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‘The exception to the rule’: exploring the exception and the exceptional in planning policy

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Abstract

This paper explores exceptions to planning ‘rules’ as a specific form of discretion exercised by planners and decision-makers. Theoretical and conceptual ideas on rules and exceptions to rules, drawing principally on administrative and political decision-making, are used to examine the role of exceptions and exceptional circumstances in planning. This analysis addresses the interdependency between exceptions and ‘rules’, the circumstances in which planning decision-makers are invited to consider exceptions to rules or exceptional circumstances, and the distinct forms of planning regulation created using exceptions. The conclusions call for systematic analysis of the role exceptions play in different contexts and planning systems.

Introduction: planning and rules

The aim of this paper is to explore exceptions to ‘rules’ as a specific form of discretion in planning regulation. A wide variety of everyday planning tools – statutes, plans, policies, and regulations – can be understood as the ‘rules we make for using land’ (Needham et al, 2019). This interpretation of rules to include regulations, principles, or even conventions, is widely accepted (Saastamoinen and White, 1995, p., 304). Twining and Meiers (2010, p. 93) demonstrate that the concept of ‘rules’ extends beyond law and into sociology, education, and many other subject areas. They argue that “there is hardly any aspect of human behavior that is not in some way governed or at least guided by rules” (Twining and Meiers, 2010, p.94).

Planning is clearly an activity involving a complexity of different rules. Planning systems may include, for example, ‘rules’ about which locations and types of land are suitable for development, rules about where development should not take place, and rules about building in protected areas of different kinds, and so on, through to detailed or technical rules about extending individual properties. These can be thought of as a hierarchy of planning rules – some rules are written into the law, some are expressed in policy, and some are simply articulated in everyday practice as ‘rules of thumb’. Planning regulation consists of more than just a series of ‘rules’, of course, and these rules are also simply a means to an end. Yet rules form an important part of regulation in planning and any other aspect of regulation. This article focuses principally on rules – and more importantly *exceptions to rules* – expressed in planning policy. Planning policies can express ‘rules’ in a variety of different ways. They will often not be

expressed as directly as, say, legal rules. They nevertheless set out principles on where and under what circumstances certain forms of development are acceptable. Planning is a complex activity that involves multiple and competing objectives. It is also an activity where simple rules are difficult to adhere to and the context for a decision is always important. These factors usually necessitate thinking about *exceptions* to planning rules. **The task of 'Rethinking Regulation' underpinning the papers in this special issue inevitably involves reflecting on 'the planning rules' – and consequently presents opportunities for designing creative and purposeful exceptions to planning regulations that support contemporary planning objectives.**

The conceptual and practical significance of examining exceptions to planning rules is highlighted by the author's involvement in two projects in the United Kingdom that involved the making of exceptions to the general 'rule' of not allowing new housing in the open countryside. The first project examined the provision of housing on rural exception sites, allowing affordable housing to be constructed on sites where housing would not usually be permitted (Webb et al, 2019). Sites not considered suitable for housing would be permitted *as an exception* if the housing was affordable housing. The second project evaluated the exceptional grant of planning permission for One Planet Developments in the open countryside in Wales (Harris, 2019). This involves permitting new houses in the open countryside *as an exception* to strict controls over such development where the dwelling and its associated permaculture activities can achieve a One Planet ecological footprint. This making of an exception to planning controls enabled experimentation with new forms of living and working in the countryside and generated new and innovative forms of regulation. In this case the management of the exception required detailed monitoring of occupants' consumption and everyday activities – evidence was needed of compliance with the basis for making the exception. Reflection on these two projects – each of them exploring an exception to the usual protection of rural spaces from new residential development - identifies that the making of exceptions to planning rules is commonly practiced yet has not been explored systematically or conceptually. Booth (2007, p. 132) argued that 'discretion is everywhere' in common-law planning systems like those in Britain. Discretion can nevertheless take different forms. This paper examines the making of exceptions as a very distinct and specific form of discretion not previously addressed in literature on planning and discretion (Booth, 1995, 2003, 2007).

This paper has four sections. This introduction is followed by a section exploring selected concepts related to rules and exceptions, drawing on literatures beyond planning, including legal reasoning, organisational decision-making, and philosophy. The section concludes with a framework of questions for investigating rules and exceptions. The following section explores the practical use of exceptions in planning in England, as expressed in the National Planning Policy Framework (2019). This section identifies when and under what conditions planners are invited to consider exceptions to policy rules. The concluding section reflects on what can be learned about planning rules and the discretionary space created by enabling exceptions to those rules, as well as outlining areas for researching exceptions in specific policy areas and in different planning systems.

Rules and exceptions

This section explores concepts on rules and exceptions from several disciplines to construct a framework for analysing exceptions in planning. These disciplines include law, philosophy, organisational theory, and decision support. Some of this literature refers to moral rules and when exceptions to those rules may be justified – such as when killing someone might be justified - while other material refers to making exceptions to legal, regulatory or policy rules. The section first highlights the interdependence of rules and exceptions, then explores arguments for making exceptions to rules and the importance of giving reasons for making exceptions, and finally examines the relationship between different categories of rules.

The rule and the exception

“When we set up a list of rules, we also set up the possibility of breaking them” (Brännmark, 1999, p. 135).

Every rule constructs the opportunity of breaking the rule or making an exception to it. Indeed, the making of an exception is dependent on the existence of a rule. In some cases, the rule itself will include the grounds for its suspension (Kertzer, 2015, p. 418). Twining and Meiers (2010, p. 93) identify examples of these ‘straightforward’ and explicit exceptions, where the exception is ‘generally considered to form part of the rule’. Their example of a mother’s instruction to a child ‘never to enter the larder *without my permission*’ (emphasis in original) refers to the exception - when permission is given. They state the function of an explicit exception ‘is to delimit the scope of the rule’ (p. 93). For other rules there are no explicit grounds within the rule itself for making an exception, even though there may be good grounds for doing so (for example, signs stating ‘Do not enter’). **These grounds for an exception may include emergency situations, preventing serious harm, or extraordinary and unprecedented events – with the current global coronavirus pandemic illustrating the suspension of many previously strictly applied rules and regulations, alongside the introduction of other rules.** This requires an understanding of the interdependent relationship between rules and exceptions. Kertzer (2015, p. 417), for example, highlights the popular phrase that “It’s an exception that proves a rule”. Schauer (1991, p. 872) argues that “there is no logical distinction between exceptions and what they are exceptions to”. Similarly, and in relation to ‘rules’ in law, Davies (2013, pp. 40-41) interprets exceptions as an affirmation of the law and not a contradiction of it.

Making an exception to a rule does more than affirm or prove that rule. For example, Brady (1987) focuses on the *ethical* dimension of deciding *when* to make exceptions to rules – which also involves making judgments about the rules themselves. The scope to make an exception to a rule is also – because of the need to properly understand what it is that an exception is being made to – an opportunity to explore the merits of the rule itself. Kertzer (2015, p. 422) therefore identifies exceptions to rules as an affirmation *and a testing* of a rule – a “rivalry of rule and exception”.

Twining and Meiers (2010, p. 93) note how what practically appears to be a breach of a rule can be less than clear-cut – and that not all instances of not adhering to a rule

can be properly understood as 'exceptions'. Those responsible for promoting adherence to rules have a series of options in such cases, for example where a situation suggests that it is appropriate to not comply with a rule (for example, rules broken in an emergency). The role of technical breaches and a decision not to punish for breaching a rule, or the contextual situation may lead someone to conclude that a rule has not been breached; or rules can be 'waived' and an exemption given in a particular case, without implying a general exception to a rule (Twining and Meiers, 2010, p. 93). Exemptions – as will be illustrated below for planning – differ from exceptions in completely removing a category – of people, property types, land uses etc - from the decision situation and the application of the rules to which the exception can be made. Exceptions sustain decision-maker discretion where exemptions do not.

Brady (1987) categorised two approaches to rule construction and the making of exceptions to rules - utilitarian versus deontological ethics. These echo similar considerations to the concept of the public interest in planning (Campbell and Marshall, 2002). A utilitarian approach to rules and exceptions emphasises situational assessment and maximising good through a flexible approach to rules, where rules are adjusted or interpreted in the light of certain features. The utilitarian tradition supports the idea that administrators can 'add value' by departing from the mechanical enforcement of rules – that is, there is value in making an exception (p. 439). The deontological or formalistic approach emphasises absolute principles and rules, and a tendency to treat all individuals, decisions or cases in the same way. Later sections highlight that planning operates very much within a utilitarian tradition with considerable flexibility in the interpretation of policy rules, especially in making exceptions to achieve enhanced planning outcomes. **This often makes planning appear pragmatic in style, seizing on opportunities to achieve desirable outcomes, but potentially at risk of compromising on some important and fundamental principles.**

The purpose of making exceptions to rules

Rules are designed to constrain decisions and are usually put in place 'for good reason'. Yet if rules and exceptions are closely interdependent, to the point where one necessitates and depends on the other, then we should expect exceptions to rules to occur. We should nevertheless try and understand *why* exceptions to rules are made. There are some very clear reasons for making exceptions to rules. Exceptions are required at a point where the rules 'stop', or where we reach the 'limits' to rule-based forms of decision-making (Brady, 1987). Brady, (1987, p. 436) argues that "For moral reasons, we must know how to make exceptions to rules" – in that it would be immoral to always apply rules strictly to every case. His argument draws on management theory and ethical theory to discuss the consequences when administrators within organisations apply rules inflexibly. The strict application of rules in every case can lead to perverse, and perhaps immoral outcomes (e.g. someone who has prevented a serious accident by breaking a rule). Brännmark (1999) also argues for allowing exceptions to 'basic', moral rules in certain circumstances, and promotes a 'common sense understanding' of departing from rules. Twining and Meiers (2010, p. 57) also identify that exceptions, including those where policies advise on interpretation of the

law, can be a practical and useful way of mitigating the strictness of the law. Their example of fire engine drivers, and the requirement in the law to stop at red traffic lights, also highlights the driver's significant discretion in making a judgment as to whether to break the law, and the responsibility they take for doing so. Exceptions can therefore act as an instrument for exercising "control without rigidity" and enable decision-makers to balance multiple or competing considerations (Brady, 1987, citing Elster, 1979, p. 109).

Yet what would in any situation constitute 'exceptional circumstances' for departing from a rule? When, for example, might it be acceptable to kill or seriously injure someone? When might it be acceptable to drive a vehicle through a red traffic light? Saastamoinen and White (1995) state that "The basic characteristic of exceptionality is the degree of difference when compared to the corresponding normal case" (p. 303). This point highlights the importance of understanding what a 'normal' case is and when the standard application of a rule is warranted – in other words, when something is normal or exceptional. Saastamoinen and White (1995) go on to define a series of different types of exception: an 'established exception' (there are rules but they are incomplete), an 'otherwise exception' (where an organization has no applicable rules), and 'true exception' (an event so unanticipated that that the organization has not been able to prepare for it at all – the organisation is unable to apply wider goals, or identify what a corresponding normal case would be).

Exceptions can also be used to deal with extraordinary and unanticipated contextual circumstances – similar to the 'true exception' referred to above. Davies (2013), for example, highlights the making of exceptions to European Commission state aid rules precipitated by the circumstances of the Global Financial Crisis in 2008. Davies' account (2013, p. 34) is better understood as the temporary 'suspension' of rules in a crisis, rather than as an exception. Davies (2013), citing Schmitt (2005) and Agamben (2005), also refers to sovereign authority and exceptions – an executive authority with a permission to break the rules that it enforces. This executive 'suspension' of rules in a crisis is quite different to the exception in a planning context, where exceptions are anticipated and expressly written into policies.

Rationality and situational judgment – giving reasons for making exceptions to rules

"We know that certain rules hold true most of the time, even though there are *obvious* exceptions to them" (Brännmark, 1999, p. 131, emphasis added).

There may be 'obvious' exceptions to certain rules, including where refusing to make an exception will result in a ridiculous or perverse outcome inconsistent with the purpose of the rule. Worthington (2006) uses the example of children making rules for a game to highlight that initially simple rules usually evolve into more complex forms, driven by the need to ensure fair or equitable outcomes, and so an exception to a rule can be seen as an evolution of that rule by enabling 'fairer' outcomes. Yet even though some exceptions may be 'obvious', exceptions to rules usually require a justification for making the exception (e.g why some people are not required by law to wear seat

belts in vehicles). There are good arguments for insisting on giving reasons for exceptions to rules:

“few rules are exceptionless, but exceptions are *made with adequate reason* – unless the administrator is willing to appear capricious, cynical, untrustworthy, inconsistent, or impulsive” (Brady, 1987, p. 436, emphasis added).

Brady (1987, p. 436) explores exceptions as exposing the limits to ‘rational’ decision-making, with exception-making understood as an activity that ventures into ‘new territory’ and is designed “to produce rational decisions that are not guided by accepted rules”. Saastamoinen and White (1995, p. 303), writing in the context of computer science, also define ‘exceptions’ narrowly as ‘events for which no applicable rules exist’. However, in legal and regulatory contexts it is rare for a decision-maker not to be able to find some general rule or principle that cannot guide a decision in exceptional circumstances (Twining and Meiers, 2010, p. 93). So, in practically all conceivable situations of decision-making in planning, there will be some general ‘rules’ to apply, even in circumstances described as ‘exceptional’.

Exceptions are by their very nature exceptional. Brännmark (1999, p. 131) argues that reasons for making exceptions cannot be based on the consistency of our actions or decisions, for example between like cases, but that justification for the exception must be based on the *particular circumstances* of the case. He argues for the role of situational judgment, which “is needed not only in weighing different relevant features against each other, but in determining which features are relevant in which situations” (Brännmark, 1999, p. 130). We see in this a considerable discretion on the part of the decision-maker to identify the scope of the issues relevant to the making of an exception. So, while there is a tendency in certain cases to define carefully the exceptional circumstances for departing from a rule, “Making exceptions to rules is more an aesthetic skill than a mechanical efficiency” (Brady, 1987, p. 443). This ‘aesthetic skill’ and situational judgment in making an exception may involve reference to the ‘contextual function’ of the policy or rule (Brady, 1987) – what is the rule trying to achieve? Saastamoinen and White (1995) state that rules will often include a reference to a goal too. The function or purpose of a rule may be clearly stated, or it may often be implicit, requiring some work or assumption on the part of the decision-maker as to what the rule is trying to achieve.

Exceptions and discretion

Radoynovska’s (2018) recent exploration of rules and exceptions for the distribution of resources within organisations refers to both ‘discretion work’ and ‘rules of exceptionalism’. Her focus on exceptions and discretion offers valuable insights for planning decision-making. ‘Rules of exceptionalism’ refer not to the simple breaking of rules – instead, Radoynovska understands this as the *sanctioned* deviation from a rule, an internalization of the tensions between rules and exceptions, or between *related objectives* (Radoynovska, 2018, p. 1279). This contrasts with Rana and Chhatre’s (2015) use of the idea of exceptions as the exploitation of gaps or loopholes

in regulatory policy, and the subversion of the regulatory system. Radoynovska instead refers to discretionary allocative processes as a means of ‘continual boundary-testing’. This point highlights that exceptions are a means of testing and challenging limits and boundaries – including whether a prevailing set of circumstances are sufficient or appropriate for the making of an exception to a rule. Radoynovska (2018) highlights the discretion evident in applying rules and categorises various forms of discretion, including ‘evaluative discretion work’ (p. 1289) – an evaluation of whether an organization achieves its mission – that is, she links discretion in the application of specific rules to an overarching or higher purpose or objective. This can in turn lead to the questioning of what is the purpose or function of a rule.

Complex systems of multiple rules

Rules rarely operate singularly, abstractly, or in isolation. We usually work within systems of multiple rules that must be applied sequentially or simultaneously. We may in planning, for example, need to manage ‘rules’ to prioritise the use of brownfield land for housing, or locate retail activity within established town centres, yet at the same time also apply ‘rules’ that prevent new development being located in areas at risk of flooding. These rules may also have differing status. Exceptions to rules may be presented in different places and in different documents to that which the rule is presented in, and so the presentation of the rule itself may not make clear the exception to it (Twining and Meiers, 2010, p. 93). In other words, we may need to look elsewhere and beyond the rule itself to find the authority for making an exception to the rule. This interrelationship between different rules does not make the subservient rule inapplicable:

“These rules do still apply, and they might count either for or against the action we are considering; yet, all things considered, they are outweighed by other rules” (Brännmark, 1999, p. 129).

A planning example of this is the infamous United Kingdom case of Fidler’s castle, the unauthorised construction of a house which was deliberately concealed from public authorities (Childs et al, 2017). The planning system in England has a ‘four-year rule’ where a house constructed without planning permission becomes immune from enforcement four years after substantial completion. The person who constructed the house appeared to have initially succeeded in securing protection for his house under this rule. However, regulatory authorities explored other means of tackling this ‘abuse’ of the planning system. **First, a general legal principle – the Connor principle - was applied. This states that someone should not profit from their own wrongdoing, in this case the deception and deceit of concealing a breach of planning law. So, one rule was qualified by an exception in a more general legal rule. In other words, there are conditions under which other rules either do not apply or are overridden by more important rules (Twining and Meiers, 2010, p. 93). Second, the case was tactically interpreted as not benefitting from the ‘four year rule’ as the removal of the material concealing the house – hay bales and tarpaulin – was interpreted as part of its substantial completion.**

One of Brady's (1987) key concerns was to explore "rational principles behind the making of *exceptions* to rules", but his material also focused on the "normative principles that guide the *construction* of rules" (p. 437). This construction of rules included the concept of 'meta-rules' or ultimate principles – and supports the idea that exceptions are ways of ensuring that the application of rules accords with the ultimate principles of the meta-rules. In other words, making an exception to a rule may be necessary to facilitate achievement of wider goals or principles. This is a form of flexibility, as noted above, to prevent perverse or ridiculous outcomes from the overly strict application of a rule. Therefore "the meta-rules themselves become the grounds for exceptions to our rules and policies" (Brady, 1987, p. 439).

A framework for interpreting exceptions to planning rules

This review of concepts on rules and exceptions provides a basis for exploring exceptions in relation to planning. The various considerations above are condensed here into a simple series of questions. These can be used for exploring any rules, including planning rules expressed in law, as policy, or as rules of thumb. The key questions are:

- What *is* the rule?
- What is the *purpose* of the rule? What is it trying to *achieve*? Is the purpose of the rule *clearly stated*?
- *When* might exceptions be made to the rule? Does the rule itself state what *valid* exceptions might be? Do decision-makers have opportunity to identify *other* exceptions to the rule?
- What is the *relationship* between this and other rules, including *meta-rules* of higher order and status?
- What *impact* does the making of an exception to the rule have on the rule? Is the rule '*tested*' or *challenged* by the exception? Does the exception lead to the creation of *new* or *altered* rules?

This framework is used in later sections to reflect on the use of exceptions in planning following an exploration of the use made of exceptions in planning policy in England.

Exceptions in planning – an illustration using planning policy in England

The practical sections of this paper are illustrated from the example of the planning system in England. This system is characterised by a high level of discretion and is contrasted with mainland European and international planning systems offering greater certainty of planning decisions (Booth, 1995). This considerable extent of discretion is framed in the law, reinforced by the nature of development plans – usually general statements of policy accompanied by strategic land allocations – and further enhanced by the significance given to national planning policies. Booth (2007) highlights the 'far-reaching' influence of central government planning policy in framing decision-maker discretion. He argues that this is usually a constraint on local discretion. The British planning systems are not obviously framed by 'rules' that have

to be followed in individual decisions. Indeed, describing planning policies as ‘rules’ could be interpreted as a clear overstatement of the role of policy in shaping planning decisions in Britain’s planning systems. Yet this section identifies the sanctioned use of exceptions as a discretion to depart from a rule *in a specific set of circumstances*. These may be ‘exceptional circumstances’, promoted in national planning policy, where adherence to a ‘rule’ is not required.

An illustration of the use made of exceptions and exceptional circumstances in planning policy

This section of the paper explores England’s National Planning Policy Framework and its use of exceptions as a way of illustrating differing forms of exception (Ministry of Housing, Communities and Local Government, 2019; see also Mills, 2018). The material is based on an analysis of the Framework, especially the framing of terms and concepts such as exception, except, and exceptional. The section also explores similar constructions and phrases, such as ‘unless’. The section organises material thematically, such as the use of exceptions in housing or for Green Belt designations, before the discussion and commentary section returns to the key questions set out in the earlier framework.

Local plan-making

The first thematic area for the use of exceptions is policy on local plan preparation. Paragraph 23 of the Framework, for example, refers to allocating sufficient sites to deliver on a plan’s strategic priorities “except insofar as these needs can be demonstrated to be met more appropriately through other mechanisms, such as brownfield registers”. The ‘rule’ is that a plan should allocate sufficient sites and is designed to assert a local authority’s plan as the principal vehicle for identification of sites. The rule is set in the context of concerns that local planning authorities are not allocating sufficient sites in their plans for development, particularly sites for housing. The Framework relays an ‘explicit exception’ in the rule itself (Kertzer, 2015) – when other mechanisms are better placed or more appropriate for delivering on a plan’s strategic priorities. So, it is the delivering on a plan’s strategic priorities that is the wider principle that may be used to justify the exception to allocating sites in a plan. The Framework includes other similar exceptions in its advice on plan-making activity. The requirement is set out for a development plan’s strategic policies to look ahead over a minimum 15 year period from adoption (paragraph 22), ‘except in relation to town centre development’. The reason for the exception for town centre development is not clearly set out as part of making the exception.

Housing and exceptions

Planning for housing has become a key area of contention in England. National planning policy on housing has become focused on ensuring that sufficient land is allocated and available to support increased delivery of housing. Some of this has

involved prescribing the way in which local planning authorities should assess housing need. Paragraph 60 of the Framework advises on use of standard methods for the assessment of local housing needs, as also set out in national guidance, ‘unless *exceptional circumstances* justify an alternative approach which also reflects current and future demographic trends and market signals’ (emphasis added). The framework does not suggest what might constitute ‘exceptional circumstances’ for the purposes of this paragraph. This is an interesting carving out of discretionary space – it is flexible in leaving open to subsequent argument what may constitute ‘exceptional circumstances’, yet nevertheless frames these as ‘exceptional’ in the sense of being rare and demanding strong justification.

There is further reference to meeting identified housing needs in the footnote to paragraph 117 of the Framework, which sets out that land to meet objectively assessed needs should be met in a way that ‘makes as much use as possible of previously developed or ‘brownfield’ land’. There is then an exception to this, expressed as ‘except where this would conflict with other policies in this Framework, including causing harm to designated sites of importance for biodiversity’. This is a useful example of the interplay between multiple ‘rules’ expressed in the same policy document, identifying the potential for ‘conflict’ between rules and how they should be resolved where they occur.

Paragraph 64 also refers to the concept of *exemptions* – in this case exemptions to the expectation that larger-scale housing sites will include a minimum 10% of affordable homes. These exemptions are listed and detailed, such as where sites are for self-build or commissioned build. Paragraph 64 also exempts from the 10% affordable housing requirement ‘entry-level exception sites’ and ‘rural exception sites’ (see below). This prompts reflection on the distinction between an exemption and an exception in planning policy. The distinction appears in part to lie in an exemption being specified – the exemptions are listed and clearly set out. So, it is clear that self-build sites are exempt from providing a minimum percentage of affordable housing units. Exemptions are also not ‘exceptional’ in any way – they do not have to demonstrate anything or be subject to any special deliberation other than being covered by the defined exemption. Exemptions of this kind eliminate discretionary space.

The Framework also refers to ‘exception’ in relation to types of housing sites. There are references to two types of housing ‘exception sites’. The first is ‘rural exception sites’ of the type outlined in the introduction to this paper. Rural exception sites are a well-established mechanism in the planning system in England. The Framework defines them as ‘small sites used for affordable housing in perpetuity where sites would not normally be used for housing’. Their exceptional nature derives from making an exception for the release of land for housing that would not otherwise be used for housing, with the exception justified by the provision of affordable housing. It is therefore the release of the site that is an exception to usual planning principles. This idea of the exceptional release of sites that would not usually be allocated for housing has recently been extended to ‘entry-level exception sites’. This suggests an incremental extension in policy of the use of exceptions. Paragraph 71 of the framework refers to entry-level exception sites, suitable for first-time home buyers or

renters, 'on land which is not already allocated for housing'. The use of similar 'exception' terminology across these two variants disguises some important differences in policy. For entry-level exception sites the policy refers to 'land which is not already allocated for housing', while rural exception sites refer to 'where sites would not normally be used for housing'. Rural exception sites are therefore more 'exceptional' than entry-level exception sites. These examples are nevertheless the closest ones in the Framework to a 'pure' exception that prohibits one form of development but allows an exception – or perhaps an opportunity - for another.

'Exceptional quality' design houses in the open countryside

One of the most celebrated 'exceptions' in planning policy in England relates, like rural exception sites, to the construction of houses in the open countryside. Paragraph 79 of the Framework concerns planning policies and decisions to avoid the development of 'isolated homes in the countryside, unless one or more of the following circumstances apply'. We can already note that this paragraph uses an 'unless' formulation, which is a form of exception (see below). One of the circumstances identified is where the design [of the isolated home] is 'of exceptional quality'. This is elaborated upon with two criteria, placing some parameters on what constitutes 'exceptional quality'. In other words, there is an attempt to circumscribe the 'exceptional'. The first criterion is that the design 'is truly outstanding or innovative, reflecting the highest standards in architecture, and would help to raise standards of design more generally in rural areas'. This must also be accompanied by meeting a second criterion that it 'would significantly enhance its immediate setting, and be sensitive to the defining characteristics of the local area'. We can read into this exception several different rules in operation. The foremost of the rules is not to build homes in the open countryside, especially 'isolated' ones, a rule designed to protect the countryside from sporadic development and ensure houses are located in existing settlements with adequate services. These are very well-established, and usually widely supported, planning principles or goals. So, what is the rationale and objective behind this exception for exceptional design quality? This exception is a curious one, in that a well-established planning 'rule' is compromised based simply on attainment of the highest architectural standards. These standards should be capable of being delivered on sites that do not result in isolated homes in the countryside. The isolated location seems to be something of a 'bonus' for demonstrating exceptional quality, rather than a necessity. This is nevertheless an example where the exception is reasonably well-defined, and decisions in practice do typically evaluate proposals against a high bar of design quality – that is, whether the proposals are 'truly outstanding or innovative'. The exception therefore enables attainment of architectural quality that would be otherwise difficult to insist upon. Nevertheless, it is clear that there remains significant discretion in evaluating whether the proposal 'is truly outstanding or innovative' or is 'sensitive to the defining characteristics of the local area'.

Exceptions and Green Belt designations

Green Belts are a long-standing feature of planning and planning policy in England (Sturzaker and Mell, 2016). Planning policy for Green Belts also includes references to exceptions and exceptional circumstances, both for designation and alteration of Green Belts and developments within them. Paragraph 135 of the Framework states that 'New Green Belts should only be established *in exceptional circumstances*'. The paragraph goes on to exemplify what may constitute exceptional circumstances for the purposes of this policy – 'for example when planning for larger scale development such as new settlements or major urban extensions'. This is illustrative and gives indication of the scale and character of those circumstances that could be 'exceptional'. Proposals for new Green Belts are referred to as an 'exceptional measure' for which *justification* is necessary – echoing the conceptual points in earlier sections on providing *reasons* for making exceptions to rules. Similarly, at paragraph 136 of the Framework, established Green Belt boundaries 'should only be altered where *exceptional circumstances* are fully evidenced and justified'. The conclusion that such 'exceptional circumstances' exist requires a demonstration that the strategic policy-making authority 'has *examined fully all other reasonable options* for meeting its identified need for development' (paragraph 137, emphasis added). This phrasing suggests an exception in this context is an outcome accepted after all other options have been explored and discounted.

The use of 'exceptional circumstances' for Green Belt designation and alteration is reinforced by exceptions for particular forms of development within Green Belts. Paragraph 143 of the Framework states that 'Inappropriate development is, by definition, harmful to the Green Belt and should not be approved *except in very special circumstances*'. This is a curious form of exception – given that it refers to 'inappropriate development' yet leaves open the possibility that in 'very special circumstances' this 'inappropriate development' may be approved. We may ask if it is 'inappropriate development', why should it be approved at all? Paragraph 144 of the Framework attempts to qualify the exception by stating that 'very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations'. So, even here, the exception is qualified by a balancing of harm and 'other considerations' of a positive nature, reflecting the utilitarian approach noted earlier by Brady (1987). This again highlights the continuing and significant role for decision-maker discretion even under the parameters created by use of exceptions. Paragraph 145 of the Framework expands upon development in the Green Belt, stating that 'A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt'. This is then immediately followed by the qualification that 'Exceptions to this are:', followed by seven different exceptions. These exceptions range from that the buildings are for agriculture or forestry, to limited infilling in villages. So, paragraph 145 sets out a general rule and makes exceptions to it. The following paragraph, 146, then goes on to note 'other forms of development that are not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it'. Examples include mineral extraction and engineering operations. These aspects of Green Belt policy usefully highlights the conceptual point that decision-makers can make exceptions to maximise utility (Brady, 1987) – and that planners must make

practical and ethical judgments about the rules themselves and their underlying purpose.

Other protected designations and environmental considerations

Green Belts are not the only protective designation where exceptions are stated in the Framework. Paragraph 172 refers to development in National Parks and selected other protected area designations, and states that 'Planning permission should be refused for major development *other than in exceptional circumstances*, and where it can be demonstrated that the development is in the public interest'. Paragraph 175 deals with development in Sites of Special Scientific Interest (SSSI). The 'rule' is stated that development within or outside a SSSI which is likely to have an adverse effect on it 'should not normally be permitted'. The reference to 'normally' itself creates the possibility of some form of exception when 'normal' circumstances do not apply. The rule is then caveated by an exception: 'The only exception is where the benefits of the development in the location proposed clearly outweigh both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest'. The 'only exception' here appear to leave open considerable decision-maker discretion in terms of balancing and judging the positive and negative impacts of the proposal.

Also, within paragraph 175, there is reference to development resulting in the loss or deterioration of irreplaceable habitats should be refused 'unless there are *wholly exceptional reasons*'. A footnote provides the example of certain types of infrastructure project as a 'wholly exceptional reason'. This paragraph is principally of interest for distinguishing between the exceptional and the *wholly* exceptional – planning clearly operates with differing degrees of exceptionality. This same distinction can be found in policy in the Framework linked to built heritage. Paragraph 194 refers to designated heritage assets, including listed buildings. Substantial loss of or harm to listed buildings, should be 'exceptional' or 'wholly exceptional'. The distinction between exceptional and wholly exceptional is linked to the classification or grading of the heritage asset.

The Framework also includes reference to exceptions in environmental policies, including flood risk and renewable energy generation. Paragraph 154 on renewable energy development includes a footnote stating that proposed wind energy development consisting of 'one or more turbines' should not be considered acceptable unless in an area identified in the development plan as suitable for wind energy development, 'except for the repowering of existing wind turbines' (see also Windemer, 2019) – a basic form of exception. Paragraph 157 on planning and flood risk refers to an 'exception test'. The definition of this exception test is not set out very clearly in the Framework. The Framework does nevertheless set out what is required for the exception test to be passed, and it comprises two elements. Both elements must be passed for a development to be allocated or permitted in an area of flood risk. The first of the issues that need to be demonstrated is that 'the development would provide wider sustainability benefits to the community that outweigh the flood risk'

(paragraph 160). This is an additional example of an exception that enables planners to maximise utility by trading off competing objectives (Brady, 1987).

Additional forms of 'exception' and qualification

The preceding sections focused principally on policies in the Framework that refer specifically to 'exceptions' or 'exceptional circumstances'. There is also very extensive use of 'unless' formulations throughout the Framework. The phrasing in policy of 'unless' is frequently used in a very similar way to the phrase 'except where', although the conditions or circumstances are usually always set out with some degree of specificity, whereas 'exceptional circumstances' is not always defined or elaborated upon. This perhaps reflects the difficulty of defining in advance what may be exceptional circumstances – a reaching of the limits of rule-based decision-making. A useful example in the Framework of this 'unless' form of exception is found in paragraph 97 on building on open spaces. The paragraph sets out a policy 'rule' that 'existing open space, sports and recreational buildings and land, including playing fields, should not be built on, unless...'. This is followed by three conditions, the first requiring an assessment to have 'clearly shown the open space, buildings or land to be surplus to requirements'. What, then, is the distinction between an exception and an 'unless' formulation as set out in this example? In many ways they seem broadly comparable, yet an exception appears to be expressed as something rare, unusual, and occasional, and something demanding stronger justification, rather than something that may occur repeatedly subject to the adherence to a specified series of criteria.

Commentary and discussion

This review of rules and exceptions in planning policy was initially prompted by experience of two different exceptions to the general restriction on the construction of new houses in the open countryside. In each of these examples – One Planet Development and affordable housing on rural exception sites – it appeared that the interplay between rules and exceptions created different planning outcomes and enabled specific forms of planning regulation. This paper has extended the consideration of rules and exceptions in planning policy through initially taking a more abstracted look at rules and exceptions, before then exploring how planning policy in England establishes rules and exceptions to them. The exploration of general themes on rules and exceptions was distilled into a series of questions. This commentary and discussion section is organised around these questions.

The first of the questions is '*what is the rule?*' The 'rules' expressed in planning policy are usually clear – such as 'existing open space, sports and recreational buildings and land, including playing fields, should not be built on'. These rules when isolated as a singular rule statement, and separated from their qualifications and exceptions, take on a deceptively simple form and character. The example 'rule' given in this paragraph is that we do not allow building on playing fields. These rules are perhaps too simple to apply in the context of planning where so many different factors form part of making

planning decisions. Planning policy is therefore written in a way that anticipates that there will be situations where building on playing fields will be justified. The making of an exception, however, needs a clear and 'strict' rule – for example, the restriction of new houses in the open countryside, or the prevention of building houses in areas of high flood risk. These rules are generally restrictive in character, in that they prohibit certain forms of development in defined locations, and the exception is usually framed as a means of relaxing that rule under specified conditions or circumstances. These examples echo the interdependency between rule and exception highlighted in the conceptual section of this paper (Kertzer, 2015). Planners can create purposeful exceptions when they create well-defined rules.

The second question was '*What is the purpose of the rule?*' Planning policy – at least at national level – rarely explains the reasons for the 'rules' it sets out. The reasons are often implicit or unstated in the policy itself, relying on other documents or policy statements, or even received wisdom, to 'fill in the gaps'. It is therefore for decision-makers to infer what the intention behind a rule is, or what purpose it is meant to serve. This means a decision-maker has considerable opportunity to interpret a rule – for example, why is it that playing fields should not be built upon? Alternatively, why is it that new houses in the open countryside are to be exceptional and otherwise restricted? These deliberations over the purpose of planning rules and policies sometimes surface in decision-makers' reasoning for planning decisions, especially when several 'rules' or policies come into conflict. This is comparable to judges' deliberation in court decisions as they attempt to understand what a legislature intended when establishing statutes, as a way of trying to properly apply a rule. This implicit purpose of rules in planning therefore creates considerable discretionary space. Planning rules need a clearly stated purpose if they are to resist widely varying interpretations.

The third question was '*When might exceptions be made to the rule?*' We see from the conceptual section earlier in the paper that exceptions are ways of making strict rules more practical – to "control without rigidity" (Brady, 1987, citing Elster, 1979, p. 109). We see in planning policy exceptions that are used in precisely this way – to avoid overly rigid application (development on playing fields or in flood risk areas). In other cases, exceptions are used to accept that some forms of development are so essential that we would, rarely or exceptionally, accept significant negative impacts (loss of irreplaceable habitat). We also see exceptions used in ways that try to account for the unforeseen or specific ('wholly exceptional circumstances'). We also see exceptions in planning used to enable certain forms of development that would not normally be acceptable in some locations – the exception used as a 'lever' to promote enhanced or desirable outcomes (outstanding architecture, affordable housing). We can then categorise some exceptions in planning as *easing* restrictions, while others use the exception to a well-defined and strict rule positively to *enable* new forms or types of development. The planning system therefore operates very much in the way that Radoynovska (2018, p. 1279) describes organisations, operating through 'rules of exceptionalism' and the *sanctioned* deviation from rules. The analysis of the Framework identifies several different ways of sanctioning or inviting exceptions to rules. We have 'except for', 'exceptions', 'exceptional circumstances' and 'wholly

exceptional' circumstances. There are other, related formats that initially appear to perform a similar function to exceptions - such as 'exemptions' and conditional 'unless' statements. The analysis identifies some very specific examples of when an exception may be made to a rule, sometimes relaying a series of criteria to guide the making of an exception. We also find less specific formulations of when exceptions may be made to a rule, referring only to unspecified 'exceptional circumstances' and calling on planners to exercise practical and ethical judgment. Some exceptions in planning policy are simply justified and resolved by a balancing of positive impacts against the negative impacts of a proposal, with the latter usually having to be 'clearly outweighed' by the positive impacts or advantages of a development. **This exemplifies the utilitarian tradition – set out by Brady (1987) - that is often characteristic of planning.** We therefore find a spectrum of differing situations of when an exception may be made - from the tightly prescribed to the very open - and differing extents of justification for the making of an exception.

The fourth question is '*What is the relationship between this and other rules, including meta-rules of higher order and status?*' The 'meta-rules' that decision-makers can appeal to when required to interpret a more detailed rule might include that set out in the Framework at paragraph 7 – 'The purpose of the planning system is to contribute to the achievement of sustainable development'. This is supported by three objectives covering economic, social and environmental dimensions. These meta-rules play an important role in planning given that more detailed rules appear not to clearly state the reason for or purpose of the rule. The overarching purpose of the planning system being set as 'to contribute to the achievement of sustainable development' leads us to also reflect on the role of exceptions. Exceptions to planning 'rules' provides an insight into the operationalisation of 'sustainable development' in the planning system. The preceding review of national planning policy in England shows that it is the statement of strict rules, often designed with a protectionist intent, that most often include exceptions. The 'rules' to prioritise use of brownfield land, to restrict development in the Green Belt or open countryside, or not build on playing fields, are all designed to support the achievement of sustainable development. These are all rules to which there are defined exceptions, and they highlight the difficulty of using absolutist principles in the planning system without making some form of exception. The question of whether the pursuit of sustainable development may increasingly call for 'rules' to which there are no exceptions – and where certain 'rules' cannot be compromised or outweighed by other considerations - is a particularly interesting one.

The fifth and final question is '*What impact does the making of an exception to the rule have on the rule?*' So, for example, does the making of an exception 'test' or challenge the rule? Does the exception perhaps lead to the creation of new or altered rules? This is an empirical question and requires practical and applied research of the situations where decision-makers are invited to consider an exception to a prevailing 'rule'. This paper's early exploration of planning policy in England highlights several policy areas where this could be undertaken – development in Green Belts, houses in the open countryside seeking to secure an exception to the normal rules based on exceptional design quality, and so on. This work could explore both when exceptions are made, how they are justified, how decision-makers interpret 'exceptional circumstances', and

the ways in which an exception reflects back on the rule to which it is an exception. This research will also enable assessment of whether making exceptions to rules engenders further regulation in trying to manage the scope of the exception – in other words, exceptions promote increasing complexity of regulation and compliance (see Worthington, 2006, p.4). Additional research comparing lessons from policy rules with legal rules or rules of thumb could also be valuable as a way of exploring a ‘hierarchy’ of planning rules. There is also scope for wider, complementary research that explores the framing of exceptions in ‘regulatory’ planning systems, **building on the earlier work of Booth (1996)**, where decision-maker discretion is already more tightly constrained, and a less ‘flexible’ planning culture exists.

In conclusion, it is instructive to consider the concept of exceptions to rules in planning and the scope for the exercise of this form of discretion. Exceptions appear to be especially significant in planning, where engagement with sustainable development demands that some comparatively strict ‘rules’ about where development is and is not acceptable are written into planning policy. **It is in the arena of sustainable development and planning – and driving society more ambitiously to more sustainable outcomes - that exceptions may be especially useful in the task of rethinking regulation in planning.** Exceptions initially appear to offer a considerable narrowing down of decision-maker discretion in an otherwise characteristically flexible planning system – we expect exceptions to be rare, infrequent and uncommon. Yet the complexity of planning – and the very wide range of issues and considerations that are relevant to any planning decision – mean that planning rules always create the scope for an exception. **The challenge is ensuring that these exceptions are intentionally designed with the aim of delivering more socially, economically and environmentally sustainable places.**

References

- Booth, P. 1995. Zoning or discretionary action: certainty and responsiveness in implementing planning policy. *Journal of Planning Education and Research* 14(2) 103-112
- Booth, P. 1996. *Controlling Development. Certainty and discretion in Europe, the USA and Hong Kong.* London: Routledge.**
- Booth, P. 2003. *Planning by Consent. The origins and nature of British development control.* London: Routledge.
- Booth, P. 2007. The control of discretion: planning and the common-law tradition. *Planning Theory* 6(2) 127-145
- Brady, F.N. 1987. Rules for Making Exceptions to Rules. *Academy of Management Review*, 12(3) 436-444.
- Brännmark, J. 1999. Rules and Exceptions. *Theoria*, 65(2-3) 127-143
- Campbell, H. and Marshall, R. 2002. Utilitarianism’s Bad Breath? A Re-evaluation of the public interest justification for planning. *Planning Theory*, 1(2) 163-187

- Childs, S, Ginige, T. and Pateman, H. 2017. Deliberate Concealment. *International Journal of Law in the Built Environment*, 9(1) 32-62
- Davies, W. 2013. When is a market not a market? 'Exemption', 'externality' and 'exception' in the case of European state aid rules. *Theory, Culture and Society*, 30(2) 32-59
- Harris, N. 2019. Exceptional spaces for sustainable living: the regulation of One Planet Developments in the open countryside. *Planning Theory and Practice*, 20(1) 11-36
- Kertzer, J. 2015. Flouting and Scouting: Rules and Heroic Exceptions. *Law and Literature*, 27(3), 417-440.
- Mills, A. 2018. *Interpreting the NPPF. The New National Planning Policy Framework*. Bath Publishing.
- Ministry of Housing, Communities and Local Government. 2019. *National Planning Policy Framework*. London: MHCLG.
- Needham, B, Buitelaar, E. and Hartmann, T. 2019. *Planning, Law and Economics: the rules we make for using land*. Second edition. London: Routledge. RTPI Library Series.
- Radoynovska, N.M. 2018. Working within discretionary boundaries: allocative rules, exceptions, and the micro-foundations of inequ(al)ity. *Organization Studies*, 39(9) 1277-1298
- Rana, P. and Chhatre, A. 2015. Rules and exceptions: regulatory challenges to private tree felling in Northern India. *World Development*, 77(1), 143-153
- Saastamoinen, H. and White, G.M. 1995. *On Handling Exceptions*. Proceedings of the Conference on Organisational Computing Systems, Milpitas, California, USA, August 13-16, 1995.
- Schauer, F. 1991. Exceptions. *The University of Chicago Law Review*. 58(3), 871-899.
- Sturzaker, J. and Mell, I. 2016. *Green Belts: past, present, future?* London: Routledge.
- Tasan-Kok, T. 2008. Changing interpretations of 'flexibility' in the planning literature: from opportunism to creativity? *International Planning Studies*, 13(3), 183-195
- Twining, W. and Meiers, D. 2010. *How to Do Things with Rules*. Fifth edition. Cambridge: Cambridge University Press.
- Webb, B., Harris, N. and Smith, R. 2019. *Rural Housing Delivery in Wales: how effective is rural exception site policy?* Cardiff: Royal Town Planning Institute Cymru.
- Worthington, S. 2006. *Equity*. Oxford: Oxford University Press. Second edition.