**APPG MEETING**

**22 October 2018**

**Answers to Questions Posed by the APPG**

**Marc Willers QC and David Neale of Garden Court Chambers**

**In association with Frack Free United**

**Question 1**

**What is a Permitted Development Order, how is it currently used in the planning process and what are the associated issues with it?**

Answer

The developments which are classed as “permitted development” are listed in Schedule 2 to the Town and Country Planning Act (General Permitted Development) (England) Order 2015 (the 2015 Order). These developments are granted planning permission by virtue of Article 2 of the 2015 Order and therefore do not require planning permission from the local authority. Certain classes of permitted development are subject to *“prior approval”* from the local authority, which is less extensive than a planning application. The local authority has powers to restrict particular classes of permitted development by giving a direction under Article 4 of the 2015 Order. But the Secretary of State has power to cancel or vary such directions by virtue of paragraph 1(13) of Schedule 3 to the 2015 Order.

The classes of permitted development are wide-ranging. They include, for example: various minor modifications to existing buildings, such as extensions and loft conversions; various changes of use for land and buildings; construction of temporary buildings and structures; and temporary uses of land for various purposes. In short, the function of “permitted development” is to allow these everyday developments to go ahead without the bureaucracy of a full planning application. Significantly, development which requires an environmental impact assessment (EIA) under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 is generally excluded from the scope of permitted development (Article 3(10) of the 2015 Order).

Some types of permitted development require “prior approval” from the local planning authority. This is (intentionally) a much less onerous process than a full planning application.

**Question 2**

**What could an exploratory drilling proposal look like if included as permitted development? What is the limit to the PD right proposals? Does it apply to the well, pad or whole site, for example? Will development by-pass environmental permits, for example?**

Answer

There are a number of questions. We are not able to answer the first question.

The second and third questions can be answered by reference to the Government’s consultation paper: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/726916/Consultation_document_-_shale_gas_permitted_development.pdf>

The consultation acknowledges at [24] that *“[b]y law, development which is likely to have significant effects on the environment requiring an Environmental Impact Assessment would not be permitted development.”* This is correct; it reflects the terms of Article 3(10) of the 2015 Order.

Schedule 1 to the EIA 2017 Regulations lists the types of development which always require an EIA. It includes inter alia *“[e]xtraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes per day in the case of petroleum and 500,000 cubic metres per day in the case of gas.”*

Schedule 2 to the EIA 2017 Regulations lists the types of development which require an EIA if the development is *“likely to have significant effects on the environment by virtue of factors such as its nature, size or location”*. It includes inter alia *“[s]urface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.”*

In this regard, the consultation paper states at [24] that *“[i]f the proposed development would fall into Schedule 2 of the Environmental Impact Assessment Regulations, it would only be permitted where a local planning authority has issued a screening opinion determining that the development is not Environmental Impact Assessment development, or where the Secretary of State has directed that it is not Environmental Impact Assessment development, or that the development is exempt from the Environmental Impact Assessment Regulations.”*

It is possible, therefore, that there may be room for controversy about whether a particular shale gas operation which does not fall within Schedule 1 to the EIA 2017 Regulations nonetheless has a significant impact on the environment, such that it requires an EIA under Schedule 2.

In respect of the fourth question, our assumption is that there is to be no change to the criteria which must be met for the grant of environmental permits.

**Question 3**

**What are the practicality issues that arise from the PD and NSIP proposals?**

Answer

There may be various practical issues with the PD proposal:

* Classing shale gas operations as permitted development will be extremely controversial. It effectively deprives local planning authorities of the power to determine whether, where and when shale gas may be extracted in their areas. It therefore raises serious issues of local democracy and accountability.
* As set out above, there may be controversy as to whether a particular operation is such that, although not falling within Schedule 1 to the EIA 2017 Regulations, it has a significant impact on the environment and therefore requires an EIA under Schedule 2. This could be particularly controversial where the Secretary of State has directed that the development does not require an EIA in the teeth of local objections.
* There may also be controversy over the use of prior approval. The consultation paper suggests at [33] that *“[f]or shale gas exploration, local consideration of particular elements of the development may potentially be required to be approved by the relevant mineral planning authority through a prior approval process. By way of example, the prior approval considerations might include transport and highways impact, contamination issues, air quality and noise impacts, visual impacts, proximity of occupied areas, setting in the landscape, and could include an element of public consultation.”* Depending on how the relevant legislation is drafted, there may well be room for controversy about which developments require prior approval and what factors should be taken into account.
* The prior approval process is also unlikely to meet the democratic objections to the proposal. As the consultation paper acknowledges, *“prior approval is a light-touch process which applies where the principle of the development has already been established.”*

The NSIP proposal, likewise, will be extremely controversial in that it takes power out of the hands of local planning authorities. In the NSIP process, local authorities are entitled to be consulted at the pre-application stage and to make written representations to the Planning Inspectorate during the examination process, but they are not the decision-makers – it is the Inspectorate and the Secretary of State who ultimately determine the outcome of the process.

As the House of Commons Housing, Communities and Local Government Committee stated in their report of 5 July 2018, *“there is limited evidence that* [including fracking in the NSIP regime] *would expedite the application process and such a move is likely to exacerbate existing mistrust between local communities and the fracking industry. We are particularly concerned that if the NSIP regime were adopted, there would be no relationship between fracking applications and Local Plans in communities. Furthermore, we note that the Government has not provided any justification or evidence for why fracking has been singled out to be included in a national planning regime in contrast to general mineral applications.”*

**Question 4**

**Are the NSIP proposals intended for individual fracking wells/pads or major projects, such as the multiple numbers of wells/pads needed to decrease foreign gas dependency?**

Answer

This is addressed in the Government’s consultation paper at pages 17-19: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727044/NSIP_Consultation_Document_Final.pdf> This sets out various proposed criteria as to whether a shale gas operation would be considered nationally significant, including number of wells, recoverable gas, gas production, local or national grid connection, associated equipment, and shared infrastructure.

**Question 5**

**How can shale gas exploration and extraction ambitions in the UK develop without the implementation of the PD and NSIP proposals?**

Answer

This is an economic question which is outside the scope of our remit.

**Question 6**

**How can public influence in the fracking planning process be assured if PD and NSIP proposals are adopted?**

Answer

Classing shale gas operations as permitted development would leave very limited scope for public influence. The consultation paper suggests that the prior approval process *“can involve a requirement for public engagement through site or written notices to allow representations from local residents, and the views of statutory consultees.”* However, it goes on to acknowledge that *“[t]he requirements relating to prior approval are much less prescriptive than those relating to planning applications. This is deliberate, as prior approval is a light-touch process which applies where the principle of the development has already been established.”* It is clear, therefore, that the ability of the public to engage with and influence the shale gas planning process, and to campaign against the grant of permission for a shale gas operation, would be greatly diminished if this proposal were adopted.

The NSIP process allows some scope for public influence. There is provision for consultation of the local community at the pre-application stage (section 47 of the Planning Act 2008), and a member of the public can become an “interested party” by making a “relevant representation” to the Secretary of State (section 102 of the Planning Act 2008). However, as set out above, it is the Planning Inspectorate and the Secretary of State who are tasked with making the decision, rather than the local planning authority – so local residents are likely to have less direct influence over the eventual outcome, leaving a potential democratic deficit.