

YORK POTASH

6th ADVICE; COMMITTEE REPORT

AND

RELATED MATTERS

1. I advise the North York Moors National Park Authority (“the NPA”) about the following matters in relation to the planning application by York Potash (“the Applicant”);
 - i. The interpretation of planning policy;

Treatment of the Major Development Test

2. I turn to planning policy. I think that the report generally correctly states the effect of the Major Development Test (“MDT”) at paragraph 116 of the NPPF. However, I have the following detailed comments.
 - a. Paragraph 14.2.4 appears to say that the Applicant needs to demonstrate a national need for the mineral. I do not agree. Clearly, whether there is a national need for the mineral needs to be considered, but the proposal will not necessarily fail just because there is not such a need. A more general economic need, or some other exceptional case, could suffice, although it is perhaps hard to imagine a sufficiently exceptional case being made out in those circumstances, as I said in my Fifth Advice of 7th January 2015 at paragraph 5. Therefore the statement in 14.2.4 needs amending in my view. I notice that the remainder of the report (eg 8.11.7 onwards) takes what I think is the correct line.
 - b. I do not understand 14.2.5. Insofar as it is suggesting that an assessment of whether any national economic need can be met in some other way is beyond the objectives of the MDT policy, which is what 14.2.9 seems to say, I do not

agree. An economic need, including a national economic need (eg the need to boost GDP by any economic activity) is relevant to the MDT. However, it is also relevant to consider whether that need might be met in other ways, although to assess it might be difficult or even impossible. Generally, I think convincing the NPA that alternative ways of meeting the need outside the National Park do not exist is likely to be more difficult if the need relied on is an economic need as opposed to need for the mineral itself.

CONCLUSIONS

3. To conclude;
 - i. It should be made clear that although national need should be considered, it is not necessary to prove national need in order to obtain permission;

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5th June 2015

NORTH YORK MOORS NATIONAL PARK AUTHORITY
YORK POTASH PLANNING APPLICATION

OPINION

INTRODUCTION

1. I advise the North York Moors National Park Authority (“the Authority”), in relation to a planning application proposed to be made by York Potash Limited (“York Potash”) for the extraction of potash in the Authority’s area. I am asked in particular to consider how in determining the application the Authority should deal with paragraph 116 of the National Planning Policy Framework (“NPPF”). I have seen an Advice (“the Advice”) on this matter prepared by instructing solicitors, and an Opinion (“the Opinion”) prepared by Martin Kingston, QC, commenting on that Advice.

2. I am asked
 - (a) Whether the Advice is a sound approach to the assessment of the York Potash proposals against paragraph 116; I am asked also to make any necessary corrections.
 - (b) Whether the Opinion raises any other issues that the Authority should be aware of to assist it in properly determining the forthcoming application.
 - (c) Whether the replacement of the wording in paragraph 14 of Mineral Planning Statement 1 (“MPS 1”) with the wording of paragraph 116 represents a significant change to national planning policy about major minerals development in National Parks. I am asked in particular to consider the implications of the change in wording relating to need.
 - (d) Whether the overall protection afforded to National Parks and the Government’s planning policy as a whole relating to nationally designated landscapes is borne out by the wording of the NPPF.

ANALYSIS

Paragraph 116 in context

3. It is appropriate to begin by setting paragraph 116 in context. The determination of planning applications is governed by section 38 (6) of the Planning and Compulsory Purchase Act 2004. By that provision, planning applications are to be determined in accordance with the Development Plan, unless material considerations indicate otherwise. The NPPF, as the principal expression of Government planning policy, is clearly a material consideration to be taken into account, and paragraph 116 is to be taken into account as part of the NPPF.
4. The Development Plan comprises the Yorkshire and Humber Regional Strategy to 2026 (“RSS”) and the North York Moors National Park Authority Core Strategy Development Policies (“Core Strategy”).
5. I agree with Mr Kingston that the Development Plan, and the NPPF, are each to be read as a whole. It is inappropriate to apply one or more particular policies or elements of policy guidance to the exclusion of the rest.
6. However, as Mr Kingston says (paragraph 8 onwards), there are policies in the Development Plan of particular relevance, namely policy ENV4 of the RSS and Policy E of the Core Strategy.
7. Core Strategy Policy E allows mineral extraction to enable the provision of materials necessary for preserving traditional buildings and for maintaining and enhancing the character of settlements. It states that “All other minerals developments will be considered against the major development tests”, and then goes on to make specific provision for continued potash extraction at Boulby.
8. The reference to “the major development tests” is a reference to paragraph 49 of circular 12/96, which contains wording very similar to paragraph 116. Hence, as Mr Kingston says (paragraph 13), the upshot is that the Development Plan incorporates paragraph 49 of the circular. Since the wording of paragraph 116 is

very close to that of paragraph 116, it follows that in effect the Development Plan incorporates the approach set out in paragraph 116.

9. I turn to paragraph 116 itself. As Mr Kingston says (paragraph 18), the guidance in paragraph 49 of circular 12/96 and paragraph 116 of the NPPF is not described in those documents as either “Major Development Tests” or a single “Major Development Test.” However, it is true to say that the phrase “Major Development Test” or “MJT” is often adopted to describe the policy guidance set out in those paragraphs. The important point is that as Mr Kingston suggests paragraph 116 is not to be used as an exclusive test for the acceptability of a major mineral application such as that proposed by York Potash. Together with the Development Plan, all the guidance in the NPPF must be taken into account. That includes section 13 of the NPPF, entitled “Facilitating the sustainable use of minerals”, in which paragraph 142 states that minerals are essential to support sustainable economic growth and our quality of life, and paragraph 144 of the NPPF states that local planning authorities should “give great weight to the benefits of ... mineral extraction, including to the economy.”
10. However, the guidance in paragraphs 142 and 144 is general, in that it applies to all land in England and Wales. The proposed site of the York Potash application is in a National Park, which is a designated area to which paragraph 116 applies. Given that paragraph 116 is policy guidance applying specifically to National Parks and other areas which have highest protection in relation to landscape and scenic beauty, I would expect paragraph 116 to be given substantial weight when determining York Potash’s planning application.

The approach taken in the Advice

11. In dealing with the approach to paragraph 116 taken in the Advice, Mr Kingston accepts (paragraph 22) that the Tesco v Dundee case is an appropriate starting point in directing oneself as to the approach in interpreting a particular policy, but states that in this case the meaning of paragraph 116 is clear. I agree that paragraph 116 does not give rise to particular difficulties of interpretation.

12. However, Mr Kingston goes on to say that the Advice deals with paragraph 116 in isolation, and does not acknowledge that it is to be read in association with the rest of the NPPF, just as the policies of the Development Plan are to be read as a whole. As I have already stated, the guidance in both the Development Plan and the NPPF must be read as a whole. Instructing solicitors have explained that they are well aware of this, but that the Authority was asking for advice on paragraph 116 in particular. Nevertheless, I have suggested the insertion of text to make clear the principle that paragraph 116 has to be read in the context of other applicable policies.
13. Mr Kingston (paragraph 24 and 25) criticises the Advice for taking an excessively legalistic approach, isolating particular terms and seeking authority to explain their meaning. Plainly, paragraph 116 is no more to be read as a statute than any other planning policy, but I think it acceptable to draw on other sources to understand concepts in the paragraph, providing any differences of context are made clear, and that it is kept in mind that the paragraph is to be read along with the rest of the applicable policy guidance.
14. Mr Kingston is clearly right (paragraph 26) to say that the decisions cited in the Advice are appeal decisions and not those of a court. Instructing solicitors have accordingly proposed amendments to the Advice, with which I agree.
15. At paragraph 27, Mr Kingston says it is inappropriate to use the Habitats Directive and decisions made in relation to it to interpret the term “public interest” in paragraph 116. My own view is that it is acceptable in principle to draw on the guidance about the Habitat Directive, so long as any differences of context are taken into account. I have therefore suggested some amendment to the text of the Advice where it deals with public interest. In particular, I have deleted the reference to the Dibden Bay decision, because the suggestion in the quoted passage that short term benefits would not be sufficient is not applicable to the present situation. As the Advice goes on to state, short term benefits are capable of being relevant in the present context, but they are likely to have less weight than long term ones.

16. At paragraph 29 Mr Kingston deals with whether the reference to need in the first bullet point of paragraph 116 is confined to need for the mineral or should be understood more widely. I agree with him that it is to be read more widely. I think the Advice as presently written acknowledges that. However, as the Advice also makes clear, the Authority may wish to give less weight to a need argument based on general benefits to the economy arising from the creation of jobs and revenue, as opposed to a case based on need for the mineral itself. I have slightly revised the relevant passage in the Advice (at page 13 of the original text, under the heading “Other arguments on National Need”), to reflect that the degree of weight the Authority gives the various arguments about need is a matter for it to decide.
17. At paragraph 33 onwards, Mr Kingston deals with the second bullet point in paragraph 16, which concerns “meeting the need...in some other way.” Mr Kingston rightly draws attention to the importance of minerals generally, as recognised in policy, and states (paragraph 37) that this aspect is not mentioned in the Advice. I think that is likely to be because the Advice was requested specifically to deal with paragraph 116. Nevertheless, in dealing with the context of paragraph 116, I think it appropriate for section 13 of the NPPF, including paragraphs 142 and 144 to be mentioned, and I have suggested text.
18. At paragraph 38, Mr Kingston says that it is “unsound to argue that importation of minerals which are necessary to meet society’s needs is a proper alternative to indigenous production”, because “(s)uch an approach would lead to an externalisation of the environmental impacts of the nations use of natural resources.”
19. It is not clear to me whether Mr Kingston is here suggesting that the availability of imports as an alternative source of supply is legally irrelevant, or whether he is simply making a planning argument that the availability of imports ought not to preclude permission being granted for indigenous extraction.
20. It is not for me in an Opinion of this nature to deal with the planning merits of imports versus home supply. There may be a number of factors to take into account. However, for the avoidance of doubt, I think there is nothing in law to

prevent the Authority taking into account the possibility of alternative supply from imported sources.

Core Strategy policy E

21. At paragraph 40 onwards Mr Kingston considers policy E. He says the policy is clear and does not require the supporting text to aid interpretation. I agree. The policy sets out a particular approach to Boulby and the supporting text explains the reason for that approach. Nevertheless, I think the Advice is right to point out that the supporting text is available to be used in the interpretation of the policy, should that be necessary.

Differences between the wording of paragraph 14 of MPS 1 and paragraph 16 of the NPPF

22. There are differences between the wording of paragraph 14 of MPS 1 and that of paragraph 16 of the NPPF, as pointed out in my instructions. The words of paragraph 14 were "...including in terms of national considerations of mineral supply", while those of paragraph 116 are "including in terms of any national considerations." I do not think this difference is significant, and I do not think there was any intended reduction in the protection afforded to National Parks with respect to proposed mineral developments. After all, both phrases are setting out an inclusive, as opposed to exclusive, list of those considerations that may be relevant to the need for the development. Even under paragraph 14 of MPS 1, any national consideration, not just one of mineral supply, could in principle be relevant.

Whether overall protection afforded to National Parks is borne out by the wording of the NPPF

23. I see nothing incompatible between paragraph 116 and the policy guidance on National Parks to be found elsewhere. The point is that paragraph 116 is part of the Government's overall guidance on the approach to development in National Parks. As stated above, I do not think it is materially different from that in

paragraph 49 of circular 12/96, or, indeed, from that formerly contained in paragraph 14 of MPS 1. It is because the Government values National Parks so highly that it has produced paragraph 116, setting out a general approach that major development will be allowed only in exceptional circumstances.

CONCLUSIONS

24. In conclusion;

- (a) I consider the Advice provides generally sound guidance, subject to the amendments I have suggested in the revised version sent with this Opinion. I hope the amendments I have suggested are sufficiently explained above, or are self explanatory. They should show up on screen in a different colour from the amendments suggested by instructing solicitor.
- (b) I do not think the advent of paragraph 116 of the NPPF heralds a less protective approach to development in National Parks than that contained in paragraph 14 of MPS 1.
- (c) I do not think paragraph 116 is incompatible with the rest of Government guidance about National Parks; rather, it is an inherent part of it.
- (d) For completeness, I do not think there are any aspects of Mr Kingston's Opinion on which I need to comment other than those set out above.

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3rd January 2013

**NORTH YORK MOORS NATIONAL
PARK AUTHORITY**

**YORK POTASH PLANNING
APPLICATION**

OPINION

Browne Jacobson LLP

Ref; Jonathan Allen