In his Post Case Management Conference Note, the Inspector identifies that for relevant appeal decisions and judgments “each must be prefaced with a note explaining the relevance of the Decision to the issues arising in the current Inquiry case, together with the propositions relied on, with the relevant paragraphs flagged up”.

Explanation Note:

CD12.30 - Judgment, Mr Justice Burton Leicestershire County Council v Secretary of State for Communities and Local Government and UK Coal Mining Limited [2016] EWHC 1427 (Admin)

Appellant’s Note

The cumulative impact assessment at Appendix 2 to my proof has been prepared on the basis of the approach set out by Mr Justice Burton in his judgement.

Worcestershire County Council’s Note

I do not refer specifically to the Judgement within my proof, however at paragraph 41, a four stage overview that was defined as appropriate to review cumulative impacts of development, including impacts that on their own may not be objectionable but as one of “one, two, three of four features” that may be close to objectionable, in their totality,

Strand
London WC2

Date: Monday, 11 June 2007

B E F O R E:

MR JUSTICE BURTON

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THE QUEEN ON THE APPLICATION OF LEICESTERSHIRE COUNTY COUNCIL

(CLAIMANT)

-v-

development unless the proposal would meet the following tests:

(i). is the proposal environmentally acceptable, or can it be made so by planning conditions or obligations?

(ii). if not, does it provide local or community benefits which clearly outweigh the likely impacts to justify the grant of planning permission?"

5. There is thus a presumption against development; for the purpose of considering whether that presumption is rebutted, the two limbs of the test have loosely been referred to as costs or detriments on the one hand and benefits on the other.

6. The other policy document is Mineral Planning Statement 2 (MPS2), issued in March 2005. This post-dated the refusal of permission by the MPA, but antedated the inquiry. Central to our consideration has been paragraph 12 of MPS2:

> "With respect to an individual site, the effect of all relevant impacts (ie of noise, dust, traffic, on landscape etc.) should be considered objectively. Impacts that are acceptable individually should not be regarded as unacceptable in combination without a proper assessment."

7. The conclusion by the MPA in refusing planning permission was recorded by the Inspector at paragraph 7.2 of her report as follows:

> "7.2 The reason for refusal is concise. It refers to an unacceptable cumulative environmental impact adversely affecting those who live, work and pursue leisure activities in the area, 'as a result of the

"14.48. The site is in a quiet rural area and those living there are particularly concerned at the likelihood of disturbing and unacceptable

environment or wider area of mineral working can reasonably be expected to tolerate over a particular or proposed period."

13. I have read the MPA's reason for refusal, to which I refer. In support of its case it made submissions, and of course referred to Mr Hunt's evidence, to which I will return, and at paragraph 7.109 the concise submissions of the MPA, as they remained before the Inspector just as they had been in their original conclusion, are set out as follows:

18. He then addresses whether the adverse impacts of the appeal proposals would be unacceptable because of the cumulative impacts which might occur because of other developments taking place, and he ruled that out, and he referred to the earlier history. Then he concluded at 10.2.12:

> "Taking all of this into account, I consider that the cumulative impacts of the proposals are unacceptable under the first test of LLRSP Resource Management Policy 11 [which is the 'costs/detriment' test]."

19. Those paragraphs of the proof, no doubt supplemented in cross-examination, were addressed in submissions to the inquiry by the Interested Party, as summarised by the Inspector in the following paragraphs of her report:

> *"Combined effects of the appeal scheme*
>
> 8.143 The starting point for consideration of this category of cumulative impact must be the recognition that all surface mineral workings have effects which occur together. However no one is suggesting that there is any policy embargo on surface mineral working in general or surface mineral working of coal in particular. Therefore the mere fact that effects of a proposal for such working will be experienced in combination cannot be sufficient to justify refusal and there would have to be something more. There must, in short, be something out of the ordinary that elevates impacts that are acceptable on an individual basis into an unacceptable cumulative impact when experienced together.
>
> 8.144 This is made explicit by the very recent guidance of MPS2 at [paragraph] 12 [which she then sets out].
>
> 8.145 The guidance offers no indication as to how the *proper assessment* [which is plainly a reference to those words as used in paragraph 12 of MPS2, and in this judgment I shall put them in italics wherever they appear] should be carried out. It must, however, be the case that the

> together with the other minor impacts be environmentally unacceptable and tip the balance back firmly against the proposal? There is nothing about the combination of impacts that is unusual [she thus accepts the submission made to her by the Interested Party]. In the absence of any evidence to indicate that a proper assessment has been carried out or how it might be done, it is my judgment that the combined effect of the multiple environmental impacts is not such as to tip the balance back against the proposal."

25. Consequently her conclusion in 14.134 is that:

> "... subject to the imposition of appropriate conditions and the provisions of the S106, the proposal meets the requirements of [the relevant policy] in that its adverse environmental impact, including the potential for cumulative impact, can be kept to an acceptable level."

26. The submissions of Mr Cahill in his skeleton argument are summarised conveniently in paragraph 36 of his skeleton, where he says this:

> "It is submitted that pursuant to her own guidance in MPG 3 paras 7 and 8 the correct approach should have been
>
> (1) to acknowledge that although the appeal constituted a re-hearing pursuant to section 79 of TCPA 1990 (or a “fresh look”) [the reference to which I will come back to], the fact that the MPA had refused the application having concluded that it had unacceptable environmental effects was an important material consideration in the re-hearing (the reference in section 79(1) that the Secretary of State '... may deal with the application as if it had been made to him in the first place' is permissory ... and does not create a statutory obligation to ignore the MPA's conclusion on acceptability of environmental impacts which the Secretary of State's policy in MPG 3 now requires);
>
> (ii) to acknowledge that this important material consideration constituted a rebuttable presumption that the MPA's assessment of the environmental acceptability was correct;
>
> and
>
> (iii) if she believed the presumption had been rebutted she should give clear and adequate reasons as to why it had been rebutted and why the MPA's assessment should not prevail."

27. Those submissions were not really in issue between the parties. As to “fresh look”, the Inspector did say at paragraph 14.14 of her report the following:

> "Submissions were made as to the interpretation to be placed on the last part of MPG3 [paragraph] 8 and that the MPA's assessment of environmental acceptability should normally prevail. That is however

> qualified by being 'subject always ... to normal rights of appeal' which provide for a fresh look to be taken at a proposal if permission is refused."

28. However, it is quite plain that the Inspector did not simply give a ‘fresh look’ ignoring the conclusions of the MPA, because they were put before her as submissions based not only upon the evidence of Mr Hunt, but upon the case which the MPA, through Mr Cahill, sought to uphold as the appropriate way of looking at the planning permission application, and it is totally apparent that the Inspector paid full regard to those submissions, as I shall describe.

29. It is also apparent that the Inspector recognised that there was a presumption against the mining development. She said as much in paragraph 14.171, when she concluded:

> "I find that the presumption against open cast working in MPG3 ... is outweighed."

That was repeated and recognised by the Defendant in paragraph 46 of the decision letter.

30. It is also accepted and common ground that reasons are required in planning decisions, not only as in other administrative decisions, but perhaps even more so for the reasons clearly, fully and bindingly set out in South Buckinghamshire County Council v Porter (No 2) [2004] 1 WLR 1953, particularly per Lord Brown at paragraph 36, and in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153, particularly per Lord Bridge. That is not only for ordinary purposes whereby a person in the position of an application for planning permission can know why such an application has been refused, but also so that in the circumstance of an appeal being allowed against an original decision of a planning authority the planning authority should know in the future the reason why its decision has been overturned, so as to be able to take into account the appropriate approach in its decision on future applications.

31. I drew to the attention of the parties a particular example in the planning area of the need for and importance of the giving of reasons by an Inspector in Dunster Properties Limited v First Secretary of State [2007] EWCA Civ 236; [2007] PLSCS 40. That was a case where a second planning Inspector differed in view from a first planning Inspector, but did not give adequate reasons as to why he did so, and the Court of Appeal concluded that it was necessary to show why there was a difference from the first decision and on what basis. It appeared to me that it was a similar situation here, where there is the paramount decision of the MPA which is being differed from by an Inspector, namely that it is necessary for the Inspector to give good reasons why such decision was being differed from, particularly where it involves the rebutting of a presumption against such development.

32. Once again the parties did not differ in their approach to the applicability of Dunster. Indeed, it is apparent that, insofar as the MPA had a view about noise, from which the Inspector differed, giving full reasons, Mr Cahill did not object, indeed he concluded that the Inspector had approached the position in the correct way, and no challenge, as I have earlier indicated, was sought to be made in respect of it. It is to that position,

38. Effectively, Mr Cahill set this within the kind of criticisms such as were enunciated by Lord Bridge in Save Britain's Heritage, namely that they (the MPA) were left not knowing what they had done wrong or not knowing what they should do for the future.

39. It is obviously a concern to the court if it is said by a Council that, if an appeal is upheld by an Inspector, it is left not knowing what it did wrong. If indeed this were a case in which some criticism was being made of the Council on the basis of an allegation that the assessment was not *proper* in any sense -- that either it was improper or negligent or did not take sufficient care -- then I could entirely understand and sympathise with that approach. But it is quite plain to me what was meant by the Inspector in her conclusion, as she accepted was being submitted to her by the Interested Party, namely that all that the MPA's assessment was was the subject matter of an assertion: see paragraph 14.130 onwards in which the
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50. MR CAHILL: My Lord, I make an application which your Lordship may or may not

60. MR JUSTICE BURTON: But it is 21 days from today and not from the date when you get your transcript. So in effect you will have 1