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Appendix 4B

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Cllr Dr Sheila Withams, Chair, Warboys Parish Council and Mrs Betty Ball, Chair, Warboys Landfill Action Group

By email only to
clerk@warboysparishcouncil.co.uk and
david.ball473@gmail.com

Dear Sirs

Re.: Proposals for a heat and power plant comprising biomass energy from waste and treatment of waste water by evaporation treatment plant and other development at Warboys Landfill Site, Puddock Hill, Warboys, PE28 2TX

Thank you for your letter dated 25 September 2018 asking the Council to review its decision to grant planning permission for the above development.

As a preliminary point, you have noted that the Council has the power to revoke a planning permission under s. 97 of the Town and Country Planning Act 1990 ("the 1990 Act"); this power is inapplicable until the Council has actually granted planning permission which does not occur until the formal notice granting planning permission is issued.

Your letter sets out a series of points which you contend (see pg. 10) leads to the conclusion that the Committee were misdirected in coming to their decision as a result of what was said in the Council's officer's report ("the OR") or at the Committee meeting held on 6 September 2018 and that, consequently, the decision was legally flawed. I address this contention.

You may be aware that any challenge by way of a judicial review based upon a misdirection to the relevant committee must establish that the officers' advice (given in this case by way of an officer's report) has seriously or significantly misled the Council on a matter bearing on their decision. Additionally, the Court will bear in mind (as per the decision in *R v Mendip District Council ex parte Fabre* (2000) 80 P & C R 500 and *Mansell v Tonbridge Borough Council* [2018] JPL 176) that officers' reports are addressed to a "knowledgeable readership" and considered by members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge". Such an assumption is particularly pertinent here given that a number of members attended a site visit to assess the scheme proposals. Moreover, a Court will bear in mind the purpose of an officers' report which is to summarise the key issues so that members may properly exercise their planning judgment; it is not to pick through and analyse every possible point.

The Council has considered whether any of the complaints which you have set out in your letter would amount to a material misdirection. They clearly would not. Each matter is dealt with in turn.

1. Conflict with National Policies (page 2)

You refer to the National Planning Policy Framework ("NPPF"), the National Planning Policy for Waste ("NPPFW"), the Waste Management Plan for England, the 25-year Plan for the Environment and the DEFRA draft Clean Air Strategy 2018. You do not, however, specify any particular conflict with any particular policy or statement of any document except the NPPFW. You say that the conflict relates to the need to limit climate change impacts and the need to manage waste in accordance with the waste hierarchy.

Before I address your specific complaints on the NPPFW, it is to be noted that the OR specifically addressed the NPPF, the NPPFW and the Waste Management Plan for England. Climate change issues were specifically considered in the report in the context of policy CS22 of the Council's Minerals and Waste Core Strategy Development Plan Document ("the CS") and the Government's objectives both in a policy (see para. 8.2 and 8.18 and 8.22 of the OR) and a statutory context (by reference to the Climate Change Act 2008, para. 8.8 of the OR). The waste hierarchy was also specifically addressed; I deal with your identified complaints on hierarchy further below, but to the extent that unspecified allegations of conflict with the waste hierarchy are alleged, that is wholly unarguable.

I turn to your allegations in respect of the NPPFW. You suggest that paragraphs 3 and 4 of the document are relevant to this application. That contention is wrong. Paragraphs 3 and 4 specifically relate to the identification of sites through the waste planning authority's plan-making functions. They do not purport to deal with the consideration of planning applications.

Paragraph 7 of NPPFW is relevant to the consideration of planning applications. I address the specific claims you make in respect of the NPPFW – each is unarguable:

> **No assessment of need for additional waste management capacity.** This is wrong. Need was specifically considered in the officer's report and in detail at paragraphs 8.4 to 8.26. It was specifically decided that there was a demonstrable need for the facility and that, while it could not be known whether recyclable wood would be burnt, this potential disadvantage was in any event outweighed by the more proximate management of waste and other sustainability objectives, like addressing climate change (see paras. 8.10, 8.26, 8.35, 8.36 and 9.2-9.3).
>
> **No evidence that the proposal will drive waste up the waste hierarchy.** This is wrong. The OR specifically considered in detail the extent to which waste will be driven up the hierarchy. It is for that reason that the Council recognised the potential for some grade B wood to be processed which would be contrary to the hierarchy. The Committee patently had the relevant material drawn to their attention.
>
> **A failure to adequately assess the impact on neighbouring land uses.** The OR considered in detail air quality issues (8.39), human health issues (ibid.), visual and heritage issues

(8.56 and 8.86), highways matters (8.60), habitat issues (8.72), noise issues (8.81.), dust issues (8.84) and odour issues (8.85). There is simply no basis for alleging that neighbouring land uses were not adequately assessed.

A failure to assess the cumulative impact of existing and proposed disposal facilities on the site. The Environmental Statement ("the ES") and supporting application documentation provided evidence which informed the Officers' assessment of the proposal. The ES and supporting application documentation considered a range of cumulative issues of relevance to local residents including visual impacts, noise impacts, air quality matters and highways issues. The Officer's judgments on acceptability took into account this evidence when advising members that the proposal was acceptable. Moreover, members were well aware of the area and knew of the proximity of the application site to the local area.

2. "A Leap into the Unknown" (pg. 3)

You allege that the impacts of this development from a human health perspective have been misunderstood and understated; this point is made particularly in the context of the impact of depositions into the soil. These contentions are clearly unarguable. The issues of air quality and the impact on human health were specifically considered in the OR (at 8.39). The Council took into account the fact that the proposal would require licensing from the Environment Agency under the environmental permitting legislative controls and that this would require consideration of the effect of air emissions on human health. This approach is wholly in accordance with the NPPF and the NPPFW. Paragraph 183 of the NPPF states:

> *The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.*

Paragraph 7 of the NPPFW states that waste planning authorities should:

> *-Consider the likely impact on the local environment and on amenity against the criteria set out in Appendix B and the location implications of any advice on health from the relevant health bodies. Waste planning authorities should avoid carrying out their own detailed assessment of epidemiological and other health studies.* [it is to be noted that appendix B of the NPPFW does not include human health as an issue to be considered]
>
> ...
>
> *-Concern themselves with implementing the planning strategy in the Local Plan and not within the control of processes which are a matter for the pollution control authorities. Waste planning authorities should work on the assumption that the relevant pollution control regime will be properly applied and enforced.*

Consistent with this advice, the Council has (8.39 of OR et sec) assumed that the environmental permitting system will operate properly, taken into account the advice of the Environment

Agency (which was that there was no objection to the proposal) and Public Health England and avoided undertaking its own detailed assessment of epidemiological and other health studies. Additionally, and in any event, it specifically considered the air quality assessment which considered the potential impacts of the scheme on vegetation (8.49 of the OR) and concluded that they were acceptable.

There is no conceivable error in this approach.

3. Local Planning Policies (pg. 4)

You contend that there were "serious flaws" in the way in which the application was presented to committee by not identifying the contravention of certain CS policies. I deal with each of the points you rely upon.

Policy CS33. You appear to contend that the proposal is contrary to this policy. I remind you that any potential challenge to the legality of the decision must be based on public law grounds. In the context of attacks on Council policy decisions, the Supreme Court has recently reiterated the general principle that, while the interpretation of policy is a matter of law, the application of policy is a matter for the decision-maker (see *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] UKSC 17). Accordingly, the OR concluded, having assessed the potential impact of the proposal by reference to appropriate viewpoints and their context, that the scheme would comply with policy CS33 (8.59); your suggested challenge is against the application of the policy and not the Council's understanding of its meaning.

Policy CS34. The OR specifically considered this policy in the context of dust, odour and noise issues (see 8.82-8.85). It appears that your complaint is that the Council should have reached the conclusion that the policy was contravened because the scheme fell within a "buffer zone" which, you contend, is identified at paragraph 7.39 of the CS as 400 metres from the development. As a starting point, there is no specific requirement in any policy of the CS that a buffer zone must be applied to the instant development. The Council considered the evidence of potential effects on the nearest properties to the site and reached the conclusion that they were acceptable; this alone discounts the necessity for a buffer zone - there could not have been any justification for the imposition of a generic zone. In any event, paragraph 7.39 of the CS which you rely upon is irrelevant to the consideration of this proposal. This paragraph relates to sewage water treatment works and is not relevant to the present proposal – we note that you do not suggest that policy CS17, to which paragraph 7.39 refers, did fall to be considered in this case. You will note that policy CS17 was not applied to this scheme by officers. Again, I remind you that the application of policy is a matter for the authority not for the courts in the absence of irrationality.

As part of your complaint under this policy, you contend that the Council has failed to take into account the effects on a touring caravan park in, it appears, the context of noise impacts. This is wrong. The Council has considered the nearest residential properties which are themselves closer than the caravan park. As a result, there could be no conceivable error in not dealing with the existence of this receptor. In any event, as you are aware, members were notified at the meeting of the existence of the caravan park and the members who attended the site visit saw

it. It is inconceivable that members had not considered this issue and reached the conclusion that the development was acceptable in noise terms.

Nevertheless, in order to provide further information on this point, the Council has asked the environmental health officer ("the EHO") whether his view of the application would be any different if the caravan park was assessed as a specific receptor. We have had the attached response from the EHO. This response makes quite clear that he takes no different position on the application when taking the caravans into account. I refer to this additional information further below.

Allocation W1V. You contend that this proposal is subject to allocation W1V and so is subject to the criteria contained in the allocation framework. This is wrong. As a matter of fact, the application site lies adjacent to the allocation not within it and so the policy guide in allocation W1V does not apply.

Misdirection that members were told not to take into account air quality issues. For the reasons given above, this point is unsustainable. Members were not told to ignore air quality issues. They were told that the matter would be adequately dealt with through the environmental permitting process and that in the context of air and water borne contaminants the evidence was that the proposal would be acceptable (8.49). As a result, the proposal was considered to comply with policy.

Failure to consider dust, odour and noise. You say that members were told that they could not take such matters into account. This is wrong. Noise issues were specifically considered in the OR (at 8.81 – 8.83) and found to be acceptable and in compliance with policy CS34. The same conclusion, following analysis, was arrived at in respect of dust (8.84). While it was concluded, correctly, that dust would be controlled by the Environment Agency (8.84), this was an additional factor and did not affect the prior conclusion that policy CS34 was complied with. For the sake of completeness, however, even if this point had been taken into account as part of the assessment of policy CS34, it was relevant. Odour was also considered under policy CS34 and the Environment Agency's role assessed in the same manner.

4. Waste Water (pg. 6)

The contention under this heading appears to be that the Council took into account an immaterial consideration or made an error of fact in assessing the waste water treatment proposals on the basis that it would comprise "primarily landfill leachate" when Earthworm Capital who are attracting investment describe the proposed waste water on their website as including "landfill leachate and waste water from the food and plastics industries". You contend that the consultants' reports were therefore assessed on an incorrect basis.

First, there is no actual inconsistency with the statement even if correct; a statement that the treatment will be in respect of "primarily landfill leachate" and a statement that it will include waste water from other sources are not inconsistent positions; the application does not state that all the water treated will be landfill leachate. Second, you have not established that there has, in fact, been any error in the assessment process by any consultant. Third, in any event, this suggested error is a repetition of the contention that health issues have not been properly taken

into account. In accordance with the Council's correct approach of deferring on such matters to the Environment Agency, any such issues will be considered at that stage in the process. You suggest that the consequence is that it cannot be demonstrated that the human health or the environment will not be endangered. The Council disagrees. The air quality analyses coupled with the protective assessment of the Environment Agency does enable the Council to conclude that there will not be an unacceptable effect on the area.

You include under this heading (pg. 7) the lack of a reference to a response from the Food Standards Agency ("FSA") although the Council had recommended (5.30, OR) that the authority should consult that body. This recommendation is in fact derived from Public Health England, not the Council (5.27, OR). The FSA was consulted but no reply was received (5.31, OR). Having received your letter, the Council has made enquiries of the FSA. The FSA did respond on 12 March 2018 but used the wrong email address and so its email was not received by the case officer. I have attached a copy of this email. The email establishes that the FSA had no objection to the scheme subject to monitoring. Monitoring will not occur until commissioning and will be undertaken through the environmental permitting process. Had this email been taken into account by the Council or members at the time of the decision, it is inconceivable that there would have been any difference to the decision.

You assert that there has been no assessment of the effects of water vapour and plume emissions on local atmospheric conditions. Air emission analyses will, as appropriate, be considered by the Agency. There is nothing to indicate that they will not consider this issue (indeed, the advice you refer to in your letter - which is part of the guidance applicable to the environmental permitting process - indicates that it will). In these circumstances, it is unarguable to suggest that this issue could lead to any different conclusion on the part of this Council.

Nevertheless, in order to provide further information on this point, the Council has asked the EA to indicate whether it would consider the consequences of water vapour on local atmospheric conditions as part of the environmental permitting process. They have confirmed orally that they will do so. I refer to this additional confirmation further below.

5. Sustainability (pg. 7)

Your contention is that the Council has wrongly concluded that the proposed development is sustainable. There is no legal error identified in this assertion. Whether the proposal is sustainable is a matter of judgment. The Courts have continually deprecated legal challenges which seek to attack matters of planning judgment. The OR considered over some 9 paragraphs the degree to which the scheme would be sustainable in waste transportation terms (8.27 – 8.35) and the conclusion was reached that, with a relevant condition imposed, the project's aims would be achieved. Condition 25 was accordingly recommended; it is a valid condition.

6. Waste Hierarchy (pg. 8)

It is not clear what error you allege under this heading. However, it appears that you are suggesting that the Council failed to take into account the potential for the scheme to process material which is currently recycled and therefore not drive that material up the waste hierarchy. However, that potential was specifically taken into account in the OR (8.26). Having considered

this potential, the Council also assessed other sustainability objectives (8.27) including compliance with the proximity principle and the contribution of the development to avoiding climate change. Having considered the totality of the application's merits, the Council concluded that this factor did not lead to the conclusion that development was either contrary to the development plan or national policy nor that material considerations should lead to a refusal of permission. There is no legal error in this analysis.

7. Need (pg. 8)

You argue that the applicants should have demonstrated the need for this scheme which they have failed to do. The pertinent question is whether the Council was required to consider the question of need and reached a conclusion on that question. As has been indicated above, this matter was considered within the context of policy CS29 and it was concluded that there was a demonstrable need for the facility; this conclusion then took into account the potential uncertainty of some recyclable wood going to the plant. This uncertainty was plainly material and was properly taken into account by the Council.

8. Impact on Nearby Residents (pg. 9)

This section is a repetition of an earlier part of the letter, namely, the failure to properly take into account the potential for impacts on nearby residents. As I have stated above, the relevant issues were assessed.

9. Weighing the Balance (pg. 9)

Two issues are raised under this heading. First, it is suggested that conflicting policies and inconsistencies in the documentation were ignored in the OR. This is wrong. The relevant issues were taken into account and the Council's assessment dealt with them proportionately and appropriately. There is no conceivable error based upon this unparticularised allegation.
The second point is that members were told that it was preferable to grant planning permission subject to stringent conditions rather than risk an appeal and that members were not told that the applicant could appeal against conditions, an Inspector could add further conditions or an appeal could be dismissed. I remind you of the need to take into account members' knowledge; members were plainly aware of the potential powers available to an Inspector on appeal and of an applicant's ability to appeal the imposition of conditions.

Additionally, there was no error in the guidance which was given. If the suggestion under this part of the letter is that members were told that permission should be granted because the Inspectorate could reduce the number of conditions and that this was an error of law, that is patently unsustainable. A statement to that effect would, in fact, be correct. However, the pertinent issue for the purposes of any legal challenge is what members' decision was based upon. There is nothing to indicate that the decision was reached on any different basis than as it was contained in the OR, namely, that approval should be given for the scheme because of the lack of harm occasioned by it and the number of benefits associated with it.

For all of the above reasons, there is no basis for challenging this decision.

As I have indicated above, there are two additional items of information included in this letter which relate to two specific complaints made by you, namely, (a) that relating to potential noise experienced by caravan occupants and (b) the effects of water vapour releases on local atmospheric conditions. Neither of these items of information was before the Committee and so the Council proposes to provide this information to Committee as well as the two particular complaints made by you in order that the Committee can decide whether their decision should be any different. This further consideration will not involve a full rehearsing of the entire application scheme but only a consideration by the Council as to whether, in the light of that additional information and your specific complaints, there should be any change to the decision they have made. This additional information will be reported committee at the next committee on Thursday 13 December and a short report dealing with this point will then be considered; this report will be made available in the usual way on the Planning Committee website pages. The agenda and the planning officer's report will be published 6 working days ahead of the meeting.

I hope the above is of assistance.

Yours faithfully

LGSS Law

LGSS Law Ltd

Enc. Food Standards Agency response
Emails from Huntingdonshire District Council EHO, dated 11 October 2018 and 24 October 2018