Case Name: *Frack Free Balcombe Residents Association v Secretary of State for Levelling Up, Housing and Communities & Ors* [2023] EWHC 2548 (Admin) (13 October 2023)

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Commentary:
This was an unsuccessful statutory challenge which sought to quash the decision of an Inspector to grant planning permission for hydrocarbon appraisal and exploration in Lower Stumble, Balcombe (an area of AONB). In bringing their claim, the Claimant relied on the widely-reported "bridge to nowhere" decision in Ashchurch Rural Parish Council v Tewksbury BC [2023] EWCA Civ 101 ("Ashchurch") handed down by the Court of Appeal in February 2023.

Background
Planning permission was granted by an Inspector for "exploration and appraisal comprising the removal of drilling fluids and subsequent engineering works with an extended well test for hydrocarbons along with site security fencing and site restoration" in Lower Stumble, Balcome. The proposal was "major development" within an AONB for policy purposes.

Grounds
Ground 1
Ground 1 alleged the Inspector had erred in law when he took into account the benefits of the production of hydrocarbons that might ultimately flow from the site but did not take into account the harms.

The Claimant relied heavily on the Ashchurch "bridge to nowhere" decision. In that case, the local planning authority had granted permission for a bridge which of itself had no purpose (not being connected to the wider road network) but was solely intended to enable future residential development. The authority were found to have acted unlawfully in taking into account the prospective benefits of that future development without taking into account potential harms.

Ground 2
The Claimant argued that the Inspector misdirected himself by incorrectly applying local plan policy. Whilst the Developer's application made clear that the application itself did not involve hydraulic fracturing, the Claimant argued that any hypothetical future production at the site may involve hydraulic fracturing and the application should be assessed against policy M7b accordingly (rather than default policy M7a).

Ground 3
Ground 3 alleged the Inspector had erred in his interpretation of local plan policy by failing to consider alternatives to the proposal which fell outside the AONB. The Claimant argued the Inspector was wrong to have focussed on whether there was any

way to assess the geology of the Lower Strumble strata from outside the AONB and that he should have instead considered whether there were any alternative sources of hydrocarbons outside the AONB.

Ground 4
Ground 4 concerned an alleged failure to comply with EIA Regulations. The two limbs of the Claimant's argument were that: (a) the decision makers failed to properly consider the project as a "whole"; and (b) there was no consideration of greenhouse gas emissions in the screening opinion.

Ground 5
Ground 5 alleged a failure by the Inspector to consider the climate change impacts from the development, in particular an express consideration of the assessed and quantified level of greenhouse gas emissions from the development.

Ground 6
Ground 6 argued that the Inspector had unlawfully failed to consider the impact of the development on water resources. Specifically, a mistake of fact was alleged concerning the hydrological link between the development site and Ardingly Reservoir.

Judgment
Ground 1
Lieven J found that the Inspector had not erred in law. On a fair reading of the decision letter, the Inspector understood that the application was for exploration alone and that his focus should be on the benefits and disbenefits of that phase.

The benefits of the production phase were only relevant insofar as if there was no policy or economic support for hydrocarbon extraction, there would be no benefit in exploring or assessing them. This drew on reasoning in R (Preston New Road Action Group) v Secretary of State for Communities and Local Government [2018] Env LR 18 ("PNRAG"). The Judge rejected the comparison to Ashchurch. In deciding whether to permit the bridge, the local planning authority had to consider the benefits and disbenefits of the wider scheme because the bridge itself had no benefit or use. There was no "exploration benefit".

Ground 2
The Judge held that policy M7a had to apply given the application before the decision maker did not involve hydraulic fracturing.

Ground 3
Lieven J held that the Inspector's approach to the issue of alternatives was a rational one which fell within the scope of his planning judgement. The application sought to determine whether there were commercially viable hydrocarbons at the site; not to

determine whether there should be production of any hydrocarbons. It followed that the policy, applied rationally, must be restricted to alternatives for the purpose of the exploration in issue, rather than the production of hydrocarbons at the site.

Ground 4
Applying the reasoning in PNRAG, the Judge rejected limb (a) and found the approach in the screening opinion was lawful. The application was a clearly definable project limited to exploration and did not include subsequent commercial production.
The Judge again rejected the comparison to Ashchurch: the bridge was plainly not a definable, separate project but a "paradigm example of 'salami-slicing'".

The second limb was also rejected. There was no requirement for the local planning authority to have express regard to greenhouse gas emissions in the screening opinion. An "element of realism" should be applied where it would have been obvious to the decision maker that the proposal would produce greenhouse gas emissions, particularly given local planning authorities' acute awareness of climate change. The Judge found that "the submission that the failure to have express regard to [greenhouse gas emissions], when the evidence overwhelmingly indicates that it was not a significant likely effect, is not sustainable".

Ground 5
Lieven J was satisfied that the Inspector's reference in the decision letter was adequate. There is no requirement that every planning decision expressly refer to or quantify resulting greenhouse gas emissions. Climate change is likely to be a material consideration in every planning decision, but what will be required ultimately depends on the factual and policy context.

Ground 6
The Judge held that to the degree to which there was any mistake of fact, it was not material to the decision and the Inspector was therefore not required to give further reasons or consideration to the matter.

All grounds were refused.

Case summary prepared by Anna Sidebottom