

## RE: FRACKING IN BALCOMBE

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### NOTE

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1. I am asked by Kevin Bottomley, on behalf of Balcombe Parish Council, what steps the concerned residents of Balcombe might take to prevent Cuadrilla undertaking exploratory drilling at the Lower Stumble site in Balcombe, West Sussex. In particular, I am asked what, if any, steps might be taken to challenge the planning permission under which the exploratory drilling is to be conducted. As I understand it, residents are particularly concerned about potential ‘fracking’ activities at the site.
2. The background to the case is familiar to the Council. I will consider first the 2010 planning permission, and then what steps might be taken to delay the exploratory drilling.

#### The 2010 planning permission

3. On 23 April 2010, West Sussex County Council granted Cuadrilla planning permission to “*upgrade [the] existing stone platform and drill an exploratory borehole for oil and gas exploration at Lower Stumble Hydrocarbon Exploration Site*”. That permission was subject to a number of conditions:
  - 1) The development must be commenced within 3 years of the date of the permission;
  - 2) The permission will last for 3 years beginning with the “*date of commencement of site construction*”. By the expiry of the permission, the site must have been completely restored in accordance with an approved restoration scheme;
  - 3) A number of conditions were laid down which had to be discharged **before** development could commence (conditions 4 and 12-16 inclusive);
  - 4) The remainder of the conditions concern the way in which the development is to be carried out (hours of work etc.);
  - 5) Further, condition 3 requires that the development “*is carried out strictly in accordance with the particulars of the development contained in...appendix C*” [of the Supporting Statement submitted with the planning application].
4. A number of documents relating to the conditions can be found on the WSCC website. Of particular importance are:

- 1) An email from Phil Mason to Michael Vine of WSCC informing him that Cuadrillia proposes to start construction on 13 September 2010, and a further email on 27 September 2010 from Phil Mason to the Highways Authority and James Neave of WSCC informing them that construction will commence on 28 September 2010;
  - 2) An email from Michael Vine to Phil Mason on 15 June 2010 confirming that conditions 12 and 13 have been discharged;
  - 3) An email from James Neave to Phil Mason on 2 June 2010 confirming that “provided the submitted measures to ensure mud and debris is prevented from getting on the highway are carried out in full the pre-development element of this condition [14] can be considered discharged”;
  - 4) An email from Michael Vine to Phil Mason on 5 July 2010 confirming that condition 15 is discharged;
  - 5) An email from Michael Vine to Phil Mason on 22 July 2010 confirming that condition 16 is discharged.
5. On the above information, if development was not commenced by April 2013 then the planning permission has already expired. If, however, development had commenced by April 2013, the planning permission expires three years from the date of the commencement (28 September 2013 on the available evidence).
6. On the fulfilment of planning conditions and the commencement of development, Lord Justice Woolf in the *Whitley* case said this:
- “...are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities.”<sup>1</sup>*
7. If, therefore, Balcombe Parish Council could show that the conditions were not discharged, the planning consent will have lapsed and no drilling can occur (any development that did take place would not have ‘commenced’ the permission due to the non-compliance with the conditions).

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<sup>1</sup> *Whitley & Sons v Secretary of State for Wales and Chryd County Council* (1992) 64 P. & C.R. 296 at 302 per Woolf LJ

8. In this case, the conditions fall into two types: those matters on which schemes must be submitted for council approval (conditions 4 and 12-16) and conditions governing the way in which the development is to be carried out (hours of work etc.).
9. On the face it, from the above documents, council approval has been obtained for all those areas in which it was required. Whilst a challenge to the council deciding to sign off a condition is possible, such a challenge would in my view need to be made by way of judicial review, and therefore within 3 months of the decision to treat an ‘approval’ condition as discharged. That time limit has, of course, expired.
10. Assuming that whatever work that was carried out on 28 September 2010 was compliant with the other conditions and approved schemes, development under the planning permission will have commenced and therefore drilling can occur under the planning permission, in accordance with its terms, until September 2013. On available information, this seems the most likely possibility. Of course, any information on what development was actually undertaken in September 2010 would be useful in confirming this.
11. If I am right in the above analysis, then Cuadrilla enjoy a valid planning permission which, until September 2013, permits them to drill an exploratory borehole for explorations of oil and gas. It should be noted, however, that the permission is to drill ‘strictly’ in accordance with the methodology contained in annex C of the Supporting Statement (planning condition 3).

What can be done to delay drilling?

12. The statements from both Cuadrilla and the Environmental Agency (‘Drilling in Balcombe’ website entry, May 2013) are clear that no fracking will take place at the site, but rather conventional exploratory drilling only. Efforts should, if possible, be made to ensure that what is proposed is consistent with Annex C of the Supporting Statement that accompanied the planning application. My current understanding of Annex C, admittedly on the basis of limited engineering knowledge, is that the initial drilling described does not involve fracking, though I note that the subsequent ‘testing procedure’ described states that “*stimulation is carried out by pumping water under pressure into the natural fractures in the shale to open them up to allow the gas to flow more freely*” (which, it seems to me, may well be fracking). Any expert view that the Council can obtain on whether drilling under Annex C can take place without fracking would be useful.
13. If the permission cannot be implemented without fracking, then Cuadrilla will need to apply for the correct permits and permissions from both the Environment Agency

and the Department of Energy and Climate Change (DECC). I attach a helpful note by the Environment Agency setting out its approach in considering applications for the exploration of shale gas which involve fracking. Particular attention should be given to the 'Openness and Transparency' section which states that the Agency's policy is to consult widely before granting bespoke permits for exploratory shale gas drilling involving fracking, and that the process takes 13 weeks or more (perhaps 4-6 months in cases of high public interest). If this policy applies, Balcombe Parish Council should seek to participate fully in any consultation which, by the time it has finished, is unlikely to leave enough time for any drilling before the planning permission expires and the site has to be restored as per the agreed scheme.

14. If Cuadrilla limit themselves to conventional drilling, and no fracking will occur, Cuadrilla still require various environmental permits from the Environment Agency and drilling permission from DECC. The Environment Agency has made clear what documents it expects from Cuadrilla in order to assess what permits are required (an environmental method statement etc.) and whether they should be granted. The regulations which govern the Agency's permit process (The Environmental Permitting (England and Wales) Regulations 2010) incorporate the relevant European Directive requirements (for example, the Waste Directive).
15. Balcombe Parish Council would be well advised to seek to participate fully in the permit process, including being kept updated as to exactly what works are proposed and what permits the Agency considers will be required. Again, the Council should explore the possibility of consultation before a decision on permits is reached.

#### The proposed second borehole

16. For completeness, I note that a second borehole is proposed to test for water contamination. Whilst the planning consent only relates to a single borehole, the council has indicated that the second borehole falls under permitted development rights and so does not require planning permission (email from Jane Moseley to Chris Hird on 26 April 2013). Providing any such works are kept within the proper scope of those development rights, this part of the proposed development will be lawful.

#### The way forward

17. For the reasons above, at this stage and on current information, it appears to be unlikely that a successful challenge could be brought against the 2010 planning permission. In planning a way forward, Balcombe Parish Council would, in my opinion, be well advised to obtain as much information on the proposed drilling as possible, and compare what is proposed to the process described in Annex C of the

Support Statement. Second, the Council should seek to be kept updated as to the permit process being conducted by the Environment Agency.

18. More generally, if Cuadrilla's activities are, for the moment, limited to conventional drilling, then the Council will have an opportunity to resist any further drilling in future: as the company recognises, commercial exploitation of the site in the future would require further planning consents and environmental permits.

Richard Clarke  
Landmark Chambers  
5 June 2013