



Minerals
Planning
Conference

The Minerals Planning Conference

Priorities for a New Government



Some Case Law Themes

and a little look ahead

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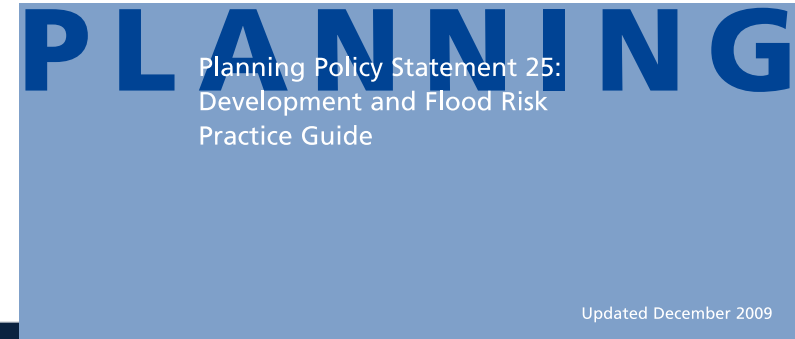
What's up?

- First, flood risk
- Next, s73 and how that works this week
- Third, some more on changing consents – applying *Hillside/Pilkington*
- Fourth, projects and cumulative effects
- Last, looking ahead to national development management policies
- And some Supreme Court judgments

- Flood Risk
- A policy we have had since 2009
- What is going on with the sequential test?



Planning shapes the places where people live and work and the country we live in. It plays a key role in supporting the Government's wider economic, social and environmental objectives and for sustainable communities




- It has been understood and explained by the courts for years
- See R (oao) EA v Tonbridge & Malling
- Or *Watermead* [2017] EWCA Civ 152

**R. (ON THE APPLICATION OF THE
ENVIRONMENT AGENCY) v TONBRIDGE,
MALLING BC**

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

(Lloyd-Jones J.): December 21, 2005¹

[2005] EWHC 3261(Admin); [2006] 2 P. & C.R. 29

 Basements; Flood risk; Planning applications; Planning policy guidance; Sequential assessment

H1 *Town and country planning—flood risk—interpretation of PPG25—planning application granted for sheltered apartments with habitable accommodation below ground level—Environment Agency objecting—Local Planning Authority granting planning permission—flood risk of land examined previously in Urban Capacity Study—whether on each planning application involving flood risk the sequential test should be applied—whether reconsideration of decision by Committee under threat of judicial review should persuade judge not to quash decision*

H2 The interested party had sought planning permission from the defendant to build 63 sheltered apartments on a site which lay within the indicative 100-year flood plain. The site tended to flood despite a flood defence system known as the Leigh Barrier. The interested party had been aware, prior to the planning application, that the claimant might object to sheltered apartments on the site. The application included flats at ground floor level with three higher storeys and excavation, below ground level, to provide a lower ground floor accommodation. The claimant

What is going on?!

- Two recent cases in the Court of Appeal
- Joined cases in the High Court
- Spate of relevant appeal decisions
- The PPG and the PINS Training Manual

Two issues are live

- First, what prompts the need for a sequential test?
- Second, if a sequential test is undertaken, which sites do you consider?
- There are many further and sub-issues

Substation Action [2024] EWCA Civ 12– CoA §43

- “The provisions of the Framework do not, however, require an applicant for development consent to demonstrate that there are no other sites reasonably available if any part of the development is to be located in an area where there is a risk of flooding from surface water.”

Wathen-Fayed [2023] EWHC 92

- And [2024] EWCA Civ 507
- Groundwater flooding
- In Flood Zone 1
- Whether sequential test needed, a matter of planning judgement

Wathen-Fayed in the CoA

- On all fours with *Sub-station Action*
- Pragmatic approach
- Flood Zone 1 is not enough to eliminate need for sequential test
- Other sources of flooding to be considered too
- Can take account of controls at site
- Take account of reasonable conditions

- PINS Training Manual
- Focus on *all sources of flooding*
- And *Even where a flood risk assessment shows the development can be made safe...the sequential test still needs to be satisfied*

Flood Risk

Updated to reflect 2023 Framework (NPPF)	Yes
<p>What's new since the last version</p> <p>Changes highlighted in yellow made 26 July 2023</p> <ul style="list-style-type: none"> • Updates to paragraph 20 regarding the Site-Specific FRA when considering future climate change 	
<p>Other recent updates made 18 April 2023</p> <ul style="list-style-type: none"> • Updates to paragraphs 8, 25, 27-30, 33-35 regarding the Sequential Test, based on revised PPG dated August 2022 and recent cases 	

- Lancaster
- “Whilst no changes to the Framework have taken place, the updated PPG is now explicit that the sequential test applies to all sources of flooding including areas at risk of surface water flooding.” para 25



The Planning Inspectorate

Appeal Decision

Inquiry held on 27, 28 and 29 February and 1, 5 and 8 March 2024

Site visit made on 27 February 2024

by Katie McDonald MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3 May 2024

Appeal Ref: APP/A2335/W/23/3326187

Land west of Highland Brow, Galgate, Lancaster LA2 0NF

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
- The appeal is made by Wainhomes (North West) Limited against the decision of Lancaster City Council.
- The application Ref is 22/01494/OUT.
- The development proposed is a residential development for up to 108 dwellings with access considered.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The proposal is for outline planning permission with access. An illustrative masterplan has been submitted and I have had regard to this so far as relevant.
3. The Council refused planning permission for several reasons. However, as set out in the Ecology¹, Planning² and Highways³ Statements of Common Ground (SoCG), those relating to the road network and highway safety, biodiversity, surface water flooding and infrastructure are now agreed between the Council

- The conclusions in the FRA take into account the benefits of mitigation works and therefore flood risk after development
- This is not consistent with guidance in the Framework or PPG
- Although the extent of the area shown to be at risk of flooding is relatively small, I am nonetheless of the view that a Sequential Test should have been carried out in this case.



The Planning Inspectorate

Appeal Decision

Hearing held on 8 February and 23 April 2024

Site visit made on 8 February 2024

by Anne Jordan BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 May 2024

Appeal Ref: APP/D2320/W/23/3329702

Land at Babylon Lane, Heath Charnock, Adlington, Chorley, PR6 9NP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
- The appeal is made by Adlington Land Limited against Chorley Borough Council.
- The application Ref is 23/00510/OUTMAJ.
- The development proposed is outline planning application for the proposed development of 40 dwellings, with associated new access, replacement of brass band building and associated parking, landscaping reserved, on land at Babylon Lane, Adlington, Chorley.

Decision

1. The appeal is dismissed and planning permission is refused.

Applications for costs

2. An application for costs against the Council was made by the appellant in advance of the hearing. This is the subject of a separate decision.

Preliminary Matters

3. The appeal relates to a failure of the Council to determine the application within the prescribed period. Following the submission of the appeal the Council's planning committee resolved that had the application been determined they would have resolved to refuse the application and outlined their concerns. I have taken this report into account in determining the appeal. I have also had regard to the concerns expressed by local residents.

4. The hearing took place on the 8th of February 2024. Before the decision was

- Lynchmead Farm/Mead Realisations
- Little Bushey Lane, Redrow Homes Ltd
- High Court February
- [2024] EWHC 279



The Planning Inspectorate

Appeal Decision

Inquiry held between 23-25 May 2023

Site visit made on 23 May 2023

by Guy Davies BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20th June 2023

Appeal Ref: APP/D0121/W/22/3313624

**Land at Lynchmead Farm, Ebdon Road, Wick St Lawrence,
Weston-super-Mare BS22 9NY**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
- The appeal is made by Mead Realisations Ltd against the decision of North Somerset Council.
- The application Ref 20/P/1579/OUT, dated 12 June 2020, was refused by notice dated 8 July 2022.
- The development proposed is an outline planning application (with all matters reserved except access) for a residential development of up to 75 dwellings and associated infrastructure.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application is made in outline with all detailed matters reserved for later consideration other than for access. A layout plan has been included but this is for illustrative purposes only. It was confirmed at the inquiry that access relates to the two junctions proposed with the Ebdon Road and their associated geometry. It does not extend to the internal roadways shown on the illustrative layout plan.
3. Amended location and access plans were submitted by the appellant, but subsequently withdrawn. I have therefore determined the appeal based on the plans on which the Council made its decision.

4. Two legal undertakings have been submitted with the appeal. I comment on



Reasonably available

- Para. 028 PPG
- Suitable location for the type of development
- Reasonable prospect available to be developed at point in time envisaged
- Could be series of smaller sites
- Could be part of larger site
- Do not need to be in applicant's ownership
- 5 YLS is irrelevant


Can I change that? – s73

- S73 – application for planning permission without complying with conditions
- Not a change to description of development
- If conditions fundamentally inconsistent with desc. dev, then 🗨️

Can I change that? – s73

- Does s.73 extend to:
 - minor material amendments ?
 - non-fundamental variations ?
 - Any amendment, so long as no conflict with description of development ?
- Cf. s.96A (non-material amendments)

Can I change that? – s73

- *Armstrong* [2023] EWHC 176
– change to nature of development, said Cornwall Council
- Appeal decision quashed because s73 is not restricted to minor amendment
- 



Can I change that? – s73

- Government updates the PPG -

“In contrast to section 96A, an application made under section 73 of the Town and Country Planning Act 1990 can be used to make a material amendment by varying or removing conditions associated with a planning permission. There is no statutory limit on the degree of change permissible to conditions under s73, but the change must only relate to conditions and not to the operative part of the permission.”

Can I change that? – s73

- But then...
- *Fiske* [2023] EWHC 2221 – removing sub-station which was in the description
- Permission quashed
- Also held that cannot result in fundamental alteration to the permission as a whole

Can I change that? – *Hillside*, a reminder [3]

- Planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible;
- The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole;
- What must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms;
- Mere incompatibility with the terms of another, implemented, permission does not mean that a permission which is capable of being implemented is of no effect;

Can I change that? – back to Mrs Fiske [4]

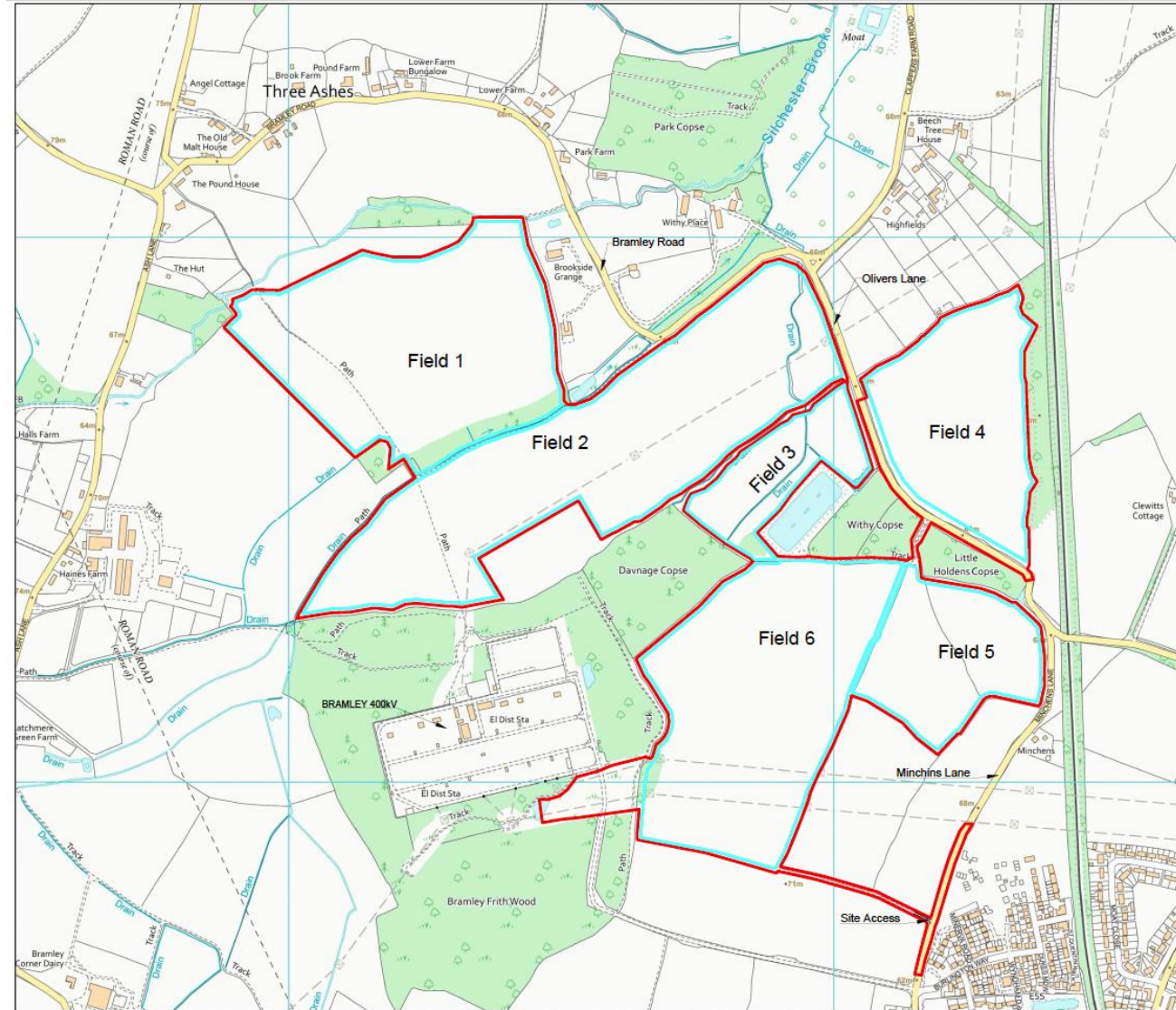
- In separate litigation related to the same solar farm, Mrs Fiske went to the CoA – [2023] EWCA Civ 1495
- On this occasion, an incompatibility/*Pilkington/Hillside* argument
- It is for the developer to choose which scheme to develop, or none
- There was nothing unlawful in the incompatibility

Can I change that? – *Dennis* [5]

- *Dennis* [2024] EWHC 57 (Admin)
- Outline for redevelopment of Aylesbury Estate, SE London
- s96A application for non-material amendment to insert ‘severable’ into the description of development
- Not non-material
- Reliance on *Finney* and limits on s73
- *Hillside* – PP for multiple units unlikely to be severable

Can I change that application at appeal? [1]

- *Bramley* [2023] EWHC 2842
- Challenge to large solar farm by local residents
- Scheme amended at appeal



Can I change that application at appeal? [2]

- Developer carried out consultation themselves
- C said unlawful
- High Court happy 😊
- Two tests from *Holborn Studios* [2020] EWHC 1509:
 - Substantial alteration?
 - Procedural fairness? (no need to comply with letter of DMPO)

“Project” [1]

- Repeated occurrence of the point recently:
 - *Ashchurch* and bridge to nowhere
 - *Sizewell*
 - *Llandaff* – large urban allocation and sewerage
- Following *Save Britain’s Heritage* [2011]; *Burridge* [2013]; *Wingfield* [2020] etc

“Project” [2]

- The 2017 Regulations refer to ‘project’ rather than ‘development’ – makes no difference.
- Identifying the project is fact specific
- Only unlawful if irrational or other public law error

“Project” [3]

- Owned or promoted by same person
- Simultaneous determination
- Functional interdependence
- Stand-alone projects
- Above not exhaustive

If not one project, maybe “cumulative”?

- Cumulative effects ≠ same project
- Assess as soon as sufficiently identifiable
- If too inchoate, can defer to later stage
- Only existing/approved projects?

Sizewell [2023] EWCA Civ 1517

Substation Action [2024] EWCA Civ 12

Looking ahead

- The scale of potential impact of national development management policies
- *Finch*
- *Manchester Ship Canal*

National Development Management Policies [1]

- By the turn of the year, will we see a further step on NDMPs?
- *Most fundamentally, we will need to identify and consult on the National Development Management Policies which will sit alongside plans to guide decision-making. **They will be derived from the policies set out currently in the National Planning Policy Framework, where these are intended to guide decision-making [2020 Policy Paper]***

National Development Management Policies [2]

- *It is our intention that National Development Management Policies would cover planning considerations that apply regularly in decision-making across England or significant parts of it, such as general policies for conserving heritage assets, and preventing inappropriate development in the Green Belt and areas of high flood risk. [NPPF Consultation]*

Supreme Court

- *Finch* and scope 3
 - Real impact?
 - Broader impact?
- Manchester Ship Canal