

Procedural Fairness

Statements of Common Ground

Yaaser Vanderman

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“Procedural fairness and regularity are of the indispensable essence of liberty”

- Robert Jackson (US Supreme Court Judge)

Preston New Road Action Group v SSCLG and Cuadrilla
[2017] Env LR 33

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Lessons to Learn



SPREAD THE WORD!

Statements of Common Ground



- Rule 14 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000

“14. — Statement of Common Ground

- (1) The local planning authority and the applicant shall—
 - (a) together prepare an agreed statement of common ground; and
 - (b) ensure that the Secretary of State receives it and that any statutory party receives a copy of it not within 6 weeks of the starting date.

...”

Statements of Common Ground

- Rule 15 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000

“15 – Procedure at inquiry

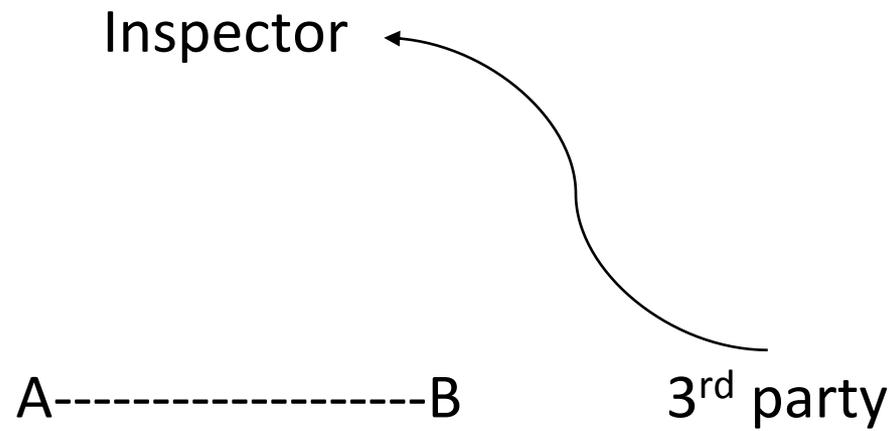
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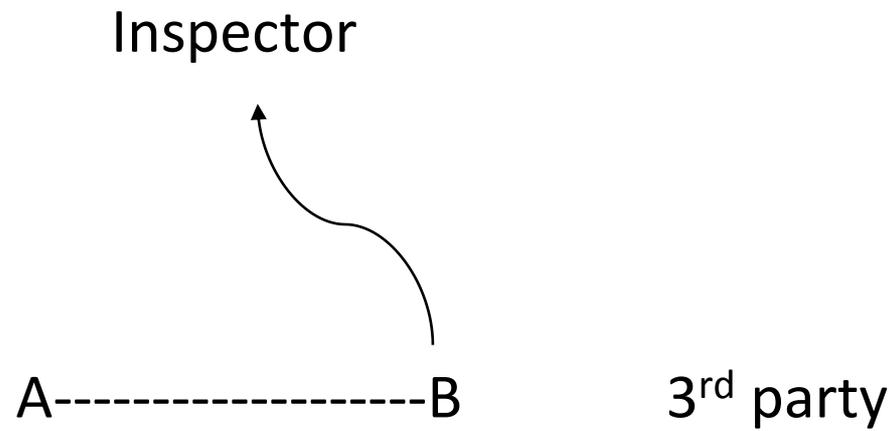
2) At the start of the inquiry the inspector shall identify what are, in his opinion, the main issues to be considered at the inquiry and any matters on which he requires further explanation from the persons entitled or permitted to appear.

...”

General Principles

- Distillation of principles in *Hopkins Development Ltd v SSCLG* [2014] EWCA 470, para 62 (Jackson LJ) – followed in *Engbers v SSCLG* [2016] EWCA Civ 1183:
 - All parties entitled to know case to meet and reasonable opp to respond;
 - Material prejudice may be good ground for quashing;
 - Rules not a complete code for achieving procedural fairness;
 - Inspector does not have to give regular updates about thinking;
 - Inspector will consider sig issues raised by 3rd parties; and,
 - If main party resiles from SOCG, other party must have reasonable opp to deal with issue.







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- Policy EP11 (Fylde Local Plan)

“New development in rural areas should be sited in keeping with the distinct landscape character types identified in the landscape strategy for Lancashire and the characteristic landscape features defined in Policy EP10. Development must be of a high standard of design. Matters of scale, features and building materials should reflect the local vernacular style.” (emphasis added)

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6. PLANNING POLICY CONTEXT

6.1 This section sets out the principal planning policies which the Parties agree should be taken into account in the determination of this appeal.

6.2 Policy considerations can be separated into the following categories:

6.2.1 National policy, comprising:

- (A) National Planning Policy Framework ("NPPF") (Core Document 48.1);
- (B) National Planning Practice Guidance ("NPPG") (Core Document 48.2); and
- (C) Overarching National Policy Statement for Energy ("EN1"), July 2011 (Core Document 48.4).

6.2.2 The Development Plan comprising:

- (A) Joint Lancashire Minerals and Waste Development Framework Core Strategy Development Plan Document, February 2000 ("JLMMWDF") (Core Document 48.8);
- (B) Joint Lancashire Site Allocation and Development Management Policies DP2CD, September 2013 (Core Document 48.9); and
- (C) Fylde Borough Local Plan, May 2003 (Core Document 48.10).

6.2.3 Since the refusal of the Exploration Application by the DCC, the Secretary of State for Energy and Climate Change (the Rt Hon Amber Rudd MP) made a written statement to the House of Commons on 16 September 2015 titled 'State Gas and Oil Policy' ("the Statement") (Document 48.5). It replaces the previous DECC and DCLG State Gas and Oil Policy Statement published on 15 August 2015 (Core Document 48.3).

6.2.4 The Statement sets out a range of measures to avoid unnecessary delay and uncertainty in the planning decision making process.

6.3 NPPF

6.3.1 The NPPF sets out the Government's overarching planning policies and is a material consideration when determining planning applications. The Parties agree that the following paragraphs of the NPPF are relevant to determination of the appeal:

- (A) Paragraphs 11 – 14: The presumption in favour of sustainable development;
- (B) Paragraph 17: Core planning principles;
- (C) Paragraph 32: Transport criteria for decision making;
- (D) Paragraphs 58 – 66: Requiring good design;
- (E) Paragraph 108: Flood risk;
- (F) Paragraph 103: Requirements for flood risk sequential test;
- (G) Paragraph 109: Conserving and enhancing the natural environment;
- (H) Paragraphs 116 – 125: Conserving and enhancing biodiversity; and
- (I) Paragraphs 142 – 144, 147 – 148: Facilitating the sustainable use of minerals.

6.4 NPPG

6.4.1 The NPPG includes policy on mineral extraction, which includes section 9 on planning for hydrocarbon extraction.

6.5 Overarching National Policy Statement for Energy (EN1), July 2011

6.5.1 EN1 advises of an urgent need to increase the security of the UK's energy supply, in order to avoid the economic and social risks of an energy shortage. It identifies gas as the cleanest and most reliable fossil fuel and recognises that gas will:

"continue to play an important role in the electricity sector - providing vital flexibility to support an increasing amount of low-carbon generation and to maintain security of supply" (page 30, paragraph 3.2.2).

6.5.2 The proposed solution is therefore to deliver a diverse range of energy infrastructure with an important and potentially increasing role for gas generation.

6.5.3 EN1 recognises that the "development of new energy infrastructure, at the scale and speed required to meet the current and future need, is likely to have some negative effects on „landscape/visual amenity" which will sometimes be hard to mitigate (para 5, paragraph 1.7.2).

6.5.4 It advises that decision makers should consider whether these effects are reversible and recommends that effects are minimised through appropriate siting and design, and use of suitable materials. The statement also recognises that reducing the scale of energy infrastructure may result in significant operational constraints.

6.5.5 In addition, the Written Statement on State Gas/Oil Policy made to the House of Commons by the Secretary of State for Energy and Climate Change (the Rt Hon Amber Rudd MP) on 16 September 2015 will be a material consideration in relation to determination of this appeal (Core Document 48.6).

6.6 Local Development Plan

6.6.1 The Development Plan for the site is made up of the LMWDF, the Joint Lancashire Minerals and Waste Local Plan - Site Allocation and Development Management Policies - Part One and the Fylde Borough Local Plan. The following policies were relevant to consideration of the Exploration Application:

6.6.2 Joint Lancashire Minerals and Waste Development Framework Core Strategy Development Plan Document, February 2000

- (A) Policy CS1: Safeguarding Lancashire's Mineral Resources; and
- (B) Policy CS5: Achieving Sustainable Minerals Production.

6.6.3 Joint Lancashire Site Allocation and Development Management Policies, September 2013

- (A) Policy NPPF1: Presumption in favour of sustainable development; and
- (B) Policy DM2: Development Management

6.6.4 Fylde Borough Local Plan, May 2003

- (A) Policy SP2: Development in countryside areas;
- (B) Policy EP1: Building design and landscape character;
- (C) Policy EP12: Conservation of trees and woodlands;
- (D) Policy EP15: European nature conservation sites;
- (E) Policy EP16: National nature reserves;
- (F) Policy EP17: Biological heritage sites;
- (G) Policy EP23: Pollution of surface water;
- (H) Policy EP24: Pollution of groundwater;
- (I) Policy EP28: Air pollution;
- (J) Policy EP27: Noise pollution; and
- (K) Policy EP28: Light pollution.

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Preston New Road - Exploration Works Appeal
Statement of Case/Reasons

D 635

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Preston New Road - Exploration Works Appeal
Statement of Case/Reasons

D 636

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Preston New Road - Exploration Works Appeal
Statement of Case/Reasons

D 637

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- Cuadrilla: not relevant
- Inspector: “*Policy EP11 cannot sensibly be applied to these schemes*”
- Secretary of State Decision Letter: Agreed

PNRAG's argument in High Court

- Change came out of the blue
- No opp to make submissions
- Limited resources: barrister could not be there full-time

Secretary of State's and Cuadrilla's argument



Cuadrilla's position clear from:

- Cuadrilla's expert's proof of evidence;
- Cross-examination of Cuadrilla's expert by PNRAG;
- Cross-examination of Cuadrilla's expert by Council
- Cuadrilla's cross-examination of Council's witness
- Cuadrilla's closing submissions

Dove J's judgment



- *Hopkins Development Ltd*, paras 84-90 (Beatson LJ)

“88. The question is thus whether Hopkins had a reasonable opportunity to put its case on sustainability and character and development at the inquiry...

...

90. The authorities on planning inquiries considered by my Lord show that in this context what is needed is knowledge of the issues in fact before the decision-maker, the Inspector, and an opportunity to adduce evidence and make submissions on those issues”

Dove J's judgment



Relied on:

- Cuadrilla's expert's proof of evidence; and,
- Cross-examination of Cuadrilla's expert by PNRAG

"110...Within that exchange Mr Smith makes plain his position that the policy was principally aimed at new permanent built development and not mineral development, and counsel on behalf of the first claimant brought Mr Smith's attention back to the presence of that policy within the SOCG as a relevant policy. Thus, embedded within this exchange, is clearly an issue as to the relevance and applicability of Policy EP 11. That was a live issue and one with which this cross-examination engaged. When the questions are asked as to whether or not the first claimant knew that there was an issue about the relevance and applicability of EP11 and had an opportunity to provide evidence and submissions on that issue it is absolutely clear in my view that on all counts they did." (emphasis added)

Dove J's judgment



- Relevance of closing submissions?
- “112...In my view there are very good reasons, in particular the interests of transparency and the need to secure closure of the proceedings, for the practice of the Planning Inspectorate not to receive unsolicited further submissions after the close of a public inquiry... I have no doubt that had the first claimant sought to provide further closing submissions after the close of the inquiry to the Inspector they would have been rightly refused.” (emphasis added)

Points to take away

- Importance of Statement of Common Ground;
- Deviations can be challenged by all parties;
- Review at regular intervals;
- SPREAD THE WORD; and,
- Closing submissions will not cure.

WATCH THIS SPACE!

