17 February 2016

CUADRILLA FRACKING APPEALS OPEN IN BLACKPOOL

A Public Inquiry into four planning appeals under s.78 of the 1990 Town and Country Planning Act has opened in Blackpool in Lancashire, against the decision of Lancashire County Council to refuse to permit drilling at two well sites in Little Plumpton and Roseacre Wood, hydraulic fracturing those wells and flow-testing the shale gas, and associated monitoring works. The appeals are listed to last for 5 weeks.

They are the first appeals to consider the Government's shale gas policy, and have all been recovered by the Secretary of State for his personal determination. The appeals have raised a number of interesting, and inevitably controversial, issues.

First, there is the application of the presumption in favour of planning permission contained within paragraph 14 of the National Planning Policy Framework (NPPF). The Appellant argues that because the development plan does not expressly provide for hydrocarbons, in line with the PPG, it must be either absent, silent or out-of-date. However, absence and silence have been interpreted as a high threshold, see Lindblom J in Bloor Homes East Midlands Limited v SSCLG [2014] EWHC 754 (Admin.). As to whether a policy is "out of date" by reference to paragraph 215 NPPF, the Inspector will have to resolve whether a given policy is inconsistent with the corresponding parts of the NPPF.

Second, there is a significant conflict in the expert noise evidence, between whether to use the British Standard for construction and open cast sites, or to use the British Standard for industry and commercial sources of noise – in short whether the drilling and fracturing operation (nearly 2 years) is akin to a construction site or an industrial site. There is also dispute as to the extent to which the WHO Night Noise Guidelines (2009) replace the WHO Community Noise Guidelines (1999) on Lowest Observed Adverse Effect Level (SOAEL) and Significant Observed Adverse Effect Level (LOAEL), or indeed whether LOAEL and SOAEL in WHO Guidelines are targeted to, less intrusive, anonymous (transport) noise, rather than noise with a specific character, as the appeal schemes are said to be.

Third, there is debate as to the weight to attach to the Joint Ministerial Statement on Shale Gas "Shale Gas and Oil Policy" (16 September 2015) ("WMS"). However, that debate may ultimately be somewhat redundant as it appears to be common ground after the first week of cross-examination of the Appellant's witnesses, that the WMS is not encouraging *un*sustainable (by reference to the NPPF) shale gas exploration. Thus an exploration project which conflicted with the NPPF judged objectively, as a whole, would not derive any support from the WMS.

Fourth, the weight to be attached to benefits. Planning permission is sought only for the exploration stage. It is a real possibility that following 6 years of exploration, shale gas is not

Prospect Law Ltd
23 Berkeley Square, London W1J 6HE
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle Donington, Derbyshire DE74 2TZ
T +44 (0)1332 818 785

F +44 (0)20 7665 6650
E info@prospectlaw.co.uk
www.prospectlaw.co.uk

commercially extractable at the proposed locations and thus the wells are decommissioned and plugged. Therefore, the decision taker can only place weight on the very small number of construction and security jobs that will be created to construct and maintain the wells, and the receipt of knowledge of the commercial viability of extracting shale gas at the locations. Placing weight on the benefits of a wider commercial shale gas industry in the North West is highly unlikely given that this would require at least a further planning application and may not even be a commercial reality.

Without question these appeals are a definitive test for the fledgling shale gas industry in England (readers will know that hydraulic fracturing is not presently permitted in Scotland or Wales). The seven planning barristers appearing in the appeals, including **Prospect Law's Ashley Bowes**, reflects the scale of the financial stakes and the importance and complexity of the legal issues under consideration.

Prospect Law and Prospect Energy provide a unique combination of legal and technical advisory services for clients involved in energy, infrastructure and natural resource projects in the UK and internationally.