

Planning Board Report

ITEM 1

Government Consultation	Consultation on views on the principle of granting planning permission for non-hydraulic shale gas exploration development through a permitted development right.
Recommendation	That the responses set out in Appendix 1 form the Council's response to the consultation document.

Background:

A Consultation paper on proposed planning reforms for exploratory shale gas development in England has been launched by the government (see Appendix 1). The purpose of this Consultation is to seek views on the principle of whether non-hydraulic fracturing shale gas exploration development should be granted planning permission through a permitted development right, and in particular the circumstances in which it would be appropriate. This would in effect mean that the applications the Council has recently determined at Harthill and Woodsetts for exploratory drills would become permitted development, and would not require full planning permission. Any permitted development right would not apply to the appraisal and production operations of shale gas extraction. Consultation closes on 25th October 2018.

The Consultation follows the publication of a written ministerial statement on the 17 May 2018, in which the government announced a range of measures to facilitate timely decision making on shale exploration planning applications. It reiterated the Government's view that there are substantial benefits from the safe and sustainable exploration and development of onshore gas resources and that the Government expects Minerals Planning Authorities to give great weight to the benefits of mineral extraction, including to the economy.

The supporting text to the Consultation states that with the government committed to ensuring that strong safeguards are in place, any new permitted development right would have to abide by both environmental and site protection laws and would not apply to exploratory drilling in sensitive areas (such as Areas of Outstanding Natural Beauty). It adds that exploratory drilling for shale deposits are treated separately to full hydraulic shale gas extraction (fracking), and that both will remain subject to strict planning and environmental controls.

The Consultation document notes that recent decisions on shale exploration planning applications remain disappointingly slow against a statutory time frame.

The Consultation document notes that the government will also consult on whether developers should be required to undertake pre-application community engagement prior to submitting a planning application for shale gas development and that this separate consultation will be launched in autumn 2018.

Permitted development rights

Permitted development rights are a national grant of planning permission. They provide a simpler, more certain route to encourage development and speed up the planning system, and reduce the burden on developers and local planning authorities by removing the need for planning applications.

Permitted development rights are set out in the Town and Country Planning (General Permitted Development) (England) Order 2015. The Order sets out both what is allowed under each permitted development right, and any exclusions, limitations and conditions that apply to comply with the legal duty to mitigate the impact of development granted under permitted development. For example, most permitted development rights are subject to conditions that seek to minimise their impact and to protect local amenity. Others are subject to geographic exclusions to ensure environmental protections are maintained.

If a proposal falls outside permitted development rights, it requires the submission of a planning application to the local planning authority so that the authority can consider all the circumstances of the case.

Permitted development only covers the planning aspects of the development. It does not remove requirements under other regimes such as environmental licensing and permitting or requirements under environmental legislation.

In April 2016 the Town and Country (General Permitted Development)(England) Order 2015 was amended to allow for development consisting of the drilling of boreholes for the purpose of carrying out ground water monitoring and seismic monitoring which is preparatory to potential petroleum exploration (which includes shale gas). These permitted development rights are subject to restrictions and conditions. This consultation paper proposes to extend these permitted development rights to the exploratory phase of oil and gas extraction.

Finally, the House of Commons Housing Communities and Local Government Select Committee carried out an inquiry between January and June 2018 in respect of a number of issues relating to shale gas exploration and production. It concluded that: “Shale gas development of any type should not be classed as a permitted development. Given the contentious nature of fracking, local communities should be able to have a say in whether this type of development takes place, particularly as concerns about the construction, locations and cumulative impact of drill pads are yet to be assuaged by the Government.”

Response to Consultation

The recommended responses to the Consultation document is set out in Appendix 1 and concludes, in line with the House of Commons Select Committee, that shale gas exploration should not be classed as permitted development. This is primarily as it would potentially remove altogether, or if a ‘prior approval’ process is used reduce, the opportunity for local residents and other interested parties to be fully engaged in the decision making process.

Permitted development rights should only be used to free up the planning system by allowing uncontroversial and limited impact development to be granted. The Council does not consider that this should relate to shale gas exploration for the reasons given in the responses below.

APPENDIX 1 – Response to the consultation

The definition of non-hydraulic fracturing

Question 1

a) Do you agree with this definition to limit a permitted development right to non-hydraulic fracturing shale gas exploration?

NO

Note:

paragraph 20 of the Consultation document indicates that the purpose would be to allow “operations to take core samples for testing purposes” (i.e. the core samples would be tested). However, the suggested definition indicates there would be a testing period not exceeding 96 hours, with the OGA Consolidated Onshore Guidance explaining that “when testing a discrete section of the well, each section can be produced for a maximum of 96 hours but the total quantity of oil produced from all sections should not exceed 2,000 tonnes per section”. This means the suggested definition would allow for a degree of production, which seems to contradict the approach that is being taken in paragraph 20. As such, the Council does not agree with the proposed definition.

b) If No, what definition would be appropriate?

“Boring for natural gas in shale or other strata encased in shale for the purposes of searching for natural gas and associated liquids by obtaining borehole logs and taking core samples for testing purposes”

There is a fundamental difference between collecting geological information in the form of borehole logs and core samples and testing the in situ rock (either with or without fracturing). Officers are of the view that there would not be an issue with putting gas monitoring equipment on top of the borehole for 96 hours to record any ‘natural’ flows of gas due to the pressure release. To not do so would be a missed opportunity in terms of data collection.

Question 2

Should non-hydraulic fracturing shale gas exploration development be granted planning permission through a permitted development right?

NO

Note:

The Council does not consider that any such non-hydraulic fracturing exploration should be permitted development, primarily as it would remove the local level of decision making and local accountability that communities expect. Whilst exploratory drills are not for full hydraulic fracturing (fracking), they can still have a significant impact on the locality, as evidenced at Harthill and Woodsetts. The correct route for such development is through the normal planning application and, where necessary, appeal process.

Although the Government has stated that it remains fully committed to ensuring that local communities are fully involved in planning decisions that affect them, it remains to be seen how the permitted development process would enable full public involvement as the purpose of the consultation is to take shale gas exploration out of the current planning process.

In addition, paragraph 34 of the consultation document acknowledges that it is unclear how effective the proposed legislation would be (in the Government's aim to further the industry) given it envisages a range of exclusions, limitations and restrictions. This shows that these types of proposals would result in multiple and complex planning issues which require expert consideration by planning and regulatory experts with local knowledge on a case by case basis.

If the key aim of the proposal is to speed up the planning process, then full pre-application engagement is recommended between the applicant and the Council (which did not take place at two recent exploratory drill sites within the Rotherham Borough at Harthill or Woodsetts). The most recent Woodsetts application was determined within the 13 week target period, albeit it for refusal due to concerns that Members had in respect of the proposals. In addition, the applicant can refuse to extend the time period for determining the application if it is considered that the Council is taking too long to determine an application, and appeal against non-determination.

If shale gas exploration development was to be defined as permitted development the limitations list would have to be very carefully worded to cover all the possible impacts and issues which might fall to be considered in the planning arena for each any every possible site. These would then have to be enforceable which would no doubt be via an enforcement notice for unauthorised development if it fell outside those permitted. If only one aspect was breached the Council would have to consider whether it would be expedient to take enforcement action bearing in mind the undoubted public pressure the authority would be put under to act.

Development not permitted

Question 3

a) Do you agree that a permitted development right for non-hydraulic fracturing shale gas exploration development would not apply to the following?

- Areas of Outstanding Natural Beauty**
- National Parks**
- The Broads**
- World Heritage Sites**
- Sites of Special Scientific Interest**
- Scheduled Monuments**
- Conservation areas**
- Sites of archaeological interest**
- Safety hazard areas**
- Military explosive areas**
- Land safeguarded for aviation or defence purposes**
- Protected groundwater source areas**

YES

Note:

This appears to be a relatively comprehensive list and, as such, the Council agrees with the suggested list of excluded areas where permitted development rights would not apply. Additionally, if the development would be EIA development then the new rights do not apply and it is considered that it would be useful to make reference to this within this list of restrictions.

b) If No, please indicate why.

N/A

c) Are there any other types of land where a permitted development right for non-hydraulic fracturing shale gas exploration development should not apply?

NO

Development conditions and restrictions

Question 4

What conditions and restrictions would be appropriate for a permitted development right for non-hydraulic shale gas exploration development?

Notwithstanding the Council's opposition to any form of permitted development right,

such rights should not apply where an application on the site has been submitted and is being considered, or has been refused and any related appeal is either ongoing or has been dismissed.

Any permitted development should be subject to the prior approval process (see Q5 below).

Prior approval

Question 5

Do you have comments on the potential considerations that a developer should apply to the local planning authority for a determination, before beginning the development?

Similar to other prior approval categories within the General Permitted Development Order, the developer should apply to the Local Planning Authority for a determination as to whether the prior approval of the authority will be required as to (amongst others)—

- (a) transport and highways impacts
- (b) noise impacts
- (c) ecological impacts
- (d) impacts on hedgerows and trees
- (e) visual impact on landscape
- (f) archaeological impact
- (g) heritage impact
- (h) contamination risks
- (i) flooding risks
- (j) cumulative impact with other similar developments

Where prior approval is required, the development must be carried out in accordance with the details approved by the local planning authority.

Note:

Paragraph 33 of the Consultation paper states: “By way of example, the prior approval considerations might include transport and highway impact, contamination issues, air quality and noise impacts, visual impacts, proximity of occupied areas, setting in the landscape and could include elements of public consultation”. The considerations set out in the Council’s response above are very similar to those that would be covered in a planning application, but without the democratic decision making process involved in a planning application.

When dealing with the two sites at Harthill and Woodsetts, there were a significant amount of site specific issues that had to be considered as part of the planning process. The Council remains concerned about the effectiveness of generic conditions or restrictions being used to mitigate the specific impacts at different sites. This highlights why this type of development is not suitable for the permitted development regime.

In addition, it is presumed that such applications would require publicity (as other prior approval applications do) and in view of the likely significant interest that such a proposal would generate, the prior approval route is not considered appropriate for such development.

The amount of work involved (officer time and cost) would be comparable to that of a planning application, albeit with no planning application fee associated with it. It would be unreasonable to significantly increase the workload of the Council in this way without covering the associated costs for the work that would need to be undertaken and which would allow the Council to properly resource the work. It would not be practical to address this through a Planning Performance Agreement (PPA), where the applicant could agree to cover the costs generated by the Council, as it would rely on the goodwill of the applicant/developer to pay the authority, with no requirement for them to do so. Indeed, despite requests for the applicant to enter into a PPA for both the Harthill and Woodsetts sites, no such agreement was reached.

The 'shale wealth fund' provides funds to Councils for additional work generated by shale gas applications and the continuation/expansion of the shale wealth fund to guarantee funds to Councils to deal with any prior approval applications would be welcomed.

Finally, there are concerns about the amount of time that would be given to consider the issues set out under the prior approval application. Many existing prior approval subjects give a limited time period for the Council to determine the application, and if the application is not determined within the specified time period (which can be as little as 28 days) then the development is effectively granted. Such a time period would not be adequate to consider the issues listed in Paragraph 33 of the Consultation document. Some prior approval subjects allow for extensions of time to be agreed between the Council and the applicant, but if the applicant does not agree to such an extension, the Council would no doubt be forced to refuse the details, thereby slowing down the process.

Time-period for a permitted development right

Question 6

Should a permitted development right for non-hydraulic fracturing shale gas exploration development only apply for 2 years, or be made permanent?

2 years

Note:

The Council has interpreted this question as asking whether the permitted development rights should be changed permanently, or whether they should be trialled for a two year period before being made permanent. The response is based on that assumption.

Given the clear lack of understanding as to the impact that the changes would have, or how effective they would be, going ahead with permanently changing the permitted development rights would seem to be quite a risk. However, it would be less risky for the Government to make the change temporary with the option to remove the permitted development rights in two years' time, rather than permanently changing them. This two year trial would allow for a full assessment of the effectiveness of the permitted development regime for this type of development and enable Government and Councils to judge what the impacts have been and whether any exploratory development has been sufficiently controlled and its impacts properly mitigated. As such, it is considered that 2 years would be acceptable.

Public sector equality duty

Question 7

Do you have any views the potential impact of the matters raised in this consultation on people with protected characteristics as defined in section 149 of the Equalities Act 2010?

The Council has no comments in this respect.