



REPORT TO:	COUNCIL
DATE:	17 FEBRUARY 2015
REPORT OF THE:	COUNCIL SOLICITOR AND MONITORING OFFICER ANTHONY WINSHIP
TITLE OF REPORT:	MONITORING OFFICER'S REPORT UNDER SECTION 5 OF THE LOCAL GOVERNMENT AND HOUSING ACT 1989
WARDS AFFECTED:	ALL

1.0 PURPOSE OF REPORT

1.1 Members of Council are asked to consider this Monitoring Officer's report in relation to the Motion on Notice received on Friday 21 November 2014 which is Item 4 (iv) on the agenda for the Council meeting on 17 February 2015 and part of which is as follows:

"1. Ryedale District Council completely opposes all Fracking in Ryedale"

1.2 This report is prepared on the assumption that the above motion seeks to commit the District Council to oppose any fracking related proposals prior to consideration of any such matter by the Council's Planning Committee.

1.3 The contents of this report should not be interpreted as favouring any side in the fracking debate. The central focus of the report is on the legal constraints that the Council must comply with in its decision making process.

1.4 As the Monitoring Officer for Ryedale District Council, I have a duty to make a report under Section 5 of the Local Government and Housing Act 1989 on any proposal, decision or omission by the authority, or a Committee which has given rise to, or is likely or would give rise to:-

- (1) A contravention of law or any code of practice made or approved by or under any enactment; or
- (2) Such maladministration or failure as is mentioned in Pt III of the Local Government Act 1974, ie in connection with action taken by or on behalf of the authority, in the exercise of the authority's administrative functions.

1.5 This requirement is referred to in the Council's Constitution: Part 2 Articles of the Constitution, Section 11.4 functions of the Monitoring Officer – Ensuring lawfulness and fairness of decision making.

1.6 Under Section 5(5) of the same Act the authority shall consider the report. In this case the meeting is the Council meeting to be held on 17 February 2015.

2.0 **RECOMMENDATIONS**

2.1 It is recommended that:

- (i) This report be received; and
- (ii) That a further report be put to the Policy & Resources Committee meeting to consider and recommend to Council amendments to the Council Procedure Rules relating to motions on notice to clarify the circumstances when a motion on notice may be rejected.
- (iii) It is my recommendation that Members do not adopt the proposed policy as drafted.
- (iv) Council considers this report and has due regard to the advice in it before deciding whether or not to approve the motion set out in paragraph 1.1 above to bring finality to it.

3.0 **BACKGROUND**

3.1 The key events and points of this case which are the context for the motion on notice referred to above are as follows:

- (i) Councillor Clark and seven other Members have requisitioned an extraordinary meeting of council by an undated requisition received on Friday 21 November 2014.
- (ii) The requisition for an extraordinary meeting of council was made pursuant to Council Procedure Rule 3.1(iv) in the Council's constitution.
- (iii) That requisition includes a proposed motion on notice moved by Councillor John Clark and seconded by Councillor Tommy Woodward relating to fracking in the District of Ryedale which includes the following proposal for the District Council to resolve:

"That Ryedale District Council completely opposes all fracking in Ryedale"

- (iv) By a press release dated 25 November 2014 a company called Third Energy announced its intention to apply for permission to hydraulically fracture an existing well at Kirby Misperton in the District of Ryedale:
- (v) The legal position is that no fracking, or drilling for oil or gas, can take place without:

- (a) Planning Permission, from the Minerals Planning Authority (in this case North Yorkshire County Council or the North York Moors National Park Authority); and
 - (b) Planning Permission for any ancillary related development which is a District matter from Ryedale District Council.
 - (c) Environmental permits, from the Environmental Agency.
- (vi) The MPA, the EA and where relevant Ryedale District Council or the North York Moors National Park Authority hold public consultations before coming to their respective conclusions.
- (vii) As the Mineral Planning Authority, North Yorkshire County Council must consult Ryedale District Council under Article 22 of the Town and Country Planning (Development Management Procedure)(England) Order 2010.

4.0 INTRODUCTION

The scope of the report is to consider the following issues:-

- (i) Must all motions on notice be put to Council.
- (ii) The meaning of the motion on notice having regard to the every day meaning of the words used;
- (iii) The administrative law concept of fettering discretion by the adoption of an over rigid policy
- (iv) The legal implications of the motion on notice;
- (v) Potential personal liabilities of Members
- (vi) Whether or not there has been any illegality or maladministration for the purposes of Section 5 of the Local Government & Housing Law 1989;
- (vii) The recommended way forward for Council

5.0 REPORT

5.1 MUST ALL MOTIONS ON NOTICE BE PUT TO COUNCIL?

An original motion is one propounding a substantial issue for consideration and action at a Council meeting. The proper officer must consider whether the motion on which notice has been given is one that may properly be accepted.

If the motion may properly be accepted and notice has been given in time, then the proper officer must proceed to place it on the agenda for the next council meeting. If she considers the terms of the motion out of order, illegal, irregular or improper, she should consult the chairman or take such other action as may be laid down in standing orders.

A standing order covering these matters might be framed in these words:

“1. If notice is given of any original motion that, in the opinion of the proper officer, is out of order, illegal or defamatory, the proper officer shall immediately submit such notice to the chairman and it shall not be accepted and placed on the agenda without his sanction. In the event of non-acceptance, the proper officer shall so inform the member giving notice including the reasons for rejection.”

2. Where the deficiency in the motion on notice is technical, the Proper Officer shall seek to assist the mover to alter the notice of motion so as to achieve the movers purpose lawfully.”

With a standing order of this kind the decision to reject a motion on notice is a decision of the Chairman of Council, which may only be taken on the advice of the Proper Officer.

Other Councils may have more detailed standing orders.

Where councils have the above standing order in its constitution, a motion that seeks to require the local authority to do something that it patently cannot do would be out of order and one that sought action that was ultra vires or otherwise illegal would be out of order. One that was defamatory or offensive could be ruled out as improper.

The Council Procedure Rules in the Councils existing constitution do not currently make explicit provision for rejecting motions on notice. Members of Council are asked to consider the merits of including provision for the rejection of motions on notice in the Councils constitution and this is included as a recommendation of my report.

The motion on notice received on Friday 21 November 2014 as proposed by Councillor John Clark could not be rejected prior to the despatch of the agenda for a Council meeting on the basis of the provisions of the Councils current constitution.

5.2 MEANING OF THE MOTION ON NOTICE

The text of the motion on notice received on Friday 21 November 2014 is as follows:-

“In view of the following facts:-

- The statutory authorities have neither the people, expertise of the independently verified data to safely control Fracking.*
- As a result, risk and prevention of dangers will depend on industry self regulation.*
- The worldwide evidence to date is that Fracking is an unacceptably high risk strategy.*
- Ryedale District Council can only condone or oppose Fracking.*

It follows that:-

- i Ryedale District Council completely opposes all Fracking in Ryedale.*
- ii Ryedale District Council calls upon all Thirsk, Malton and Filey parliamentary candidates for the forthcoming general election to state clearly if they either oppose or support Fracking”*

For the purposes of ascertaining the meaning of the motion, this report focuses on the following text :

“ i. Ryedale District Council completely opposes all Fracking in Ryedale”.

The meaning of this text is clear in that it proposes an absolute policy on matters relating to fracking in Ryedale. This can be interpreted as a blanket policy of opposition before hearing the facts of the case.

This means that the motion, if passed, applies across all council functions, including as landowner, as local planning authority and as an economic development authority.

5.3 ADMINISTRATIVE LAW CONCEPT OF FETTERING DISCRETION AND THE ADOPTION OF AN OVER RIGID POLICY

Members are aware that the decisions of Council and its Committees are subject to the supervisory jurisdiction of the courts which have set minimum quality control standards for local authority decision making.

Decisions of the Council and its Committees are subject to the normal public law principles. These principles include the requirement that laws enacted by Parliament be faithfully executed and that local authority decisions be congruent with legislative purpose. Another important principle is that power should not be exercised in an arbitrary way.

The District Council is subject to the common law principles which apply to all decision-making by local authorities, including the requirement to take a reasoned decision based upon all material information.

Where no right of appeal exists the decision of a Council or Committee can be challenged by way of a court procedure called judicial review .

If the claim for judicial review is successful, the court may grant a quashing order, mandatory order, prohibiting order, declaration or injunction; it may also award damages in certain circumstances.

The three broad grounds of review for judicial review may be summarised as follows :

(a) Illegality

- (i) Doing an act with no legal authority (simple illegality).
- (ii) Misinterpreting the law governing the decision.
- (iii) Failure to retain a discretion by:
 - (1) Improper delegation.
 - (2) Fettering of discretion by adoption of over-rigid policy.
- (iv) Abuse of discretion:

(1) Using a power for an improper purpose.

(2) Taking into account irrelevant considerations or failing to take into account relevant considerations.

(b) Irrationality.

(c) Procedural Impropriety.

The focus of this report is on the ground of review relating to a failure to retain a discretion by the fettering of discretion by adoption of an over-rigid policy.

Although a statute or subordinate legislation may provide that a public body can make a decision as it thinks fit, the courts have adopted the approach that this does not mean that the public body can make literally *any* decision it thinks fit. Instead, the courts will imply certain limitations, as they do not accept the notion of an absolute or complete discretion. If the use of the discretion is not controlled, it amounts to an arbitrary power.

If a public decision –maker has been conferred with a public law discretion, it should consider whether to exercise it.

Public law decision makers therefore abuse their discretion if they unnecessarily restrict the circumstances in which they will use it (eg they adopt an overly-rigid or blanket policy which affects an applicant or individual). In this way the decision-maker is fettering his discretion by refusing to exercise it when new or exceptional circumstances arise. Essentially the matter is not considered on its merits.

5.4 THE LEGAL IMPLICATIONS OF THE MOTION ON NOTICE

Members will be aware of the importance of maintaining a clear and strong public perception of the Authority's objectivity in determining any matters associated with fracking related development or responding to consultation on fracking .

Much guidance that officers give Members on probity in decision making is intended to ensure that decisions are lawfully made and are not subject to legal challenge by judicial review.

Members know it is important that planning decisions in particular are made:-

- on their merits;
- on planning grounds;
- by Members with an open mind and after considering all the evidence;
- in the public interest and not as a result of any private interest.

Anything said or done which indicates that the above standards of decision making have not been met by Members or appear not to have been met could be used as a basis for challenging a decision related to fracking development in the High Court by anyone wishing to do so .

The proposed motion on notice, would if passed by Council, amount to the adoption of a blanket policy of opposition to any matter related to fracking before hearing the facts of the case.

The blanket policy could be applied to the following three areas of decision making:

(i) **Statutory Consultee Responsibilities.**

As the Mineral Planning Authority, North Yorkshire County Council and the North York Moors National Park Authority must consult Ryedale District Council under Article 22 of the Town and Country Planning (Development Management Procedure) (England) Order 2010. Such consultation will include contributions from the District Council in its capacity as a local planning authority for District matters and environmental health.

(ii) **As a Local Planning Authority for any fracking related or ancillary development which is not a County matter.**

Section 70 of the Town and Country Planning Act 1990, provides that Members have a statutory duty when determining planning applications, to have regard to the provisions of the development plan where material to the application, and to any other material consideration. The starting point for decisions on planning applications is the development plan. Section 38(6) of the Planning and Compulsory Purchase Act 2004 says that planning decisions shall be made in accordance with the development plan, unless material considerations indicate otherwise.

(iii) **Local Authority Land**

If any local authority land were needed for the proposed fracking development then a decision would need to be made by the Council in its capacity as a landowner.

The blanket policy of opposition to the above matters before considering the matter on its merits would amount to an unlawful fettering of discretion by the adoption of an over rigid policy.

It is appreciated that anti-fracking campaign groups wish local authorities to adopt a blanket policy of opposition to fracking. Members are advised that it is not in the gift of local authorities to adopt such a blanket policy for the reasons contained in this report.

In Summary the ground of unlawfulness, enabling a decision to be held void on judicial review, include ultra vires, unreasonableness, improper purpose, actual or apparent bias or predetermination, breach of procedural requirement

and breach of other statutory provision, such as failure to comply with HRA, etc..

Against this background the proposed motion would be unlawful for two reasons-

- a. It commits the Council to a rigid policy in areas where the Council is required to take into account a number of factors, of which policy may be one but cannot dictate the result to the exclusion of all other factors, before coming to a decision. Most notable is that of planning both in its role as statutory consultee on County and Park applications for minerals and waste, and as local planning authority where it has to determine applications itself. In all such cases, it must take its decision having had regard to all material considerations, and cannot decide them simply on the basis of policy.
- b. It is so absolute that it unreasonably fetters the Council's discretion when it comes to deal with any matter related to fracking.

The proposed motion if passed would therefore lay the Council open to judicial review. It would have the very real potential to gift a claimant with a "JR on a plate" for any promoter of fracking development.

There may well be very real concerns about the possible adverse impact of fracking and the inadequacy of the community benefit provisions. Those concerns relate to specific issues such as ground water pollution, ground instability, disturbance to wildlife and to households, road traffic, spoil disposal, and visual intrusion in areas of high landscape value. It would be entirely reasonable for the Council to list those concerns and say that it would in principle oppose fracking unless it was satisfied that these issues had been resolved. But fracking can potentially make a substantial contribution to the country's energy needs and can provide valuable local employment. So it would be unreasonable for the Council to commit itself to oppose a fracking proposal if all potential grounds of objection had been satisfactorily resolved.

5.5 POTENTIAL PERSONAL LIABILITY OF MEMBERS'

This part of the report considers what potential personal liability a Councillor will have for his/her actions in the circumstances of this case. Normally, a Councillor takes a decision not as a private individual but as a Councillor on behalf of the Council. Accordingly, it is the Council rather than the individual Councillor who incurs the liability resulting from what is in law a decision of the Council to enter a contract, buy land or grant planning permission. But the statutory immunity from personal liability, which the Councillor enjoys under Section 265 of the Public Health Act 1875, does not apply where the Councillor goes outside his/her powers as a Councillor (so acting as a private individual) or acts in bad faith, for personal gain or out of malice.

A Councillor is treated as a trustee of Council assets, with a fiduciary duty to apply those assets in the public interest. Where a Councillor abuses that trust, by causing a loss he/she can be held personally liable for the resulting loss.

The route of legal challenge, either to the overall anti-fracking policy or to any decision which has been taken on the basis of that policy rather than on proper consideration of all material considerations, would be by way of judicial

review. Judicial review is expensive. If the Council were to be challenged and lose a judicial review it might expect that its own legal costs would amount to a minimum of £50,000, and that it would be liable for the applicant's legal costs which might amount to as much as £200,000. In addition, where the Council had acted unlawfully, it could expect to be liable to the applicant for damages in respect of any business loss which the applicant has suffered as a result of the unlawful action by the Council, including delay to a profitable development.

In addition, where members act outside their powers or in bad faith, they can have personal liability for any loss which they cause. So a frustrated applicant could seek damages from individual members involved in an unlawful decision, and the Council could seek to recover any losses which it had suffered from individual members who were involved in taking the decision.

The key point is that Councillors only have a statutory immunity under Section 265 of the Public Health Act 1875, as extended by Section 39 of the Local Government (Miscellaneous Provisions) Act 1976, if they act lawfully and in good faith. Passing an unlawful resolution would be itself unlawful, and if a member has been warned by the Monitoring Officer, he or she cannot say that they were acting in good faith. Accordingly, such a Councillor can be liable in misfeasance in public office to the authority or to any person suffering loss as a consequence.

It is my duty to warn Members that an applicant could also seek damages from individual Councillors where they have acted unlawfully, as set out above, or in bad faith, and caused loss to the applicant. Such an action would probably be in the tort of misfeasance in public office.

5.6 IS THERE LIKELY TO BE ANY ILLEGALITY OR MALADMINISTRATION FOR THE PURPOSE OF SECTION 5 OF THE LOCAL GOVERNMENT & HOUSING ACT 1989?

The proposed resolution as set out in the motion on notice, would be unlawful as unreasonably fettering the Council's discretion and would render any later resolution to object to a particular fracking planning application or other fracking related matter to be open to judicial review.

It is more than possible that an unsuccessful applicant for planning permission would seek to judicially review the decisions of both the County Council as the minerals planning authority and the District Council as local planning authority and consultee, which again would be likely to result in substantial loss to the authority in terms of legal costs and possibly an award of damages.

Although this is my view as the Monitoring Officer for the District Council only the Courts can give a definitive interpretation.

Members are also advised that such an unreasonable decision to adopt this policy, or a subsequent decision taken on the basis of the policy without proper consideration of all other material factors, would almost certainly amount to maladministration. In such circumstances, the Ombudsman can make a public report identifying the maladministration and recommending the

Council to make a compensation payment to anyone suffering injustice as a consequence of the maladministration.

5.7 THE RECOMMENDED WAY FORWARD

Council is not bound to comply with the above recommendation, but Members should be aware of the risks which they are taking both personally and for the authority should they ignore this advice.

Against this background, Council is recommended to consider and vote on the motion on notice to bring finality to it having due regard to the contents of this report.

6.0 FINANCIAL IMPLICATIONS

The financial implications of passing a resolution to adopt a blanket policy of opposition to all fracking in Ryedale are significant and are as follows :

- (i) the expense of any judicial review challenge in the High Court by a person with locus standi or the External Auditor ;
- (ii) the potential for a local government ombudsman complaint with the consequent cost of Officer time in responding to any investigation;
- (iii) the cost implications of refusing any fracking related planning applications on the basis of an unlawful blanket policy. The District Council would be at risk of a full award of costs being made against it in any appeal.

7.0 LEGAL IMPLICATIONS

The legal implications of passing a resolution to adopt a blanket policy of opposition to all fracking in Ryedale are as follows :

- (i) a potential High Court challenge by a person with locus standi or the External Auditor ;
- (ii) Personal liability of Members for knowingly passing an unlawful resolution causing loss to the District Council.

8.0 RISK ASSESSMENT

The passing of a resolution to adopt a blanket policy of opposition to all fracking in Ryedale is a high-risk strategy.

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Background Papers:
None