

# Energy Now Expo 2017

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8-9 February 2017 | Telford International Centre

The renewable energy event for farmers and landowners

Lanyon Bowdler is a firm of specialist solicitors covering all aspects of law. Amongst the services on offer, we have a team of lawyers specialising in renewable energy issues.

The legalities surrounding renewable energy projects can be complex, and whether you are a business owner, farmer or landowner, we can guide you through the whole process.

This newsletter is designed to give you an insight into the kind of work we do, and how we can help you.



## Who are Lanyon Bowdler?

Lanyon Bowdler is a top 200 law firm with a wide and diverse client base including developers, landowners, funders and contractors.

Our various legal specialisms mean we are able to assist you from the inception of the project through disposal, refinancing operation and maintenance of single or multiple sites and our team of lawyers have the experience of dealing with any issues which may arise.

We are able to advise clients on all aspects of Energy law and at every stage of projects including property issues, which may include options, leasing and disposals, as well as corporate commercial and construction, including corporate structures and project financing, as well as regulatory matters such as planning and environmental consents.

Our recent projects have included acting in relation to windfarm development, drafting terms and conditions for an energy supply company, solar farms and biomass projects and we are constantly seeking new challenges, which will enable us to better assist our clients in the future in relation to energy projects.



## Renewable energy

Diversification is now a way of life for many farmers, with traditional farming under an increasing amount of pressure. Renewable energy is a popular option for many - solar panels, biomass energy plants and wind turbines can all offer an alternative income stream, often alongside the existing farm practices.

Solar panels and wind turbines have become a common sight in the British countryside in recent years and they can provide a good return, with the added bonus of allowing the land to continue to be used for certain crops.

But there are a number of legal and planning issues which landowners must be aware of when considering solar panels or wind turbines, as only certain sites will be suitable. The right contracts need to be in place at the outset to ensure you are not left footing the bill for the exploratory work if the project doesn't go ahead, and planning permission for the change of use of the site will need to be given by the local authority.

The team of specialists here at Lanyon Bowdler are experienced in dealing with renewable energy projects of all kinds and will be happy to advise you on the process.

## Fracking in North Yorkshire

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### What is fracking?

'Fracking' is the name applied to the process of drilling down into the earth before a high-pressure water mixture is directed at the rock to release the gas inside. Water, sand and chemicals are injected into the rock at high pressure which allows the gas to flow out to the head of the well. The term 'fracking' refers to how the rock is fractured apart by the high pressure mixture. Drilling for shale gas is only at an exploratory phase in the UK; however, large reserves of shale gas have been identified in the UK, particularly in northern England. More than 100 licences have been awarded by the government to firms in the UK, which would allow oil and gas exploration activities, but before fracking can take place planning permission must be obtained from the local council acting as the local planning authority.

### What is the background to the case?

In May of last year, North Yorkshire County Council considered a bid by Third Energy to extract shale gas by hydraulic fracturing (fracking) at a site near Kirby Misperton in Ryedale. The Council's planning committee voted seven to four in favour; making this the first fracking operation in England since the ban was lifted in 2012. This was clearly a ground breaking and brave move by the Council as it thrust it to the forefront of this highly contentious debate concerning the introduction of fracking.

Environmental groups, Friends of the Earth (FoE) and Frack Free Ryedale, challenged the permission on climate change grounds in the High Court. The case was heard in November 2016 with the residents and FoE, arguing that the Council had "misdirected itself in law" by concluding that it could not require Third Energy to provide a financial bond in relation to any long-term "legacy" environmental pollution arising from fracking. It was also asserted that the Council had failed to properly assess the climate change impact of burning shale gas obtained by fracking.

### What has the High Court decided?

The court decided that, on the facts, North Yorkshire County Council had "acted lawfully in the exercise of its discretion, in deciding not to seek a financial bond." It also found that the Council had properly considered climate change impacts when considering the environmental impacts of the proposed fracking operations.

### Key Aspects - Financial Bond

The application for planning permission made provision for the site to be restored by Third Energy. However, objectors raised concerns that, once restoration of the site was completed, contamination or pollution issues may arise, by which time Third Energy may no longer be in a position to rectify them. They called for a bond to be put in place, paid for by the industry, to foot the bill for any remediation required post completion. The Council's planning officers appeared to favour this approach, backed up by legal opinion from leading Counsel advising that it would be lawful. However, the Council changed tack and took a different view. They refused to disclose the legal advice which formed the basis of their new outlook, relying upon legal privilege.

Counsel for the Claimants argued that the Council had erred in law by concluding that it was not legally possible to impose a planning condition requiring a financial bond.

Under government planning guidance a financial guarantee is only justified in exceptional cases and the High Court Judge accepted the Council's submission that, when applying the relevant articles of the guidance, "the officer was entitled to advise that this was not an exceptional case which would justify a financial guarantee. In giving that advice the offer rightly reviewed the protection afforded by other regulatory regimes and proposed conditions to achieve financial protection in another way".

The Judge also found that "the terms of the conditions [proposed] afford a considerable degree of protection to residents" and "that the conditions extend beyond mere restoration to a programme of aftercare, in accordance with PPG".

### Key Aspects - Climate Change

Article 2(1) of the Environmental Impact Assessment (EIA) Directive 85/337/EEC (as amended) obliges Member States to adopt all measures necessary to ensure that projects likely to have a significant effect on the environment are made subject to an assessment of their effects, before permission is given.

The EIA Regulations 2011 state that a local planning authority is prohibited from granting planning permission for "development likely to have significant effects on the environment by virtue of factors such as its nature size or location" unless before doing so it has "taken the environmental information into account and has stated that they have done so".

It was common ground that the proposed fracking operation in this case was EIA development although the parties disagreed about what the implications of this were for the planning decision and process.

A Scoping Opinion is the Council's formal view on what issues an Environmental Statement should contain. The Claimant's asserted that the terms of the Scoping Opinion required the Environmental Statement accompanying the Planning Application to assess the environmental impacts arising from the burning of the gas at Knapton in the production phase of the development. The Claimants then submitted that the Environmental Statement was defective because of the omission of any assessment of the environmental impacts of burning gas from the site, which were either direct effects of the project or part of its indirect, secondary or cumulative effects.



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The Judge concluded that the Claimant's submissions were not "well-founded" and that "the Council was entitled, in the exercise of its judgment, to conclude that an assessment of the environmental impacts of burning gas from the KMA well site at Knapton was not required".

Her decision was based on the fact that no development was taking place at Knapton, Knapton already had planning permission and it was already authorised by the Environment Agency to burn gas from existing well sites. Any gas produced from the fracking operations would be within the limits of the existing Environment Agency permits. Paragraph 122 of the National Planning Policy Framework advises planning authorities that they should focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes, and it should be assumed that those regimes will operate effectively.

Also, the "detailed objections [submitted by FoE and others] ensured that the potential environmental impact of burning the gas at Knapton generating station was made clear to the Council - both officers and members - well before the decision to grant planning permission was taken". The Court was satisfied that the Council was "well aware of these [environmental] issues and took them into account when resolving to grant planning permission".

Furthermore, it would be impossible to assert that the officers had failed to guide the members sufficiently, or misled them, on a matter paramount to their decision.

### Future Implications

Communities Secretary Sajid Javid has stated that fracking "has the potential to power economic growth, support 64,000 jobs and provide a new domestic energy source, making us less reliant on imports". Whilst those opposed to fracking warn that the approach causes earthquakes, water pollution and contributes to green house gas emissions.

This decision coupled with the Lancashire decision set a powerful precedent, which reveal that the government is highly likely to approve fracking applications as long as they can be justified environmentally.

Significantly, notwithstanding the legal intricacies rehearsed in the High Court, what this case also shows is that only where there is a misinterpretation or misapplication of policy or clear breach of the rules of procedure or the principles of natural justice will the Court intervene. The Court's role is to review the way the authorities reach decisions, rather than to make a decision on the planning issues themselves, unless it can be argued that a decision is so unreasonable as to be irrational or perverse. They are concerned with the legality of the decision, not the planning merits.

Given the government's support and that it has publicly said it is going "all out for shale" to boost energy security and the economy, we can expect much more in the way of controversy associated with this new - to the UK - Energy source in the future.

## Brexit-Proof Your Farm: The Importance of Rural Diversification

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Family farms are at the heart of British countryside and their health is vital for the future of our rural communities. In the last five years there has been a steady decline of farmgate prices which has put unprecedented strain on farm businesses. The UK has seen real agricultural income per worker drop by 19% between 2014 and 2015. This qualifies as one of the most significant falls of any EU country. Falling incomes compounded with Brexit uncertainty has led many farmers to consider diversification.

### What is diversification?

Diversification is the process by which farmers seek alternative income by expanding their enterprises to include more than just growing traditional crops and keeping conventional livestock. There are various types of diversification that range from branching into the energy sector to providing unique holiday accommodation. Nationally, 61% of farms already have some form of diversified activity. Below we explore several examples of farm diversification.

Diversification may mean fundamentally changing the business or simply going about the business differently.

### Livestock Diversification

Farm livestock does not have to be restricted to the usual species such as cattle and sheep. Many farmers are finding profit investing in alternative species. The following are examples of some of the more successful, unusual and innovative ventures undertaken by farmers.

#### *Bee Keeping*

There are approximately 30,000 bee keepers in Britain today most with less than 40 hives. In addition to honey, cut-comb honey and wax, pollen harvested by bees is a highly sought after food product. A hive with a strong pollen flow can collect up to 1.5lbs of pollen per day which would sell for approximately £15.

Bee Bread has also developed into a high demand health food. It is 25% honey, 70% pollen and bee saliva. These ingredients are packed into empty comb cells which can then be harvested. Bee Bread is packed with natural probiotic bacteria and yeasts. A mere 100g of bee bread can cost up to £15.

#### *Deer Meat*

Consumption of venison in the UK has increased and there is a growing demand for this low fat meat. Red deer have become the species of choice for farmed venison. The main capital costs involved in deer farming are handling yards and fencing. Early in 2016, Sainsburys reported that over the festive period venison sales were up 115% on the same period from the previous year.

### Crop Diversification

Many farmers have diversified their enterprises by growing various alternative crops often referred to as novel crops. Climate change



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has created the opportunity for crops which are not native to UK to be grown here (eg vines and olives).

**Industrial Energy Crops**

Industrial energy crops are crops which are grown for the purpose of generating heat and electricity, or to produce transport biofuels. The vast majority of energy crops are grown using traditional farming techniques. The following crops can be utilized for heat and electricity generation:

- miscanthus
- switchgrass
- reed canary grass
- straw
- short rotation coppice (SRC) willow
- rye grass

(although there are several others).

The benefits of these energy crops extend beyond their use for biomass heat and electricity due to their ability to store carbon, benefit industrial landscapes, prevent erosion, improve biodiversity in the right location and improve fuel security.

Although there are various potential benefits of energy crops, public opinion on biofuels remains polarised. The viability of these alternative crops has often been questioned by the media and there are reports that have linked biofuels with rising food prices, deforestation and other harmful effects on biodiversity.

Currently, the government is supporting this emerging industry by offering a package of measures aimed at developing the biofuel measures in the UK.

**Speciality Flowers**

Cut flowers have become one of the most profitable crops around. A half an acre of open, arable land, a rototiller and of course, time and effort is your basic starting package. "Speciality cut flowers" denote crops other than the major florist crops of mums, roses and carnations. The term includes a variety of plant material: dried, fresh or preserved. Any plant parts, from buds to branches, which are used for decorative purposes are considered cut flowers.

Unlike commodity crops flowers are typically planted, cultivated and harvested by hand. Beyond field preparation very little mechanisation is involved. This makes entering into the flower market more feasible than many others. The market for homegrown British flowers has been expanding and figures from the National Farmer's Union show that the wholesale value of British-grown cut flowers sold last year reached £82m.

**Accommodation**

Love the idea of camping? Hate the idea of roughing? You're in luck as "glamping" (glamorous camping) has revolutionised the "staycation" holiday in the UK. From yurts and tipis to safari tents and tree houses the sky really is the limit when it comes to glamping.

The number of people wanting to camp has risen over the past several years, partly due to the cost of foreign travel and partly due to travel issues. This has provided a real diversification opportunity for farmers

and many have already taken advantage of this potentially lucrative venture. Glamping sites can achieve a fairly quick return on investment if the facilities, accommodation and service are all of an excellent standard. Good advertising and promotion is essential and many local tourism boards play an important role in this. The landscape produced by farmers also creates the back drop to a broader tourism industry which is estimated to be worth in excess of £23b annually. It is always worth checking if there are any planning considerations if you are contemplating any changes of use of land.

The Department for Environment and Rural Affairs (DEFRA) does offer grant aid in some circumstances - especially if the proposed enterprise will create employment opportunities. Many new enterprises will also be subject to various rules and regulations such as planning consent, health and safety regulations, business rates and so on.



At Lanyon Bowdler we are able to provide advice on all aspects of farm diversification so please do get in touch if you have any queries.

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