OXFORDSHIRE COUNTY COUNCIL

LAND AT THRUPP FARM, RADLEY, ABINGDON, OXFORDSHIRE

OPINION

1. I am asked to give Oxfordshire County Council ("OCC") as mineral planning authority ("MPA") my opinion on a matter of statutory construction under sch 14 paras 4 - 7 of the Environment Act 1995 ("EA 1995") and the consequences of that interpretation on the facts of an application by H Tuckwell & Sons ("the Applicant") purportedly under those provisions in respect of mineral workings on land at Thrupp Farm, Radley ("the Site").

2. I have been providing with Opinions of Nina Pindham (for OCC) and Greg Jones KC (for an objector to the proposals – Wick Hall Estate - "WHE") which reach opposite conclusions on the meaning of "at any time" in sch 14 para 7. I deliberately reached my own view on the central issue before considering those other Opinions. Having then considered those Opinions I found nothing to suggest the view that I had formed was incorrect.

3. I am aware that the conclusion on the statutory interpretation is likely to be determinative of the jurisdiction to make and determine this application and that any decision of OCC that it does not have jurisdiction will be likely to be disputed on appeal[1] by the Applicant and any decision that it does have such jurisdiction may be subject judicial review by WHE.

The Statutory Scheme

4. In short summary:
    a. a purposive approach to statutory construction is required – *R (Quintavalle) v. Secretary of State for Health* [2003] 2 AC 687 @ [8];
    b. section 96 of the EA 1995 gives effect to schedules 13 and 14 – schedule 13 concerns old mineral permissions[2] and sch 14 concerns review of mineral permissions generally. The two schedules have to be understood consistently with each other;
    c. sch 13 para 12(1) contains the same words as in dispute in sch 14 para 7 and the two must therefore be read consistently;

[1] A finding by OCC that it does not have jurisdiction can be the subject of an appeal and so the correct route for an applicant to pursue if OCC decides it does not jurisdiction is to appeal. If OCC decides it does have jurisdiction it seems to me that any objector would have to challenge that decision by way of judicial review (particularly if OCC decided to grant the application).

[2] This concerns deemed provisions under the TCPA 1947 - s.22(1) PCA 1991 and is not directly relevant here.

d. sch 13 has two stages – the first stage concerns the compilation of the lists of permitted mineral sites *inter alia* to clear old dormant sites which could otherwise be revived years later and to provide a definitive list of those which can apply for the second stage; and second stage is the fixing of the conditions for such old permissions;
e. as to the first stage under sch 13, para 6(1) provides for the owner of land to apply for it to be included in the list on a strict timetable with para 12(4) then providing that absent such application the old permission ceases to have effect if it is not on the list. There is no equivalent to "at any time" in the provisions with which we are concerned. This provision was in issue in *R v North Lincolnshire Council) ex parte Horticultural and Garden Products Sales* [1997] Env LR 295 ("North Lincolnshire"). The Court held that there was no power to extend time after the permission had ceased to exist. The Council could not by agreement revive an already statutorily extinguished planning permission;
f. at the second stage (and still in sch 13), the structure is very similar to the relevant provisions of sch 14 to which I turn below. The key phrase – "at any time" is included in para 12 (1) in essentially the same form as in sch 14 para 7. In *R (Payne) v Caerphilly CBC* [2002] EWHC 866 (Admin) ("Caerphilly") Sullivan J (as he then was) considered a position where no application had been made in respect of a permission which had expired. Para 9 could not revive a permission which had ceased to exist [23]. It would be "absurd" to require an MPA to decide conditions for a lapsed permission. The lapsing in that case though was by virtue of the terms of the permission itself and not by virtue of para 12(1) and I do not think this case is authority directly on point. The proposition that, in another factual context, para 9 could not revive a permission which has ceased to exist is, though, of some significance. In *Stancliffe Stone Company Limited v Peak District NPA* [2005] EWCA Civ 747 the Court appeared to have assumed to the contrary - that an application could be made under sch 13 para 9 after the cessation of permission under para 12(1) - see [50]. But the point was not addressed in any detail and the claim was in any event rejected for other reasons. I do not think that case provides any support either way;
g. turning to sch 14, it introduces periodic reviews of conditions on all mineral permissions including those in sch 13;
h. para A1 of sch 14 provides that an MPA may require a periodic review;
i. para 2A provides for the setting by the MPA of a first review date ("FRD");
j. para 4 provided for the MPA to serve a notice on mineral owners a year in advance of the FRD. The notice must state the FRD; that an application for approval of conditions "must be made" by the FRD; the consequences of no such application being made; and the ability to apply for postponement of

the FRD. There are various procedural requirements if no application is made eight weeks before the FRD – including a reminder notice (para 4(3))[3].

k. under para 5, an owner served with a para 4(1) notice may "no later than" three months from the giving of the notice, apply for postponement of the FRD including setting out the substituted FRD sought. There is no right to apply outside that period for a postponement of the FRD;
l. para 6 provides for the making of the application - which under para 4 must be made before the FRD. Subject to agreement as to extensions, the MPA has three months to determine the application - absent a decision within those 3 months or agreed extension the application is deemed to be granted;
m. para 7 is the central provision – it provides for the consequence of not making an application. "Where no application under paragraph 6 above.... has been served... by the [FRD] or by such later date as may *at any time* be agreed upon in writing between the application and the authority" each mineral permission shall cease to have effect except insofar as it imposes any restoration or aftercare condition on the day following "the first review date or, as the case may be, such later agreed date".

The Correct Interpretation of para 7

5. The central issue is whether "at any time" includes an agreement *after* para 7 has already been activated – namely where the FRD has passed without any prior agreement to an extension such that the mineral permission has ceased to have effect.

6. If so, that would mean that an MPA could by agreement *after* the cessation effectively revive a permission which has otherwise ceased to exist. That is a novel proposition at odds with approach albeit in different circumstances in *North Lincolnshire* and *Caerphilly* above.

7. There is no English authority directly on point.

8. Under a different statutory scheme and in Scotland, the words "at any time" have been considered in *Vattenfall Windpower Ltd v. Scottish Ministers* [2009] CSIH 27. The issue there was whether time to appeal had expired. S47 of the Town and Country Planning (Scotland) Act 1997 provided for an appeal to the SoS if no notice of its decision had been given by the planning authority within a prescribed time "or within such extended period as may *at any time* be agreed upon in writing

[3] In contrast to sch 13 para 8(11) where a failure to serve a reminder notice extends time, there is no such extension here

between the applicant and the authority". Under secondary legislation the planning authority could agree to extend the statutory six months in writing. The application had been made in 2003. By August 2007, the planning authority was already 4 years and 2 months beyond the statutory period. It was then agreed that the planning authority be given an extension to December 2007. That was held to be ineffective. Once the statutory period for determination had expired there was a single right to appeal which was within 6 months of the expiry of that time. There was no discretion to extend the time limit in which an appeal had to be lodged [11]. The time for determination could be extended by agreement before the right to appeal was triggered but once that right was triggered there was 6 months to exercise the right and that period could not be extended by retrospectively extending time for determination. In other words, once the ability to appeal had been triggered (the statutory consequence of non-determination within the agreed time) there was no ability to avoid the statutory consequence.

9. I consider that authority to be of some assistance – it is consistent with the general proposition in e.g. *North Lincolnshire* and *Caerphilly* that once a statutory consequence (Y) of X is triggered it is not possible to retrospectively extend X so as to avoid Y.

10. However, there is no authority directly on point and I therefore start from first principles.

11. The legislative scheme has to be read as a whole in its context and against its purposes. The statutory purpose is to be discerned from the words used, the context and the vice to which the legislation was directed.

12. The purpose of *sch 13 i*s clear. Old Mineral Permissions tended not to be subject to up to date environmental conditions which ensured an appropriate scheme of environmental protections. I agree that the central legislative purpose was to secure the timely review and modernisation of mineral permissions, which, because of their age and inadequate conditions could operate to environment standards no longer acceptable [GJ/48]: see *G Hamilton v. Highland Council* [2012] UKSC 31. A further purpose was to clear out the potential for future arguments in respect of whether there existed permissions for "dormant sites".

13. The situation covered by *sch 14* is less stark because sch 13 will have already applied to bring the most out of date permissions up to date (and dormant sites are not in issue under it). In short, it requires a first review at a date fixed by the LPA and periodic reviews thereafter 15 years since the last review or the grant of permission. However, the statutory purpose remains the same – to ensure that

mineral sites operate to up to date environmental standards as embodied in the updated conditions and that they do not continue to operate under the old conditions.

14. The legislative history leading to sch 13 and 14 confirms the statutory purpose.

15. I do not think that the subsequent MPG14 can be relied on as an aid to statutory construction or understanding the statutory purposes but I note that it is consistent with the above summary.

16. To deliver on the statutory purpose there had to be a route to force applications for review of conditions or there would be no incentive for relevant owners to apply – they could simply continue with their existing (less strict) consent conditions.

17. Hence deadlines were imposed in both sch 13 and sch 14 by which applications had to be made and the consequence of non-compliance with that deadline set out. Those two aspects (the deadline and the consequence of non-compliance) are the means to ensure that mineral sites are subject to up-to-date permissions and operate only under up-to-date permissions.

18. The mandatory structure is clear: para 1 – the LPA "shall" cause periodic reviews to be carried out; para 3(3) defines the review date is defined – "is the date"; para 4(1) the LPA "shall" give notice of the date by which an application "must be made" (para 4(2)(d)); any postponement application complying with the statutory requirements "must" be within 3 months (para 5).

19. The mine owner then has the choice as to whether to apply for a first review or not – para 6(1) – "may".

20. If the owner wishes to apply a mandatory suite of provisions applies: para 6(2). If the owner does not wish to or fails to apply, para 7 sets out the mandatory consequence – the mineral permission shall "cease" to have effect.

21. That framework does not provide a direct answer to the central issue here however. The failure to apply would force the cessation of the activity because there would be no ongoing permission for it, but it does not expressly tell us that there is no scope for a later agreement to extend time to revive the right to work the site.

22. It is thus necessary to attempt to construe the words “cease to have effect” – do those words denote permanent cessation or are they apt to describe temporary cessation thus permissive of later reviving of the permission?

23. I think that those words denote permanence rather than a potentially temporary suspension for the following reasons:
    a. that is the normal meaning of the word “cease”;
    b. that is consistent with the overall framework of the legislation as described above; and
    c. that is consistent with the statutory purpose of both sch 13 and sch 14.

24. I think that interpretation is confirmed by the fact that once para 7 is triggered, mineral extraction must cease (there will be no permission for such extraction) and, fundamentally, the restoration and aftercare conditions will then bite. The consequence of triggering para 7 is that the site necessarily moves into restoration and aftercare. That seems to me to be statutory confirmation that the extraction phrase is permanently over – to restore a mineral site is axiomatically the opposite of having the ability thereafter to revive extraction.

25. What then of the words “at any time”? What is their purpose and effect? The normal position is that the owner must apply before the first review date. The owner can seek to secure a postponement of that date in the three months after the service of the notice 12 months before the FRD (reg 5). If the owner does not do so, there is no ability to apply for a postponement under reg 5 after those three months.

26. However, para 7 means that that does not preclude a later application to provide for a later date for the application (after the three months to ask for a postponement has expired). The failure to apply for a postponement within the three months does not mean the FRD is the final date if it is thereafter agreed extend the time for making an application. “At any time” therefore is apt to describe the period up to the FRD. On the day before the FRD, the authority could extend time and para 7 would not be triggered until that later agreed date.

27. That interpretation of the two phrases seems to me to be internally consistent, to deliver the statutory purpose and to respect the mandatory nature of the statutory scheme and its time limits.

28. It also avoids the situation where apparently at any time after a permission has ceased to have effect, it can be revived by an agreement for extension of time for

a para 9 application to be made. To my mind, that position cannot have been intended. It would mean that many years after a site had ceased to operate under para 7 and after any restoration and aftercare conditions had been triggered (and potentially complied with) the permission could be revived albeit on new conditions. That makes no sense of the statutory scheme and is inconsistent with its purposes. As to the latter, a key part of the purposes of the legislation is remove old dormant permissions out – it would be inconsistent with that for para 7 to be construed as generating a potential for new dormant sites to emerge in the future.

29. I recognise that that would mean that a procedural mistake by the owner of a mineral site could lose a possession within article 1 of the First Protocol ("A1P1") of the European Convention of Human Rights (the benefits of the original permission). It might be said that the legislation should be construed to avoid that effect. I do not think any such argument is correct:
    a. the legislative purpose is clear – and the state has a wide margin of appreciation as to what is the appropriate and proportionate response to a policy dilemma under A1P1;
    b. similar arguments under the same scheme albeit in a different context were run in *North Lincolnshire* and were rejected for reasons which I respectfully adopt;
    c. the mineral right is derived from and subject to the statutory scheme – it is not possible to treat the "possession" as somehow existing irrespective of the statutory provisions for its continued existence; and
    d. there is no objection under A1P1 to time limits or to loss of X if Y is not done.

<u>Conclusion on Statutory Interpretation</u>

30. I therefore conclude that there is no jurisdiction in a mineral planning authority to extend time after para 7 has been triggered. I therefore agree with paragraphs 9, 10, 59 and 60 and 10 of Mr Jones' Opinion of 8th July 2026 and with the views of officers which led to the original instructions to Ms Pindham. I disagree with the fundamental conclusion in the Opinions of Ms Pindham.

31. I have not been provided with any representations on behalf of the Applicant in respect of this jurisdiction point. The Council appears to have been acting (until recently) on the basis that there was jurisdiction to extend time *after* para 7 had been triggered and so the Applicant had no reason to provide such representations. I therefore think that the Council should invite representations from the Applicant on Mr Jones' Opinion and the fundamental propositions in paragraphs 9, 10, 59 and 60 and on this Opinion.

Consequences on the Facts

32. The last extraction occurred here in 1995. The two permissions for extraction here were subject to the schedule 13 process in 2000. There were no further workings.

33. A valid sch 14 review notice was sent in October 2015 with a FRD of 31st October 2016.

34. No application was made, no postponement sought and no extension agreed before 31st October 2016 – or at least to date there is no evidence of any such agreement in writing to an extension. The Applicant should be asked whether it claims there is any such agreement, para 9 application and/or an application for a postponement. As to the 1st December 2015 exchanges I agree with paragraph 64 of Mr Jones' Opinion.

35. I understand that no reminder notice was served – see para 4(2) of the Ms Pindham's Opinion of 1st July 2022. This should be confirmed. She advised that that was not "fatal" to para 7 being triggered. The reminder notice is there to mitigate the severity of what is a substantial interference in A1P1 rights by giving the mine owner a final chance to apply. I note that in sch 13 para 8(11) the consequence of non-service of the reminder notice is that time is extended until after such reminder notice is sent. There is no equivalent in sch 14. Applying standard principles of statutory construction that difference between sch 13 and sch 14 must be taken to have been deliberate. Therefore the issue is what is consequence of non-compliance with the reminder notice requirements. That will turn on prejudice to the mine owner. I have seen nothing to suggest any such prejudice. This is a matter for the Applicant to raise if it contends that the non-service of a reminder notice has any legal consequence here. It may be arguable on the facts that it does but I cannot advice further on the material I have.

36. Subject to that, para 7 was triggered on 1st November 2016. The Council later referred to that as a "suspension" – but I do not agree. The statutory effect was that the permissions ceased to have effect on that date and cannot be revived. The Council cannot estop itself into reviving a permission it had no power to revive and no legitimate expectation can arise after the event that a statutory consequence will not arise.

37. The Council's "agreement" in 2022 has no legal effect in my view. I note that it relies on an unstated assumption that a permission can be revived 6 years after it has ceased to have effect. I do not agree that the statute permits that.

Conclusion

38. I have reached a clear conclusion that the legislation does not allow the permission here to be revived after para 7 is triggered. That seems consistent with all the relevant case law, the statutory purposes, the words used and the overall logic of the statutory scheme.

39. On the facts, there are some areas which the Applicant should be given the opportunity to comment on. Further, given the change in position of the Council since the report to committee on this central issue, the Applicant should be given the opportunity to comment on this Opinion and Mr Jones' Opinion and especially the key paragraphs quoted above.

David Forsdick KC

Landmark Chambers

1st September 2026