

## A38 Derby Junctions

TR010022

### 8.78 Technical Note on Supreme Court Decision – Samuel Smith (Tadcaster)

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## Supreme Court Decision – Samuel Smith (Tadcaster)

Highways England has reviewed the judgment *R ( Samuel Smith Old Brewery (Tadcaster) and others) (Respondents) v North Yorkshire County Council (Appellant) [2020] UKSC 3 e* (the Samuel Smith case) This is in response to Item 4 of the ISH4 hearing where the ExA requested a written response to the following point:

***Whether the recent Supreme Court judgement [R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) (Respondents) v North Yorkshire County Council (Appellant) [2020] UKSC 3 e] on the approach to Green Belt openness has implications for consideration of the proposed development.***

Highways England's approach to openness which has been covered during the Examination is set out below.

### Highways England's approach to openness

**As part of the ExA's First Written Questions, the following question was raised:**

*'Openness is an essential characteristic of the Green Belt. The Applicant considers that the Proposed Development would not affect the openness of the Green Belt. Applicant - please clarify in greater detail, having regard to the spatial and visual components of openness, why the elevated section of road, associated slip roads, structures and signage would not affect openness.'*

Highways England responded as follows:

*Highways England accept that the new junction at Little Eaton will have an impact on the openness of the Green Belt, but this would not result in material harm to the openness of the Green Belt as set out in the Planning Statement [APP-252] and for the reasons further explained below. Green belt is a designation of landscape value related primarily to openness between settlements rather than an indication of landscape quality. The openness is commonly referred to as the absence of built development, however it should be noted that the existing A38 corridor travels through the green belt designation severing it in a north south direction and includes; junctions, signage and large planted embankments in its current form. Where the Scheme is situated, on the southern edge of this green belt designation, openness is less due to the proximity of further built form.*

*This includes Breadsall Village itself and whilst the village is inset from the Green Belt and the areas of Oakwood to the east and Chaddeston to the west lie outside of the Green Belt (the latter two areas falling within the administrative boundaries of Derby City Council) they set a context of denser built development, that extends in parallel at either side of the Little Eaton junction. The spatial context of this part of the Green Belt is therefore different in the extent of existing built form, in comparison to the more open and rural parts of the Green Belt that extend beyond the Scheme area to the north east, such as the area that lies between Little Eaton and Morley and beyond.*

*The Scheme, although more elevated, has the same characteristics as the current A38 and it is considered that it does not significantly increase the extents of the A38 into the surrounding area. In addition, the Scheme design has also been carefully considered so as to minimise the extent of intrusion into the Green Belt, so far as has been reasonably possibly, whilst also delivering a Scheme design that meets with highway safety standards. To further protect against intrusion into the openness of the Green Belt, the Scheme includes the implementation of various mitigation measures within the landscape design and includes woodland and tree planting on the A38 mainline embankment and associated slip roads; amenity grassland planting on closed sections of the A38; and planting associated with the 2.5m high noise and screening barriers. Whilst this planting will need to mature and establish to its full effect, over time, this would assist in the further*

*integration of the Scheme within the landscape. At full maturity of this planting, the changes to the landscape character would reduce to negligible, thereby further reducing the impacts on openness. This has also been considered through the assessment of visual effects at representative viewpoints 18, 20, 21, 23, 24 - residential and recreational locations as detailed in the Environmental Statement Figure 7.5 [APP-091].*

*In this respect, it is considered that the Scheme would not give to significant visual effects in the Green Belt, taking into account the maturing landscape, intervening landscape and distance from the Scheme. Taking all of these factors into account, it is the judgement of Highways England that no demonstrable and unacceptable harm would result to the openness of the Green Belt and as such there would be no material conflict with Green Belt policy objectives as set out within the NPSNN and the NPPF. In addition, whilst it is noted that EBC are invited to respond to this question, Highways England would refer to section 3.1.22 (under the title of Green Belt Land) of the (agreed) Statement of Common Ground between the two parties, which confirms agreement that the Scheme does not conflict with Green Belt policies as set out within the NPSNN, NPF and EBC Core Strategy and in the event that the Scheme is judged to be 'inappropriate' development, very special circumstances exist, which outweigh any perceived harm to the Green Belt.*

## Issue Specific Hearing 2

The issue was subsequently discussed at Issue Specific Hearing 2 whereby the ExA sought to interrogate the local authorities on their view as to whether the impact on openness amounted to harm. The position of DCC is confirmed in their written summary of oral contributions for ISH2. Under the heading "Impact on the openness of the Green Belt" it is stated:

*As set out in its Written Representations and Local Impact Report, Derbyshire County Council had originally considered that the likely impact of the Little Eaton Junction scheme on the openness of the Green Belt, was intrinsically linked with the visual impacts of the scheme on the landscape and landscape character of the area and impact on the OUV of the DVMWHS. It considered that the junction improvements broadly accorded with national policies in the National Policy Statement for National Networks (NPSNN) and the National Planning Policy Framework (NPPF) for development of nationally significant infrastructure projects within the Green Belt and would not fundamentally undermine the openness of the Green Belt and main Green Belt purposes. However, Derbyshire County Council considered that the visual impact of the scheme could be significantly reduced by revisions to the design of the scheme, particularly the provision of an elegant viaduct to cross the floodplain rather than the extensive incorporation of embankment to carry the scheme over the floodplain.*

*As set out above, however, Derbyshire County Council considers that the additional visualisations submitted by Aecom and the County Council's officer's subsequent site visit, demonstrate that many of the adverse effects associated with the A38 crossing the floodplain already exist with the presence of sizeable embankments to facilitate the existing crossings of the River Derwent and the Midland Mainline railway. The photomontages demonstrate that the proposed new embankments would not be significantly higher than the existing embankments and in that regard, views from the selected locations would not be noticeably different from the current view in the fullness of time when the proposed mitigation planting has become established. **On the basis of the above, therefore, Derbyshire County Council considers that the proposed scheme would have no materially greater impact on the openness of the Green Belt than the existing junction scheme and that the openness of the Green Belt would be preserved.***

## The Supreme Court decision in the Samuel Smith case

The case focusses on mineral working in the Green Belt. It considers the interpretation of paragraph 90 of the National Planning Policy Framework which (in its original 2012 form) provided that:

*“Certain other forms of development are not inappropriate in the Green Belt provided that they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt. These are:*

- *mineral extraction;*”

The case concerned the extension of a magnesian limestone quarry situated on the Green Belt (in North Yorkshire). The Council’s planning officer recommended approval of the proposed development to the Council’s planning committee. As part of the planning officer’s report, both visual impacts from the development and openness were considered. The planning officer’s landscape considerations were based on comments from the Council’s landscape architect which drew attention to the potential landscape impacts of the scheme and the need to ensure mitigation in respect of these impacts. When considering the effects of the scheme on the openness of the Green Belt, the Council’s planning officer did not consider the visual impacts of the scheme. This approach was challenged.

The High Court determined that there was no legal error in the planning officer’s assessment of the scheme and stated that the officer was not required to take into account visual impact from the proposed development when considering openness.

The Court of Appeal disagreed with this approach. It considered that the officer’s approach to the decision was defective as it did not at least consider that visual impacts are relevant to the consideration of openness. As visual impacts had been considered by the planning officer then they should also have formed part of the consideration of openness.

Following these decisions the Supreme Court considered the matter. Lord Carnwath gave the sole judgment which was agreed by Lady Hale, Lord Hodge, Lord Kitchin and Lord Sales. Lord Carnwath provided:

*‘With respect to Lindblom LJ’s great experience in this field, I am unable to accept his analysis. The issue which had to be addressed was whether the proposed mineral extraction would preserve the openness of the Green Belt or otherwise conflict with the purposes of including the land within the Green Belt. Those issues were specifically identified and addressed in the report. There was no error of law on the face of the report. Paragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication. As explained in my discussion of the authorities, the matters relevant to openness in any particular case are a matter of planning judgement, not law.’ [para. 39]*

Lord Carnwath warned against the danger of “over legalisation” of the planning process, as he previously set out in some length during the *Hopkins Homes* case, where he reinforced the point that policy should not be read as if it is law. In the *Samuel Smith* case Lord Carnwath noted that the underlying concept of openness is “to prevent urban sprawl by keeping land permanently open ...”. Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt.” [para. 22] “It is not necessarily a statement about the visual qualities of the land, though in some cases this may be an aspect of the planning judgement involved in applying

*this broad policy concept.” [para. 22] Finally, he concluded that “I do not read the officer as saying that visual impact can never be relevant to openness.” [para. 40].*

### Relevance of Samuel Smith case to Derby Junctions scheme

On the basis of the Supreme Court’s judgment it is clear that there is no explicit need to assess the visual elements of openness or by implication the spatial impact (or indeed any other factor such as permanence). Fundamentally, whether visual impact forms part of the consideration and assessment of openness is a matter of planning judgement for the decision maker and there is nothing in law to say that it should be taken into account as part of that consideration or that openness is never relevant to that assessment.

During the examination, Highways England have consistently maintained (as detailed in the responses outlined above) that whilst an impact upon openness would occur from the Scheme it would not be such that it would amount to material harm to the Green Belt. At the request of the ExA Highways England have previously provided evidence of how the Scheme affects openness from both a spatial and visual aspect in coming to a conclusion on this matter. As such, Highways England does not consider there are specific implications arising from the Supreme Court judgment for the consideration of the Scheme in the context of the points raised in its question on this issue. Highways England has already clearly set out how the Scheme is compliant with the policies of the NPPF, NPSNN and local planning policy objectives in respect of Green Belt.