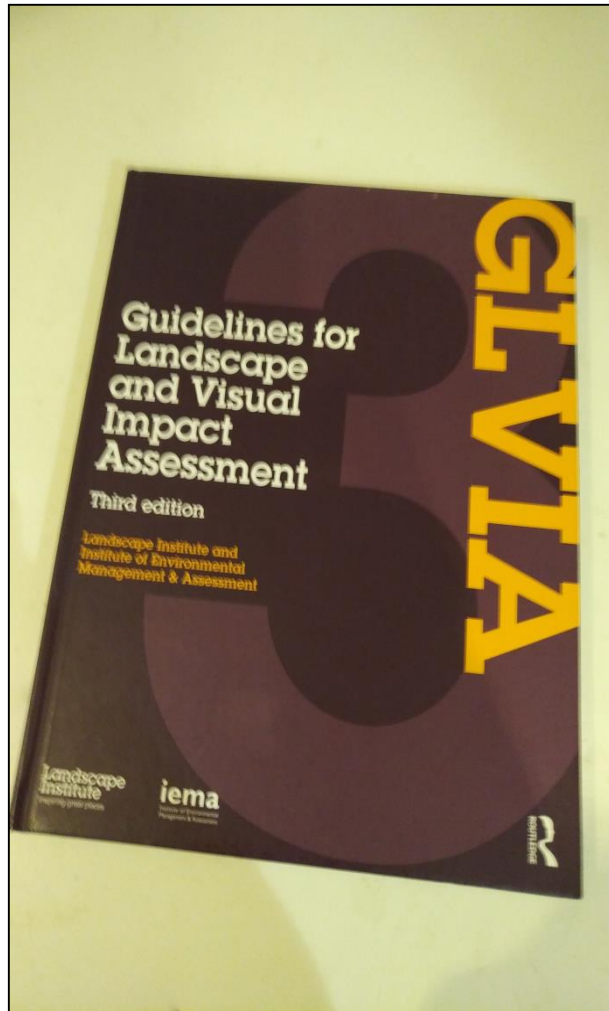


The NPPF Landscape-led Planning in Practice

What's Law Got to Do With It?

Paul Brown QC

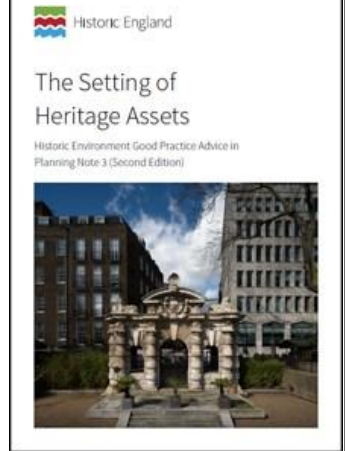
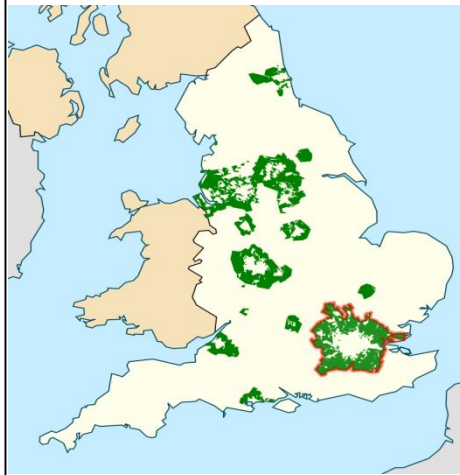
Landscape Assessment v. Policy



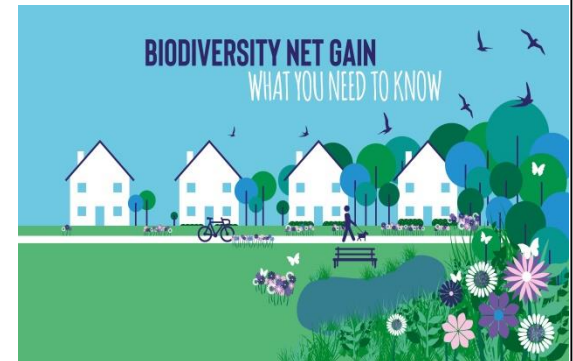
“Valued Landscape”



Green Belt



Heritage setting

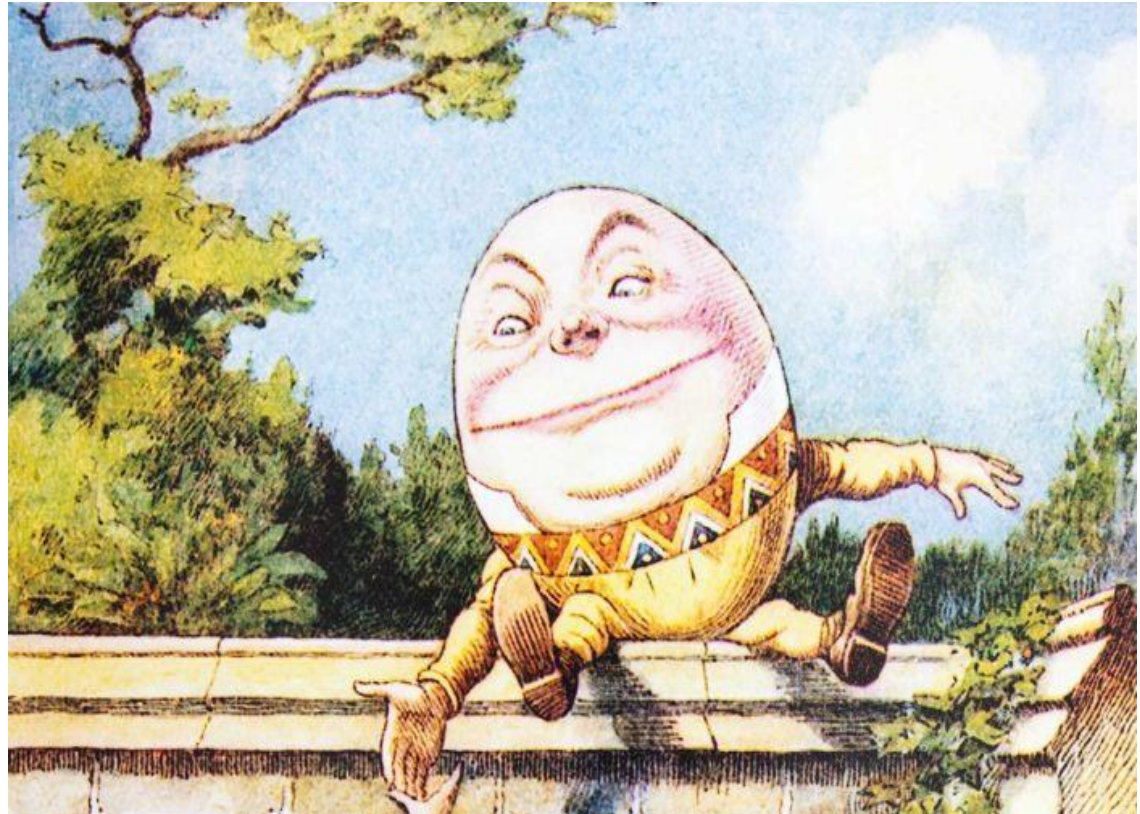


Net Gain

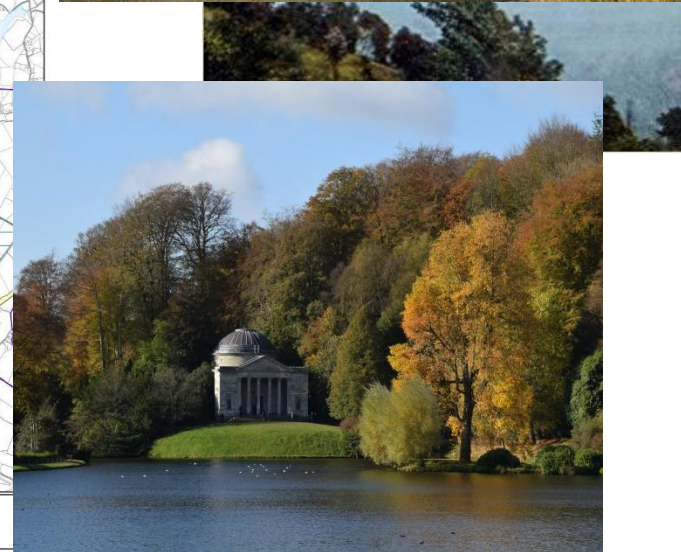
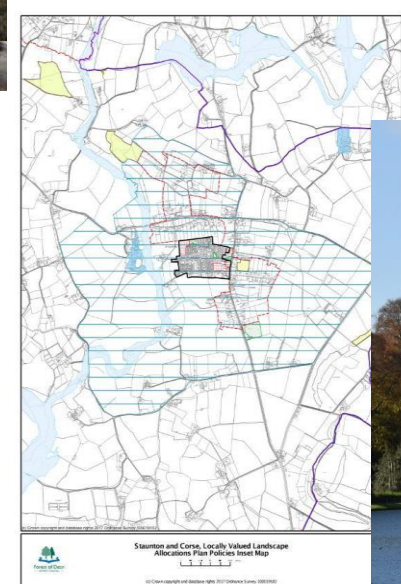
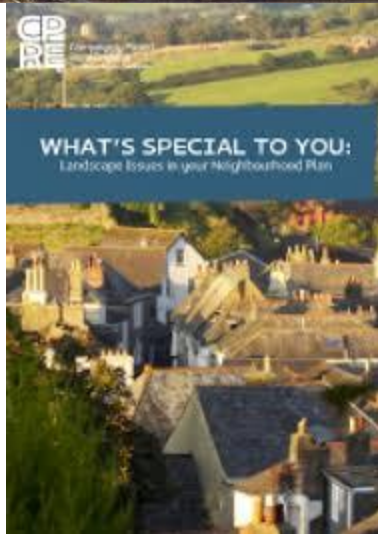
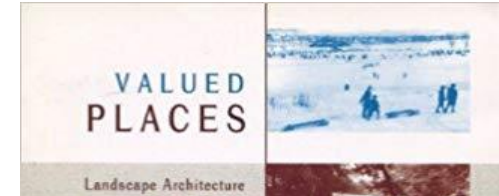
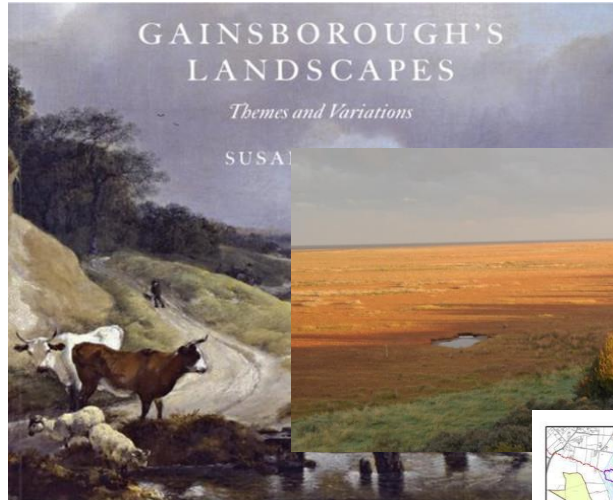
Where does Law Fit In?

Tesco v. Dundee [2012] UKSC 13

“planning authorities
do not live in the world
of Humpty Dumpty:
they cannot make the
development plan
mean whatever they
would like it to mean”



1. Valued Landscape



1A. Valued Landscapes: the Policy Origins

NPPF (2012), Para 109:

“The planning system should contribute to and enhance the natural and local environment by:

- protecting and enhancing valued landscapes ...”



1B. What is a “Valued Landscape”?



Value to whom?

How is value evidenced?

- Does it require designation?



How is value assessed?

- Is GLVIA relevant?
- Is it the site alone, or its place in the landscape?

1C. Valued Landscape: Does it require designation?

Stroud DC vs. SSCLG [2015] EWHC 488 (Admin)

- “The NPPF is clear: that designation is used when designation is meant and valued is used when valued is meant and the two words are not the same”
- So landscapes do not have to be designated to be valued
- But ‘valued’ means something other than popular
- Landscape is only ‘valued’ if it has physical attributes which take it out of the ordinary.

1D. Valued Landscape: Does it require designation?

The New NPPF Chapter 15:

Para 170: Planning policies and decisions should contribute to and enhance the natural and local environment by ...

- protecting and enhancing valued landscapes ... (in a manner commensurate with their statutory status or identified quality in the development plan)

1E. Valued Landscape post para 170 - Appeal Decisions

Designation required: APP/Z1510/W/18/3197293 Flitch Way



“the revised NPPF has clarified the position ... valued landscapes should be protected in a manner commensurate with their statutory status or identified quality in a development plan.... A straightforward reading of para 170(a) does not lead to the view that there are other categories of valued landscape (which are not statutorily designated or identified in a development plan). As the appeal site does not meet the requirements of para 170(a) I find that it is not a valued landscape.”

1F: Valued Landscape post para 170 - Appeal Decisions

Designation implicitly required (but impact on adjoining designations relevant)

APP/W3520/W/18/3214324 Poplar Hill Stowmarket, Aug 2019

“Although the site is not recognised in published documents as an exemplary or outstanding component of the Suffolk landscape ... the proposal would compromise the appreciation of sufficiently impressive examples of other characteristic features of the landscape... which have statutory status and so would qualify the landscape to be regarded as valued, to be protected and enhanced in terms of NPPF para 170(a)”



1G. Valued Landscape post para 170:

Decisions finding designation not required

- APP/PO119/W/17/3191477: Park Lane, Coalpit Heath (6/9/18)
- APP/X2410/W/17/3190236: Melton Road, Rearsby 4/10/18)
- APP/A1720/W/18/3200409: Old Street, Stubbington (22/1/19)
- APP/Q3115/W/18/3200335: Watlington Rd, Lewknor (6/2/19)
- APP/Z1510/W/18/3207509: Colchester Rd, Bures Hamlet (27/3/19)
- APP/A1720/W/18/3199119: Posbrook Lane, Titchfield (12/4/19)

1H. Valued Landscape post para 170:

Whether designation required may depend on the date of the Plan ...

APP/A1720/W/18/3200409: Old Street, Stubbington (22/1/19)

“the landscape is not specifically recognised for its quality in the current development plan. This is because local landscape designations fell from favour in national planning policy. Previously, the Lower Meon Valley had been identified as an Area of Special Landscape Character. ..

In view of ... para 170 the matter of landscape value will no doubt be considered through the emerging Local Plan process. That is the proper forum for any designation to be made. However, until that time it is difficult to understand why there would be a change in terms of intrinsic value ...”

1I. Valued Landscape post para 170:

Whether designation required may depend on the date of the Plan ...

APP/Q3115/W/18/3200335: Watlington Rd, Lewknor (6/2/19)

“The site does not form part of a landscape identified as being valued in the development plan. This is hardly surprising given that the Framework postdates the CS, the LP and the SOLP. It would be wrong ... to conclude that a landscape cannot be considered as valued simply because it was not identified in a development plan formulated at a time when no such requirement existed”

Q. Do these decisions mean designation would be required if the plan post-dates the NPPF?

1J. Valued Landscape:

The highwater mark of the non-designation decisions ...

APP/Z1510/W/18/3207509 Colchester Rd

“The Framework does not provide a definition of a valued landscape. However, I consider it improbable that the addition of the words in brackets to para 170(a) ... was intended to encourage policy makers to revive the practice of creating local ‘*special Landscape Areas*’ or similar designations in development plans ... Previous advice sought to discourage such designations in favour of landscape character assessment ...

Had the creation of new local designations been the Government’s intention then I consider that it would have been highlighted in the public consultation on the changes to the Framework and made explicit in the new text ...”

1K: Valued or not valued: does it matter?

Bures Hamlet

“Whether or not the site qualifies as a ‘valued landscape’ ... the Framework at para 127 requires development to be sympathetic to its landscape setting. Such consideration must necessarily have regard to the sensitivity of that landscape”

Flitch Way

“It does not follow from my finding on valued landscape that the effect of the proposal on the character of the appeal site would be unimportant.”

1L. Valued Landscape: The Site Alone, or in Context? (1)

Stroud

“it is difficult to see why [the fact that it is within the setting of the AONB] should be a demonstrable physical attribute when the site has not fallen within the policy designation designed to protect land beyond the AONB ...

... it is said that the land represents a wedge of countryside extending right into the hearts of the settlement ... It is crisscrossed by well-used public footpaths and from those public footpaths ... you can see the escarpment of the Cotswolds AONB ...

... But the Inspector was entitled to regard that sort of factor as falling below the level required for demonstrable physical attributes in order for countryside to be ‘valued’ but not designated countryside.”

Valued Landscape: The Site Alone, or in Context? (2)

CEG Land Promotions: the Appeal Decision

- “I do not accept that the Stroud case is authority for the proposition that one must only look to the site itself in seeking to identify demonstrable physical characteristics”
- “That is not to borrow the features of the adjoining land but to assess the site in situ as an integral part of the surrounding land rather than divorcing it from its surroundings ...”
- “I find some difficulty in ascribing the term ‘landscape’ to an appeal site comprising one large agricultural field. To my mind the term denotes an area somewhat wider ...”

1M. Valued Landscape: The Site Alone, or in Context?

***CEG Land Promotions* : the Court's ruling**

- The question whether the judgment of “valued landscape” had to be reached by examining the ‘demonstrable physical attributes’ of the development site alone, regardless of any wider area, was not the point in ***Stroud***
- ***Stroud*** lays down no general principle that the site must be considered in isolation
- It would be bizarre to adopt such a “wholly artificial” approach when “in most cases a development site is but part of a wider landscape”

1N. Valued Landscape: What is the link with the GLVIA?

Box 5.1

Range of factors that can help in the identification of valued landscapes

- **Landscape quality (condition):** A measure of the physical state of the landscape. It may include the extent to which typical character is represented in individual areas, the intactness of the landscape and the condition of individual elements.
- **Scenic quality:** The term used to describe landscapes that appeal primarily to the senses (primarily but not wholly the visual senses).
- **Rarity:** The presence of rare elements or features in the landscape or the presence of a rare Landscape Character Type.
- **Representativeness:** Whether the landscape contains a particular character and/or features or elements which are considered particularly important examples.
- **Conservation interests:** The presence of features of wildlife, earth science or archaeological or historical and cultural interest can add to the value of the landscape as well as having value in their own right.
- **Recreation value:** Evidence that the landscape is valued for recreational activity where experience of the landscape is important.
- **Perceptual aspects:** A landscape may be valued for its perceptual qualities, notably wildness and/or tranquillity.
- **Associations:** Some landscapes are associated with particular people, such as artists or writers, or events in history that contribute to perceptions of the natural beauty of the area.

Based on Swanwick and Land Use Consultants (2002)

10. Valued Landscape: What is the link with the GLVIA?



Planning
Inspectorate

APP/T3725/A/14/222868

“I do not consider the only way to define the value of a landscape is to carry out the analysis contained in Box 5.1 of the GLVIA8 . This is a guideline for professional landscape practitioners. Had the NPPF intended this to be technical process then it would have said so...”

1P. Valued Landscape: What is the link with the GLVIA?

Forest of Dean DC v. SSCLG [2016] EWHC 2429
(Admin): The conclusion in ***Stroud***

“reflects, at least to an extent, the Landscape Institute's Guidelines for Landscape and Visual Impact Assessment ("the GLVIA"), which also makes clear that an absence of designation does not necessarily mean an absence of landscape value. The GLVIA identifies various factors that may be relevant in the assessment of landscape value, in something known as ‘Box 5.1’.”

1Q. Valued Landscapes: Summary

- Locally designated landscapes (SLAs, AGLVs) are likely to be ‘valued’
- Whether non-designated areas can also be “valued” under para 170 is less clear, especially if the local plan post-dates the NPPF
- If it is not designated, the site needs to show some demonstrable physical attribute rather than just popularity. Landscape character assessments can provide useful evidence to help identify whether a site is ‘valued’ especially if they contain evaluative information.
- In assessing the value, the site should be considered in context, not in isolation
- Box 5.1 in the 3rd Edition GLVIA can help identify the ‘demonstrable attributes’ that take a landscape out of the ‘ordinary’

2. Green Belt



2A: Green Belt - where does landscape assessment fit?

Para 133:

- the essential characteristics of Green Belts are their openness and their permanence...

Para 134: Green Belt Purposes include:

- to preserve the setting and special character of historic towns

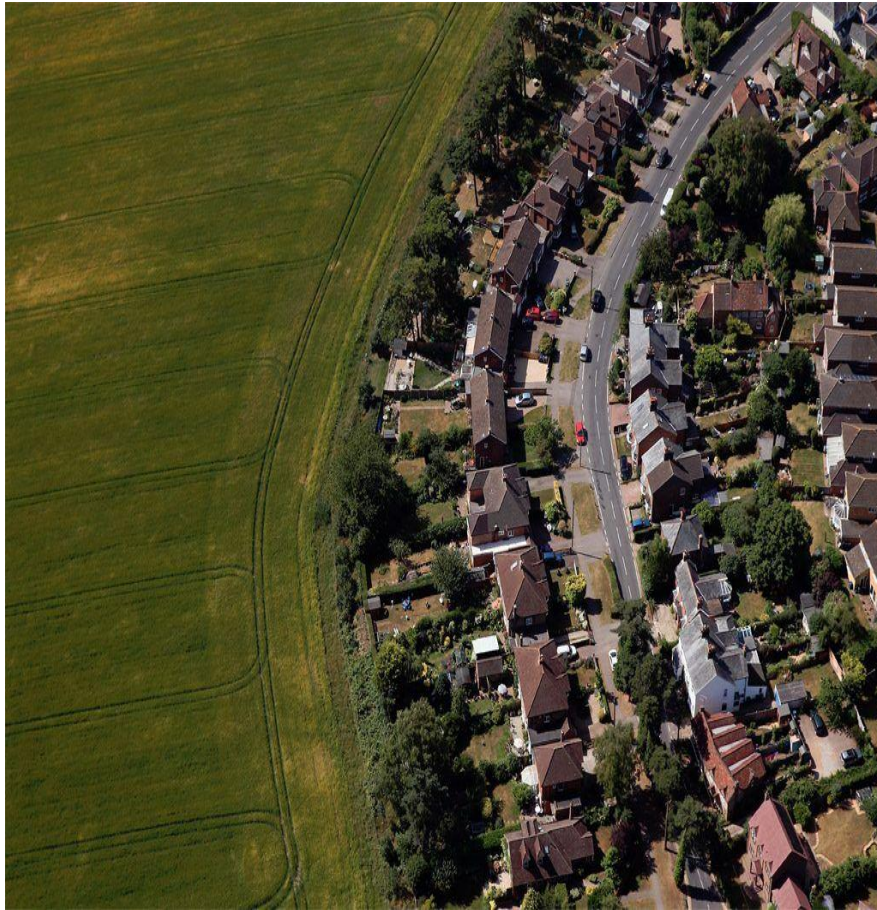
Para 141: with Green Belts, LPAs should

- plan to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land

Paras 145-146:

- “appropriateness” of development in many cases depends on absence of impact on openness

2B: This thing called “openness”...



“Openness” is at the heart of
GB policy ... but is not defined

2C: What is Openness? The old orthodoxy - *Timmins v. Gedling*

- “[any] construction harms openness quite irrespective of its impact in terms of its obtrusiveness or its aesthetic attractions or qualities”
- “there is a clear conceptual distinction between openness and visual impact”
- “it is wrong in principle to arrive at a specific conclusion as to openness by reference to its visual impact”



2D: Openness - The new orthodoxy *Turner*

“The question of visual impact is implicitly part of the concept of ‘openness of the Green Belt’ ... There is an important visual dimension to checking ‘the unrestricted sprawl of large built-up areas’ and the merging of neighbouring towns ... 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.”

2E: Openness - *Turner* (cont'd)

- The visual dimension of the openness of the Green Belt does not exhaust all relevant planning factors relating to visual impact when a proposal for development in the Green Belt comes up for consideration. ... But 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.”
- The concept of openness is:
“not narrowly limited to [a] volumetric approach”
 but
“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”

2F: The Visual Dimension...

Sam Smith Old Brewery v. NYCC

“Whether ... there are likely to be visual as well as spatial effects on the openness of the Green Belt ... will be for the decision-maker to judge. But the need for those judgments to be exercised is ... inherent in the policy.”

“...the policy implicitly requires the decision-maker to consider how those visual effects bear on the question of whether the development would preserve the openness of the Green Belt”



2G: The Visual Dimension of Openness - a different question to visual impact?

“... the officer was satisfied that the ‘proposed screening could protect the environment and residential receptors from potential landscape and visual impacts’ ...

That assessment did not deal with the likely effects of the development on the openness of the Green Belt ... It does show, however, that there would .. be ... effects on openness ... including the closing off of long distance views by the bunding and planting that would screen the working .

The officer’s conclusion ... was, in effect, that the proposed screening would be effective mitigation ... But this was not followed with any discussion of the harmful effects that the screening measures themselves might have on the openness of the Green Belt.”

3. The Meaning of “Setting”



3A. Setting: Source references

- **s. 66 Listed Buildings & Conservation Areas Act 1990**
 - special regard to the desirability of preserving the building or its setting
- **NPPF para 190 (Historic Environment)**
 - LPA's should identify and assess the significance of a heritage asset that may be affected (including by development affecting the setting of a heritage asset)
- **NPPF para 170 (Green Belt)**
 - Setting and special character of historic towns

3B: Setting – the NPPF definition

“Setting of a heritage asset: The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or maybe neutral”

3C: Setting – the PPG

“The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part, the way in which we experience an asset in its setting is also influenced by other environmental factors such as noise, dust and vibration from other land uses in the vicinity, and by our understanding of the historic relationship between places. For example, buildings that are in close proximity but are not visible from each other may have a historic or aesthetic connection that amplifies the experience of the significance of each.”

3D: The case law (1)

Steer [2017] EWHC 1456 (Admin)

“In my judgment ... the Inspector ... adopted a narrow interpretation of setting which was inconsistent with the broad meaning given to setting in the relevant policies and guidance which were before him ... Whilst a physical or visual connection between a heritage asset and its setting will often exist, it is not essential or determinative. The term setting is not defined in purely visual terms in the NPPF which refers to the ‘*surroundings in which a heritage asset is experienced*’. The word ‘*experienced*’ has a broad meaning, which is capable of extending beyond the purely visual.”

3E: The case law (2)

R (Williams) v Powys CC [2017] EWCA Civ 427

“I would not wish to lay down some universal principle for ascertaining the extent of the setting of a listed building... Clearly, however, if a proposed development is to affect the setting of a listed building there must be a distinct visual relationship of some kind between the two – a visual relationship which is more than remote or ephemeral, and which in some way bears on one’s experience of the listed building in its surrounding landscape or townscape...

Physical proximity is not always essential. This case illustrates the possible relevance of mutual visibility – or ‘intervisibility’, as the judge described it – and also of more distant views from places in which the listed building and the proposed development can be seen together – ‘co-visibility’... But this does not mean that the mere possibility of seeing both listed building and development at the same time establishes that the development will affect the setting of the listed building.”

3F: The case law (3):

Catesby v. Steer [2018] EWCA Civ 1697

“[*Williams*] does not mean ... that factors other than the visual and physical must be ignored ... Generally, of course, the decision-maker will be concentrating on visual and physical considerations ... But it is clear from the relevant national policy and guidance ... that the Government recognizes the potential relevance of other considerations – economic, social and historical. These other considerations may include, for example, “the historic relationship between places”.

... the effect of development on the setting of a listed building is not necessarily confined to visual or physical impact. As Lewison L.J. said in ***Palmer* [2016] EWCA Civ 1061** ‘[although] the most obvious way in which the setting of a listed building might be harmed is by encroachment or visual intrusion, it is common ground that, in principle, the setting of a listed building may be harmed by noise or smell’.”

4. Net Gain

- Consultation Dec 2018
- Spring Statement - confirmed commitment
- Government Response July 2019 – outline detail
- Environment Bill – main provisions
 - Sch 15 inserts new Sch 7A in TCPA
- Detail will depend on regulations



4.1 Net Gain: The Basics

- **Most development will be required to deliver 10% biodiversity gain**
- **Some exemptions (most to be set out in regulations)**
- **Provision can be**
 - **On site**
 - **On a registered site allocated to the development**
 - **By purchasing biodiversity credits**
- **Two year transition period**

4.2 Net Gain: The deemed condition

- **“Every” planning permission deemed subject to a condition which requires submission and approval of a “biodiversity gain plan”**
- **Plan must specify**
 - **Steps taken to minimise adverse effect of development on biodiversity**
 - **Pre- and post-development biodiversity value of the onsite habitat**
 - **Any registered offsite biodiversity gain allocated to the development**
 - **Any biodiversity credits purchased to the development**

4.3 Net Gain: The Exceptions

- Statutory exemption for p.d. (Sch 7A para 6)
- Power to SoS to create further exemptions. Consultation response suggests regulations are likely to provide exemptions for:
 - householder applications
 - residential self-build
 - sites which do not contain habitats to start with
 - possible “targeted exemption for brownfield sites that would otherwise face difficulties in delivering viable development and do not contain priority habitats”
 - possible simplified version for minor development

4.4 Net Gain: Approving the biodiversity gain plan

The LPA **must** approve the plan **only** if satisfied that

- The pre-development biodiversity value is as specified
- The post- development value is at least that specified
- Any relevant offsite biodiversity gain has been allocated to the development and/or relevant credits purchased
- The “biodiversity gain objective” is met (i.e. the post-development value exceeds the pre-development value by at least 10%)

4.5 Net Gain: Off-site Provision

Registered off-site biodiversity gain

- Must be recorded in a “biodiversity gains site register”
- Sites must be subject to an obligation to carry out works to enhance BDV, with maintenance for at least 30 years, and available for allocation to development

Biodiversity credits

- May be purchased subject to a scheme to be established by the SoS
- Proceeds of sale must be spent on works to enhance biodiversity of habitat on land in England (including purchasing land)

4.6 Net Gain: How is Biodiversity Value Assessed?

- Sched 7A Part 2
 - Value to be calculated in accordance with the “biodiversity metric”
 - Biodiversity metric to be produced by the SoS
- Sched 7A para 15
 - Specific provision to prevent landowners degrading the value of their land before application
 - Where works lower the biodiversity value of land, biodiversity value is to be that before the works were undertaken (unless they had planning permission)

4.7 Net Gain: Maintaining the Benefits

- Where increase in biodiversity is on site, it may only be counted if accompanied by a condition, s.106 obligation or conservation covenant which secures maintenance for 30 years post completion
- After 30 years, developer can apply for new development, but enhanced biodiversity value is the baseline

Conclusions

- Case law matters, because evidence needs to demonstrate that it is answering the questions posed by policy
- In some cases, the questions posed by policy coincide with a traditional landscape assessment. But in others they do not; or they raise issues which go beyond a traditional approach
- Where the questions go beyond a traditional approach, this need not be a barrier to landscape input: it could just as easily be an opportunity to expand that role
- Net gain will require the creation of new spaces (on or off-site) for biodiversity, where landscape planning will be key