MINERALS – A LEGAL UPDATE

Past, present, future

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2042

- A story which started in 1981, or earlier
- It is now actively playing out in plan making and DM decisions
- The Derbyshire MWLP review and MPA position
- The legal position → see the note

While profoundly affecting future minerals planning for the next two decades, the default cessation condition is really a history of our planning law as applied to minerals.

In summary, all mineral planning permissions must include a condition which limits the duration of the winning and working of minerals. For pre-1982 permissions, the default cessation date will be 21st February 2042: s7 Town and Country Planning (Minerals) Act 1981; s72 and Sch 5 TCPA. Post-1982, if a planning authority fails to include such a condition, then a condition will be deemed to be for a period of no more than 60 years beginning with the date of the permission.

The following points support the proposition that there is no legal impediment to amending a planning condition which limits the duration of a minerals planning permission. This is so whether it was granted pre- or post-1982 because:

(i) The fact that Parliament used the existing scheme for the imposition of planning conditions to control cessation rather than to impose a statutory end date. That could have been done, but was not;

(ii) The absence of any prohibition on such amendment;

(iii) The express provision of discretion to vary the default period, either way. This means that there will always be a cessation condition and thus a long stop date, but that the decision maker is given the option to choose an alternative;

(iv) The right of appeal against the terms of the condition is retained. It would be pointless to have a right of appeal against something which cannot be changed;

(v) The right to make an application to develop land otherwise than in accordance with a planning condition has been retained (s73 of the 1990 Act). In contrast, where Parliament wishes to remove that option, it does so: see s73(5) in respect of time limits for commencement of development;

(vi) There is no case authority to the contrary;

(vii) There is no indication in a range of guidance notes and policy documents which suggests otherwise.

However, a planning authority may impose some other duration which may be shorter or longer than the default period (S72 and Sch 5 of the 1990 Act). That discretion is open to a planning authority whether it is granting planning permission on application, on an application under s73 of the 1990 Act (development without compliance with a planning condition), or on the determination of conditions under Sch 13 or Sch 14 of the Environment Act 1995.

GHG

- *Finch*, basics:
  - EIA is a procedural step in major applications
  - It produces an assessment, not a decision
  - *Finch* extends that assessment in relevant cases
- *Possible*
- *Boswell*
- *Swiss Senior Women*

R (Boswell) v Secretary of State for Energy Security and Net Zero
[2025] EWCA Civ 669

Facts: Secretary of State granted consent for a new gas-fired power station with carbon capture. The benefits outweighed the harm from GHG emissions. C argued this was inconsistent with IEMA guidance; EN-1 could not replace a proper assessment of effects.
Finding: SoS not obliged to apply the guidance. The significance of GHG emissions had been evaluated and EN-1 had been properly taken into account. EN-1 recognised that GHG emissions for such projects would be managed on an economy-wide basis. In EIA terms, the significance of the emissions were a matter of judgement for the decision-maker.
Practical point: GHG emissions are a matter which policy recognise as requiring a much broader than project-based assessment – economy wide. If there is a need to assess emissions (*Finch*) that does not bind the decision-maker as to the result.

R (Possible) v Secretary of State for Transport
[2025] EWHC 1101

Facts: The SoS published a net zero strategy for the UK aviation sector, called Jet Zero Strategy. C challenged the strategy on the basis that: there was not sufficient inquiry, inadequate consultation, airport expansions were not taken into account, failure to discharge the public sector equality duty.
Findings: The claim failed on all grounds. The judgment starts by recognising that the merits of a strategy are a matter for the elected government to decide, not judges.

Practical point: the species of environmental challenge which attacks high level policy is difficult to make out unless there is an underlying hard-edged error (see the Net Zero challenges by FoE and others).

Frack Free Balcombe Residents' Association v Secretary of State for Housing, Communities and Local Government
[2025] EWCA Civ 495

Facts: An Inspector granted consent for hydrocarbon exploration works. The site was in an Area of Outstanding Natural Beauty. C challenged that on the basis that: the decision incorrectly took account of the energy benefits of a future scheme, the grant may lead to a future application for hydraulic fracturing, alternatives and risk to surface water.

Findings: The difference between 'exploration and appraisal' and 'production' was recognised in national policy and the Inspector had not made the mistake of taking account of a future scheme. The purpose of the proposal was to establish whether a commercially viable resource was present at the location applied for. To consider other locations would have been inconsistent with that purpose. The environmental permitting regime was in place to address risks to water and the Inspector was entitled to rely on that.

Practical points: A good example of the need to focus on what has actually been sought on the application and not on extraneous issues, and not on what might be applied for later – that was for later. See further *Wealden DC v SoS* [2017] EWCA Civ 39 – no need to consider a whole administrative area, and always depends on the circumstances.

Wansbeck, Northumberland

- Dolerite for crushed rock
- 28 Ha site
- Soil disturbance issue raised – carbon release
  - Not part of EIA
  - §161 and amended §163 NPPF
- MPA consented to judgment

These notes were kindly prepared by Jessica Allen (No5 Chambers), the Claimant's counsel.

Facts

Northumberland County Council granted planning permission for a 28-hectare aggregate quarry to North East Concrete Ltd for "*Proposed extraction of 2.8 million tonnes of dolerite, importation of inert infill material and associated highway and landscape works*." The application site has a complex mosaic of habitats comprising of purple moor grass and rush pasture and lowland acid grassland, which are habitats of principal importance under section 41 of the Natural Environment and Rural Communities Act 2006.

Plantlife had objected to the application on grounds including that the carbon emissions from soil disturbance in the works to create the quarry and from habitat translocation activities had not been assessed in the Ecological Impact Assessment, which formed part of the EIA. Plantlife cited research estimating that acid grasslands can hold 90 tonnes of carbon soil per square metre and is sensitive to land use change. The claimant had also objected on the basis that the Environmental Statement had not assessed the carbon emissions from soil disturbance or indeed from any other source.

Grounds

Ground 1 – the Council failed to comply with its obligations under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 by failing to assess the likely climate effects of the Development and in particular the carbon emissions from soil disturbance.
Ground 2 – the Council failed to take any or any adequate account of the full range of potential climate change impacts of the Development.

Ground 3 – the Council failed to provide adequate reasons to support its conclusion that the Development did not conflict with Policy STP 4 of the Northumberland Local Plan 2016-2036.

Context

Ground 1 Plantlife had made detailed objections relying on scientific studies regarding the risk of carbon emissions from the disturbance of the soil type on site in particular. However there had in fact been no assessment of any carbon emissions at all, including from construction and operation.

Ground 2 was along the same lines but linked instead to the amended para. 161 and new para. 163 NPPF rather than the EIAR. There was no consideration of those changes anywhere in the Officer's report or post-NPPF addendum report. There was one paragraph in the OR which dealt with climate change where the Officer dealt with local policy on climate change and referenced only one benefit and none of the harms, whereas para. 161 NPPF now makes reference to "tak[ing] full account of all climate impacts" and para. 163 NPPF refers to "The need to mitigate and adapt to climate change should also be considered in preparing and assessing planning applications, taking into account the full range of potential climate change impacts."

Ground 3 followed from the above in that the cited policy indicated that support will be given to development proposals that "*help mitigate climate change*" and, in that connection, consideration would be given to how proposals "*protect and enhance habitats that provide important carbon sinks, including peat habitats and woodland*".

The Council consented on the first ground and considered that the second and third were not necessary to concede given the decision would now be redetermined.

Since we last met…

- As to practical utility for your development management work, I address only one case from the last 12 months: *Fiske* and s73

S73 TCPA 1990 – new permissions with different or no conditions: *Test Valley Borough Council v Fiske* [2024] EWCA Civ 1541

This case is about the ambit of the power under s.73 to impose conditions on the new permission, granted on application in respect of an extant permission to undertake that development without compliance with one or more of the conditions on the extant permission. The Court decided that s73 could not be used to create a new permission which was inconsistent with the operative part of the original permission. That did not mean that a s73 application could not result in a development which was different to that consented under the original permission.

What are the practical implications of this case?

This case is the latest in a series of cases about the scope of s73. Those cases have mixed up issues of whether the result of the application can be a different description of development (it cannot), whether development to be undertaken can be different, for example by reference to layout or amount of development (it can). This case clears away those overlapping issues and somewhat different statements of the law. It returns to an analysis of the statutory provision and makes it clear that:

(a) A s73 application, if granted, results in a new permission
(b) That new permission may be subject to new conditions, but not a condition which has the effect of changing the description of development
(c) That new permission may be subject to different or even not conditions

(d) The effect of those new conditions may be that the development which is permitted is materially different to that which was originally permitted, provided that such would not require a change to the description of development.

Those who work in development management thus have a clear statement about the scope for change to an existing permission. They know that it is possible to change the scheme, but not the description of development. A residential scheme for 'Construction of a replacement dwelling' could be subject to a s73 application to change the approved plans to a new design for the dwelling, but not to 'Construction of two dwellings'.

What did the court decide?

The factual background is a complex series of applications for solar arrays and sub-stations. The facts are relatively unimportant to the principles stated in the judgment. Rather, this is a key case which returns to a first-principles examination of the scope of the legislative regime.

The court returned to the legislation itself and to first principles. The purpose of s.73 is to enable an applicant to apply for relief from any or all of the conditions but the planning authority may not go back on their original decision to grant permission.

It does not follow that the distinction between the operative part and the conditions of a permission plays no part in determining the limits of the power under s.73 to grant a new permission. Given that s.73(2) only allows a LPA to consider the conditions which were imposed on a previous permission and impose different conditions from those contained in that decision, the principle that the LPA must not go back on "the original permission", must in this context refer to the operative part of that permission. The dichotomy between the operative part of the original permission and the conditions is inherent in the power conferred by s.73.

In the well-known case of *Bernard Wheatcroft* [1982] P&CR 233, the High Court held that a decision maker could impose a condition to allow development which was different to that applied for. But the Wheatcroft test forms no part of the legal limits of the power to impose conditions under s.73.

Where both the operative part and the conditions of a s.73 permission are consistent with the operative part of the earlier permission, there is no legal justification for treating a s.73 permission as ultra vires because its conditions would make a substantial or even a fundamental alteration to the development authorised by the permission read as a whole. The legislation does not contain any language to that effect.

Provided that a s.73 permission does not alter the operative part of an extant permission, there is neither principle nor case authority to suggest that conditions imposed under s. 73 may not have the effect of substantially or fundamentally altering the earlier planning permission. Rather, the restrictions upon the power to impose

conditions in a s.73 permission are those set out in s. 73 itself, the Newbury tests and the requirement that those conditions must not be inconsistent with the operative part of the earlier planning permission.

At the conference, the question was asked: *but, can you amend the description of development by use of a non-material amendment application?*

I gave two answers. First, if what is meant by that question, can you achieve the change to a planning permission which would be impermissible by a s73 application to make a substantive change to a development, the answer is no – that would be material. Secondly, if the question is in respect of an amendment which is genuinely to make a change which is non-material, then the answer is 'yes'. S96A does what s73 does not do which is permit amendments (which are non-material) to both a planning condition and to the description of development.

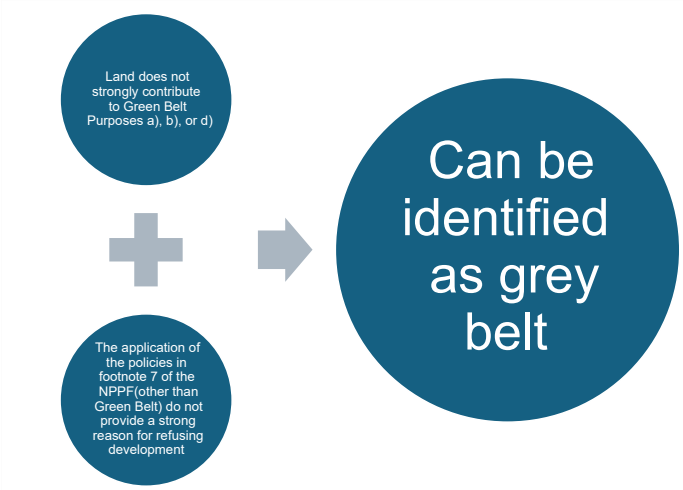

Figure 1. When can land be identified as grey belt

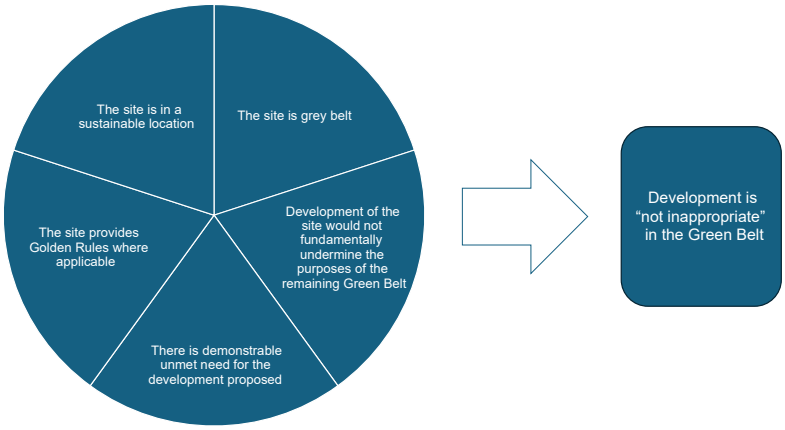

Figure 2. When is development in the Green Belt not inappropriate under paragraph 155 of the NPPF?

See the Walsall battery storage decision:

https://acp.planninginspectorate.gov.uk/ViewCase.aspx?caseid=3347424

The following are extracts from the Walsall decision at [19-22]. §155 NPPF:

"*The development of homes, commercial and other development in the Green Belt should also not be regarded as inappropriate where:*

a. the development would utilise grey belt land and would not fundamentally undermine the purposes (taken together) of the remaining GB across the area of the plan,

b. there is a demonstrable unmet need for the type of development proposed,

c. the development would be in a sustainable location, with particular reference to paragraphs 110 and 115 of this Framework, and

d. where applicable the development proposed meets the "Golden Rules" requirements set out in Framework paragraphs 156 and 157.

Criterion b and c above are subject to Footnotes 56 and 57 which do not apply to this development. The Glossary to the Framework defines Grey Belt as,

"...Grey Belt is defined as land in the GB comprising previously developed land (PDL) and/or 3 any other land that, in either case, does not strongly contribute to any of purposes (a), (b), or (d) in Framework paragraph 143. Grey Belt excludes land where the application of the policies relating to the areas or assets in Footnote 7 (other than GB) would provide a strong reason for refusing or restricting development.

To determine whether the site falls to be considered as Grey Belt, the site has to pass the test of whether the land, does not strongly contribute to Purpose a - to check the unrestricted sprawl of large built-up areas and Purpose b - to prevent neighbouring towns merging into one another listed in Framework paragraph 143.

The Framework does not contain a definition of what might constitute sprawl. Concluding on whether the development would conflict with Purpose a, depends on the relationship of the site with the large built-up area."

P&I Bill

- *Frack Free Balcome RA*
  - *"Dr Boswell's approach is, we think, a classic example of the misuse of judicial review in order to continue a campaign against a development (and the policy in a NPS) once a party has lost the argument on the planning merits. Such an approach is inimical to the scheme enacted by Parliament for the taking of decisions in the public interest."*
- *North Warwickshire DC*
- NSIP challenges and permission

North Warwickshire BC v Secretary of State for Transport
[2025] EWHC 1248 (Admin)

Facts: C refused to approve details of a tunnel portal on the basis that it was not as authorised by the hybrid bill. The Secretary of State approved the details on appeal.
Finding: The authorisation of the scheduled works in the High Speed Rail (London-West Midlands) Act 2017 was to be interpreted purposively – not every last detail was specified at the outset. This would include tunnels for the railway which was the object of the Act. The EIA was sufficient. They would not give rise to likely significant effects greater than those which had been assessed in the ES.
Practical point: Evaluate a change to a scheme by reference to its description and the environmental envelope which was assessed.

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