



Minerals
Planning
Conference

Legal Update

Richard Kimblin KC
Odette Chalaby

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LEGAL UPDATE - THE PERILS OF MINERALS DECISIONS AND HOW TO AVOID THEM



RICHARD KIMBLIN KC



ODETTE CHALABY

No5
BARRISTERS
CHAMBERS

THE PERILS

- Policies of restraint
- Assessing impacts
- Topics of particular public concern
- Time
- Decision makers – particularly elected decision makers

MINERALS PLANNING DECISIONS ARE:

- Usually concerned with locations where other forms of development fear to tread
- Associated with some inevitable effects
- Procedurally demanding
- Comparatively rare
- Sometimes contentious
- None of the above make lawful decisions any easier

SIX APPEAL DECISIONS

- Straitgate Farm, Devon
- Craig yr Hesg, Pontypridd
- Chard, Dorset
- Ware Park, Hertfordshire
- Hatfield, Hertfordshire
- Lea Castle, Worcestershire

- Straitgate Farm (2022)
 - Appeal A “extraction of up to 1.5 million tonnes of as raised sand and gravel, restoration to agricultural land... at Straitgate Farm”
 - Appeal B - importation of sand and gravel from Straitgate Farm to be processed at Hillhead Quarry.
 - Allocation (using the term broadly; includes ‘preferred area’)
 - Policy of restraint - no

- Craig yr Hesg (2022)
 - “...the extension of Craig yr Hesg Quarry via the phased extraction of some 10 million tonnes of Pennant Sandstone; extraction of the remaining reserves of some 5.7 million tonnes of sandstone within the existing quarry; retention of existing aggregate crushing screening plant”
 - Allocation
 - Policy of restraint - no

- Chard (2022)
 - “temporary planning permission for an extension to Chard Junction Quarry at Westford Park Farm for the winning and working of approximately 930,000 tonnes of sand and gravel with progressive restoration to agriculture and nature conservation, inclusive of a new internal haul road and the retention of the existing mineral processing facilities and silt lagoons for a period of seven years.”
 - Not allocated
 - Policy of restraint – AoNB
 - Complex landbank issues

- Ware Park (2019)
 - “the original application was for the extraction of 2.6Mt sand and gravel, but this was subsequently changed to 1.75Mt. It is the scheme for the extraction of 1.75Mt which was refused by HCC in determining the application and that is now the appeal scheme.” IR § 7
 - “a second scheme proposed by the appellants would omit Phase 4 and the stockpile area from the 1.75Mt scheme, and reduce the tonnage of sand and gravel extracted to 1.25 Mt.”
 - Not allocated
 - Policy of restraint – Green Belt
 - "no compelling local need for sand and gravel" § 430

- Hatfield (2022)
 - “a new quarry on land at the former Hatfield Aerodrome, including new access to the A1057, aggregate processing plant, concrete batching plant and other ancillary facilities, together with the importation of inert fill material to restore the mineral workings”
 - Allocated
 - Policy of restraint – Green Belt
 - 5.9 year landbank § 84

- Lea Castle (2023)
 - “The proposed development would involve the extraction of approximately 3 million tonnes of sand and gravel from two distinct areas separated by a bridleway that runs roughly north-south through the centre of the site. The western extraction area being approximately 12.5 hectares and the eastern area approximately 13.5 hectares”
 - A 4.14 year land bank 31/12/21; 5.74 31/12/22
 - Not allocated
 - Policy of restraint – Green Belt

POLICIES OF RESTRAINT

- Hatfield, Hertfordshire – Green Belt
- Ware Park, Hertfordshire – Green Belt
- Chard, Dorset – AoNB
- Lea Castle, Worcestershire – Green Belt

KEY GB ISSUES

- Host site – purposes
- Engineered landforms
- Built development
- Restoration landform

- Green Belt – Lea Castle
 - “It is clear from my site visit and from the evidence presented in the Inquiry that the local community recognise the contribution that the appeal site makes to the openness of the Green Belt.” [§59]
 - Extremely important spatial role
 - VSC not shown

- Green Belt – Ware Park [1]
 - “Paragraph 146 provides that mineral extraction and engineering operations are not inappropriate development in the Green Belt provided that they preserve its openness and do not conflict with the purposes of including land within it.”
 - Determining the tipping point would depend upon the particular circumstances, as a matter of fact and degree, but relevant considerations could include the siting, nature and scale of the operational development in its local context, along with its visual effects, duration and the reversibility of any adverse impact upon the openness and purposes of the Green Belt.[§363/4]

- Green Belt – Ware Park [2]
 - “I consider that the proposed development would exceed the paragraph 146 threshold for mineral extraction/engineering operations concerning the preservation of the openness of the Green Belt.”
[§370]

- Green Belt – Hatfield
 - “The omission of the CBP and setting back extraction in the LMH from the bromate plume would not result in a substantially different scheme to that considered by HCC when it refused the application.” §37
 - “The inclusion of the CBP would bring the proposal into conflict with MLP Policy 11 concerning unacceptable cumulative impacts. The appeal scheme does not accord with the provisions of the development plan taken as a whole. Other material considerations here include the SPG and the NPPF. The appeal scheme would reasonably accord with the key principles of the SPG, but it would conflict with national Green Belt policy.” §102

- Green Belt – *Openness, encroachment and visual effects*
 - The line of cases: *Timmins; Turner; Sam Smith*
 - Openness as a visual effect
 - What about ‘*Purposes*’, and encroachment in §137c NPPF?
 - If development is in the GB, but not ‘countryside’, can there be encroachment? – apparently, ‘no’ – *Link Park Heathrow* [2023] EWHC 1356 (Admin)
 - Visual effects are covered by assessment of ‘openness’; visual effect from within the countryside not an additional GB harm by reason of encroachment

GB – SOME TAKE AWAYS

- Visual effects and openness - effects of *Sam Smith*
- Importance of working plans
- Built development and ‘tipping points’
- Approach it like a DCO – no change at appeal
- Consider a ‘sector’ approach to revising GB for minerals

THE DEVELOPMENT PLAN

- Plan support:
 - Straitgate Farm, Devon - allowed
 - Craig yr Hesg, Pontypridd – allowed
 - Hatfield, Hertfordshire - dismissed
- Not allocated/preferred
 - Ware Park, Hertfordshire - dismissed
 - Chard, Dorset - dismissed
 - Lea Castle, Worcestershire - dismissed

TOPICS OF PARTICULAR CONCERN

- Hydrogeology
- RCS
- Climate change

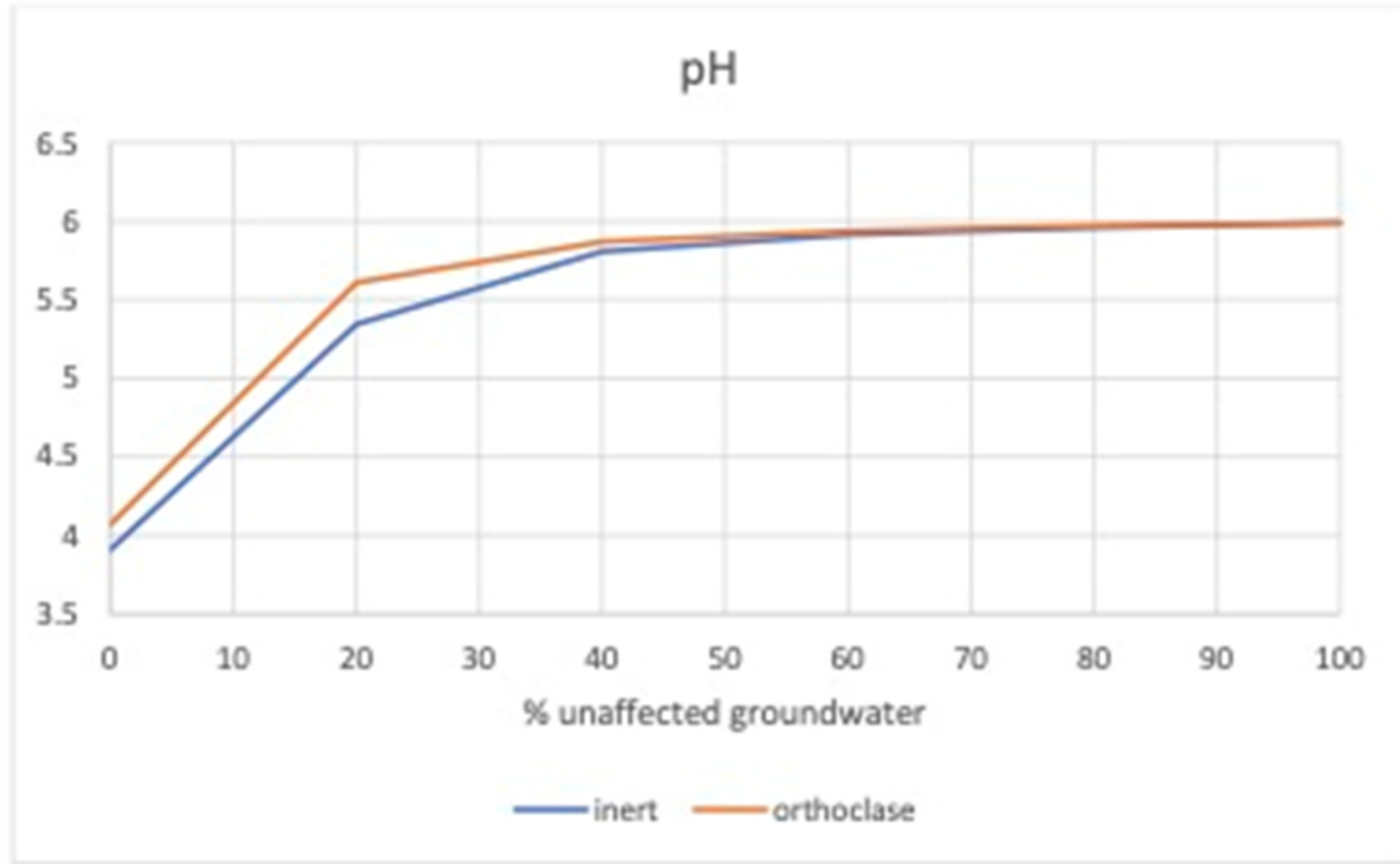
HYDROGEOLOGY

- Straitgate Farm, Devon – complex; issue overcome
- Hatfield, Hertfordshire – complex; issue overcome
- Ware Park, Hertfordshire – simple; unacceptable effect
- Lea Castle, Worcestershire – simple; issue overcome

- Hydrogeology [1]
 - “I have placed considerable weight on the views of the Environment Agency with regard to the hydrological and hydrogeological matters. Subject to the imposition of appropriate planning conditions, I am satisfied that the concerns can be adequately controlled to the extent that there would unlikely be a detrimental impact on such matters.” – *Lea Castle §182*

- Hydrogeology [2]
 - “The EA notes that the appeal site lies in a highly sensitive groundwater area, very close to an abstraction for a public water supply, and that it is essential that there is no harm to the water environment as a result of the development. The EA was aware of local concerns about the roughness of the chalk surface, but concluded that planning permission could be granted subject to the imposition of planning conditions.” Ware Park §409

- Hydrogeology [3]
 - “I do not consider that it would be possible on the information currently available to devise a condition that would appropriately address this matter. Taking into account the intended pollution control measures dealing with fuel storage and refuelling plant in a contained area, I consider that the risk of contaminating groundwater would give rise to an adverse effect of moderate significance, which should be given substantial weight because of the implications for a public water supply.” Ware Park §419



- RCS – *respirable crystalline silica*
 - “There is no UK established or recommended ambient air quality standard for RCS nor is there any recommended methodology for the assessment for potential RCS emissions to ambient air or potential off-site impacts. The Health and Safety Executive advice 34 is that ‘No cases of silicosis have been documented among members of the general public in Great Britain, indicating that environmental exposures to silica dust are not sufficiently high to cause this occupational disease’.”

Lea Castle §114

- Climate Change
 - Growing concern for Committees and public
 - Local "climate emergency" declarations
 - LURB proposes new section in PCPA 2004
 - *"The minerals and waste plan must be designed to secure that minerals and waste development in the relevant area contributes to the mitigation of, and adaptation to, climate change."*
 - NPPF consultation – carbon assessments for all development?

- Climate Change
 - Minerals must be won somewhere – but perils remain
 - Site-specific impacts
 - Haulage / road transport
 - "Minimise" emissions by design
 - Green energy
 - Green infrastructure

- "...we are satisfied that a condition requiring the use of hydrotreated vegetable oil as fuel would meet the tests in the Framework. On this basis the proposal would accord with Policy M20 of the DMP which requires development to contribute to the achievement of sustainable development, climate change resilience and mitigation, including through minimising the atmospheric release of greenhouse gases"

Straitgate at § 138

- Climate Change: *Finch* & Scope 3
 - ES must describe likely significant direct and indirect effects on climate, including GHG emissions
 - Typically, "scope 1" (vehicles) & "scope 2" (purchased energy)
 - *Finch*: why not "scope 3" emissions from downstream use of oil extracted?

- *Finch & Scope 3*

- *"... whether a particular impact on the environment is truly a "likely significant [effect]" of the proposed development ... is ultimately a matter of fact and evaluative judgment for the authority"*

Lindblom LJ, Court of Appeal

- *"... the outcome of Finch in the Court of Appeal raises serious concerns about the ability of the EIA regime to capture climate impacts"*

Office for Environmental Protection, Supreme Court

ASSESSING IMPACTS

- EU Directives since 2021 no direct status in English law
- Time to do things differently? "streamlined" "simpler"
- Retained EU Law Bill
 - "Sunset clause" recently abandoned
 - EIA / SEA / Habitats regs staying for now

ASSESSING IMPACTS

- Habitats Regulations Assessment – an uncertain future
 - 2020 Planning for the future: "*a new system*"
 - 2022 Nature Recovery Green Paper: desire "*to fundamentally change*" HRA
 - 2023 NSIP Action Plan: Government "*reviewing*" framework

ASSESSING IMPACTS

- Environmental Outcome Reports – the new EIA
 - LURB powers to make new regs, subject to recent consultation
 - Drawn out process, a national election en route
 - England only

- EORs – practical differences with EIA
 - Screening: tighter, focus on sensitive sites/species?
 - Scoping: everything to be scoped in?
 - Reporting: against defined outcomes, using indicators
 - No climate change outcome

- EORs – big questions
 - Monitoring and enforcement: who, how?
 - Future relationship with BNG
 - Data: funding, collection, management

ASSESSING IMPACTS

- Future fusion of habitats and environmental assessment regimes?
- clause 154 of LURB power for EORs to satisfy HRA requirements

TIME

- The development plan, and;
- Material considerations.
- Both are dynamic,
- As is the landbank – see Lea Castle and Hertfordshire,
- As is national policy – see climate change,
- As is the environmental baseline,
- As are the interests and leaning of elected members

DECISION MAKERS

- Pre-application discussions – who with?
- Minerals planning as:
 - An evaluative process – see the LVIA conclusions at Lea Castle
 - A technical process – see the amenity conclusions
 - A political process – CYH
- Know your decision maker - the importance of informed Governments in England and Wales
- The overarching importance of effective minerals plans