North Yorkshire Joint Waste and Minerals Plan

Statement of Councillor Paul Andrews for the EIP

Question 15: Does the JWMP comply with all relevant legal requirements, including those of the 2004 Act (as amended) and the 2012 Regulations?:

The Legal and Policy Basis of the Plan is flawed for the following reasons:

- The Policies relied on have not been taken through due process, particularly in regard to public consultation, and should therefore be given very little weight; and
- The minister has exercised her powers contrary to law.

As regards due process:
It would appear from para 5.106 that the plan is written so as to meet the requirements of the following:

- A government announcement in Autumn 2012 announcing a new strategy for gas;

- Online planning guidance published in 2014 entitled "planning for hydrocarbon extraction" which contains a passage expressing a pressing need to establish whether or not there are sufficient recoverable quantities of unconventional hydrocarbons……to facilitate economically viable full scale production";

- A ministerial written statement issued in 2015 indicating a national need to explore and develop shale gas in a safe, sustainable, and timely way

The statements of 2012 and 2015 are not serious planning documents. They contain political rhetoric, factual errors and disputed statements. An example of this is contained in the attached email, setting out the 2015 statement by Amber Rudd and, in red, the matters subject to dispute and the reasons for disagreement (Appendix 1).

- One of the statement's obvious and key weaknesses is that it fails to consider options to gas. The whole thrust of the minister's argument pre-supposes that the UK is deficient in energy resources other than gas. No proper account is taken of the cumulative beneficial use of renewables – or even of alternative non-renewables, such as coal – of which the UK has a superabundance of reserves – deep coal mines would not spoil the landscape as much as grids of frack ing drill pads, each with an area of 2 hectares and situated at intervals of one and a half to two miles in every direction.

- Another weakness is that the ministerial statement has been superseded by the Department of Business, Energy and Industrial Strategy published in October last year with the title "Gas Security of Supply" **(Appendix 2)** looking ahead over the next twenty years. It says*: "Whilst the government is optimistic about the potential for shale gas in the UK, given the industry is currently in an exploratory stage, it is not yet known how much of the UK shale gas resource will ultimately be recoverable. In order to provide a conservative estimate of supply, supply forecasts used in CEPA (2017), assume no shale contributions in the forecast period."*

I set out below Section 19 of the Planning and Compulsory Purchase Act 2004:

(1)Local development documents must be prepared in accordance with the local development scheme.

(2)In preparing a local development document the local planning authority must have regard to—

(a)national policies and advice contained in guidance issued by the Secretary of State;

(b)the RSS for the region in which the area of the authority is situated, if the area is outside Greater London;

Ithe spatial development strategy if the authority are a London borough or if any part of the authority's area adjoins Greater London;

(d)the RSS for any region which adjoins the area of the authority;

(e)the Wales Spatial Plan if any part of the authority's area adjoins Wales;

(f)the [F14sustainable community strategy] prepared by the authority;

(g)the [F15sustainable community strategy] for any other authority whose area comprises any part of the area of the local planning authority;

(h)any other local development document which has been adopted by the authority;

(i)the resources likely to be available for implementing the proposals in the document;

(j)such other matters as the Secretary of State prescribes.

(3)In preparing the other local development documents the authority must also comply with their statement of community involvement.

(4)But subsection (3) does not apply at any time before the authority have adopted their statement of community involvement.

(5)The local planning authority must also—

(a)carry out an appraisal of the sustainability of the proposals in each document;

(b)prepare a report of the findings of the appraisal.

(6)The Secretary of State may by regulations make provision—

(a)as to any further documents which must be prepared by the authority in connection with the preparation of a local development document;

(b)as to the form and content of such documents.

*(7)The **[F16**sustainable community strategy **]** is the strategy prepared by an authority under section 4 of the Local Government Act 2000 (c. 22).*

Subsection 2 (a-j) lists the matters to which an authority must have regard in the preparation of local development documents. At the top of the list (a) are national advice contained in guidance issue by the Secretary of State. At the bottom (j) is the "wash-up" clause: "such other matters as the Secretary of State prescribes" The Planning Guidance issued in 2014 comes within category (a), whereas the two ministerial statements come within para (j). My understanding of due process is that ministerial statements are followed by the issue of draft circulars which are consulted on and then by the circular itself. This is a process which has not been followed.

In dealing with any planning matter, authorities are required to determine the weight which should be given to policies, particularly where there is a conflict between different policies and one has to be preferred to another. The usual practice is to give greater weight to policies which have been carefully considered and undergone a process of public consultation – the more thorough the consultation, the greater the weight to attach to the policy. So the weight to be attached to the two ministerial statements, the 2014 circular and the NPPF should have been considered by the joint authorities in this context.

On this basis, the NPPF is the document which has undergone the greatest public consultation and scrutiny. The 2014 circular went through no public consultation process at all that I know of, but at least it is a circular issued by a minister coming within category (a) of Section 19(2) above. The two ministerial statements don't even have this status. They have not undergone consultation, and they have not been issued as a circular. They are simply "wash-up" matters – political statements made by a politician in the House of Commons and not even voted on. They are irrational and illogical and should be given very little weight – particularly as all the opposition political parties in Parliament oppose fracking and current government policy could change at any time. No circulars have been issued following the government announcements which the draft plan relies on. Due process has not therefore been followed. It is therefore clear that either these ministerial statements should not be relied on at all, or they should be given very little weight.

In my view the joint authorities have allowed the 2014 Circular and the two flawed ministerial statements to over-ride the policies in regard to landscapes which are set out in the NPPF and also the policies in the adopted Ryedale Plan, particularly Policy SP13, all of which have gone through a thorough public consultation process. This would seem to me to be the wrong approach and leaves the plan open to legal challenge.

The Brexit Case

An additional point is that the Brexit case [R(on the application of Miller and another) v Secretary of State for Exiting the European Union (24th Jan 2014)] establishes that at law national government cannot rule by decree, proclamation or

edict, but that their decisions must go through due process (in the Brexit case, Parliament), if they affect the property or rights of the subject.

In para 45 of the judgement of the majority of the court it is stated: *"The Crown's administrative powers are now exercised by the executive, ie by ministers who are answerable to UK Parliament. However, consistently with the principles established in the 17th century, the exercise of those powers must be compatible with legislation and the common law"*

In Para 46 it is stated*: " It is true statutes can make laws by issuing regulations and the like, often known as secondary or delegated legislation, but (save in limited areas where a prerogative power survives domestically……they can do so only if authorised by statute. So, if the regulations are not authorised, they will be invalid…"*

Para 48 of the judgement quotes Lord Parmoor in *De Kayser*, when discussing the prerogative power to take a subject's property in time of war:

"The Constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject."

Para. 50 includes the sentence: "*Exercise of ministers' prerogative powers must therefore be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament."*

Para. 51 states: *"Further, ministers cannot frustrate the purpose of a statute or statutory provision, for example by emptying it of content or preventing its effectual operation"*

The Brexit case is, of course, directly concerned with the operation of the Royal Prerogative. However, it did provide the opportunity for several principles of Constitutional and Administrative Law to be re-sated and re-affirmed. In this respect, it follows that similar principles apply when a minister exercises powers conferred by statute, as apply to a minister exercising a prerogative power. So, the minister, when exercising her power to prescribe that a statement in the House of Commons should be taken into account in the mineral plan making process, particularly if this involves interfering with the property or liberty of subjects, is bound to observe the restrictions which Parliament has imposed in favour of the subject. The exercise of her powers should have been consistent with the common law and with statute. Moreover, in exercising her powers she should not frustrate the purpose of a statutory provision, for example by emptying it of content or preventing its effectual operation.

By analogy, it should not be possible for a minister to exercise her powers under a statute which would undermine a local plan adopted purunnt to the requirements of the same statute.

So, have the ministerial statements interfered with property or rights?

The answer is that all the Law of Town and Country Planning affects property.

The second question is whether or not the exercise by the minister of her power to prescribe her statements in the House of Commons as matters which should be taken into account when preparing a local plan document is consistent with common law or statute.

Planning Law is statutory: so the common law is not relevant. However, as far as statute is concerned, there is in force a statutorily adopted plan, the Ryedale Plan which was adopted in September 2013. The NPPF, requires that all neighbouring planning authorities should co-operate in preparing local plan documents. Co-operation must go further than a mere consultation – the respective plans must dovetail in with each other. In this context, Ryedale is a neighbouring planning authority to North Yorkshire County Council. If the ministerial statement is construed so as to require the draft mineral plan to authorise development which would be inconsistent with the Ryedale Plan, it cannot stand.

This question is closely linked with the final question which is: in exercising her powers has the minister frustrated the purpose of a statutory provision, for example by emptying it of content or preventing its effectual operation?

Again, the Ryedale Plan is a statutorily adopted local plan adopted under the same statute as that under which the Minister has prescribed that her statement should be taken into account. If the minister's statements are construed so as to require the JWMP to authorise development which would undermine the key principles of the Ryedale Plan so as to prevent its effectual operation, the ministerial statement cannot stand.

In determining this question, one has to examine the relevant policies of the Ryedale Plan and determine whether or not these policies are undermined by a requirement to authorise fracking in the Vale and the Wolds.

The relevant policies of the Ryedale Plan and other relevant documents are set out in the attached **Appendix 3**. It will be seen that the purpose of these policies is to preserve and enhance the character of the landscape and promote the agricultural, equestrian and visitor economies of the Vale of Pickering, the Yorkshire Wolds and other areas. These policies require, for the Vale of Pickering, the retention of visually sensitive skylines, hill and valley sides and the ambience of the area including nocturnal character, level and type of activity and tranquillity and sense of enclosure/exposure.

So,what, for example, would be the point of having policies restricting all new housing and employment development to the towns, whilst in the JWMP allowing the tranquillity of the countryside and its skyline to be broken by a grid of fracking pads?

How will the visitor economy be enhanced by a grid of drilling pads, each two hectares in area and spaced at intervals of between one and a half miles to two miles in every direction?

It is as well to note:

- Firstly, Para 5.134 of the draft JWMP envisages many drill pads for unconventional hydrocarbon and gas extraction, each with an area of two hectares and para 5.137 envisages a density of drill pads of 10 to 100 square kilometres, which approximates to them being spaced at a density of one to every one and a half to two miles, if evenly spaced;

- Secondly, each of these pads will have between 10 and 50 boreholes. This is because, as the gas has to be forced out of the rock, there have to be horizontal bores radiating like the spokes of a wheel in every direction and then following the grain in the rock

- Thirdly, it takes about 100 days drilling day and night to complete each borehole. So a fifty borehole pad with a single drilling rig would be in operation continuously for many years.

- Fourthly, the drilling rigs are over100ft. high, are noisy and are lit up like Christmas trees at night.

Conclusion

In these circumstances, it would seem to me that either the two ministerial statements are unlawful or else they should be construed as not requiring the JWMP to be inconsistent with the Ryedale Plan – in which case both the Vale of Pickering and the Yorkshire Wolds should be excluded from the areas where fracking is to be allowed, and the JWMP altered to this effect.

There is also an issue of public policy here. If weight is given to ministerial statements which have not gone through due process (ie. embodied in draft circulars and then consulted upon), it opens the door to ministers becoming susceptible to persuasion by industry lobbyists (perhaps with the prospect of contributions towards party funds), without full public scrutiny of any policy pronouncements which might emerge from this. This could lead to wrecking balls being driven through the planning system and the result could be to make the planning system look rotten to the core. It is clearly in the public interest that all ministerial policy decisions which affect property or rights of residents should go through an appropriate form of due process

before they can be acted upon and not be issued just at the whim of the executive. Government policy on matters which affect property or rights (such as planning policy does) should not only be properly made, but also seen to be properly made and fully transparent.

COUNCILLOR PAUL ANDREWS February 2018