

**SPECIAL MEETING OF THE REGULATORY – PLANNING AND
CONTROL COMMITTEE – 2 MARCH 2009**

**OBJECTIONS TO THE PROPOSED DEVELOPMENT OF SHEEPBRIDGE
RESOURCE PARK BY CHESTERFIELD AGAINST INCINERATION**

LEGAL AND PROCEDURAL ISSUES

1.0 INTRODUCTION

- 1.1 Chesterfield Against Incineration ('CAI') are a Community Group formed for the purposes of opposing the development of Sheepbridge Resource Park for recycling and sorting of waste materials and generation of renewable energy, Dunston Road, Sheepbridge, Nr Chesterfield.
- 1.2 CAI have appointed professional consultants to advise on various aspects of the development proposals comprised in a planning application bearing reference CW2/0708/56 currently under consideration by Derbyshire County Council ('the planning application'), namely:

Marrons
Solicitors
1 Meridian South
Meridian Business Park
Leicester LE19 1WY (Planning, Legal and procedural matters)

Waterman Boreham
Sutton Place
49 Stoney Street
The Lace Market
Nottingham NG1 1LX (Highways and Transport Planning)

RSK Environment Ltd
29 Park Circus
Glasgow
G3 6AP
United Kingdom (Review of Environmental Statement)

- 1.3 This paper addresses a number of legal and procedural matters relevant to the determination of the planning application to which, it is submitted, the County Council should have regard. We deal with these matters under the following headings:

- Prematurity
- Environmental Statement
- Highways
- Public concerns about safety
- Matters regulated by other Statutory Codes

2.0 PREMATURITY

- 2.1 In December 2008 the Council halted work on its Waste Site Allocations DPD ('WSA') after being rightly advised that there would be a high risk of the DPD being considered unsound in the absence of a suitable Waste Core Strategy DPD¹.
- 2.2 PPS12: Local Spatial Planning describes the nature of Core Strategies as including "...an overall vision which sets out how the area and the places within it should develop" and "...how much development is intended to happen where, when and by what means it will be delivered" (para 4.1) and states that it is "...essential that the core strategy makes clear spatial choices about where developments should go in broad terms. This strong direction will mean that the work involved in the preparation of any subsequent DPDs is reduced"
- 2.3 It is therefore a matter for the Waste Core Strategy to define the future waste planning strategy for the County, set out the future predicted waste production, explore all opportunities for reduction, re-use and recycling of waste first and then, to the extent that this may be necessary, identify how many facilities will be required for the incineration or other treatment of waste. The WSA will then define more precisely where any such facilities should be located.
- 2.4 In the same way that the Council has now accepted that it would be premature to allocate energy recovery sites or gasification plants in advance of the adoption of a Waste Core Strategy, axiomatically it would be premature also to grant planning permission for such sites, particularly where, as here, granting permission could prejudice the Core Strategy by predetermining decisions about scale or location of such development which are to be addressed in the Core Strategy (see "*The Planning System: General Principles*" paragraph 17).

Statement to assist Applicants

- 2.5 It is appropriate at this juncture to consider the status of the Council's 'Statement to Assist Applicants in Preparing Planning Applications for Waste Management Development' (December 2008).
- 2.6 This Statement is, in reality, no more than a re-incarnation of the previously withdrawn 'Preferred Options Report' which includes the conclusions of the site evaluation and selection process undertaken in relation thereto.
- 2.7 Paragraph 1.6 of the Statement suggests that "...the Critical Friend Report did not...find any material weakness in the technical site selection and evaluation processes, which it considered to be rigorous and effective". This is, however, nothing to the point. The fact remains that the Preferred Options Report was withdrawn because the sites selected therein had been assessed in

¹ It should be noted, however, that had the Preferred Options Report been proceeded with, the inclusion of the application site in that document would have been rigorously opposed by CAI in any event.

the absence of a Core Strategy. The assessments are, in consequence thereof, manifestly flawed. Furthermore, in the particular case of the application site, its inclusion in the Statement is in any event predicated on access being gained from the A61(T) as opposed to Dunston Road “...*which is not satisfactory for large numbers of vehicles, especially HGVs*”. Given however, that the planning application nevertheless proposes access from Dunston Road, the assessment cannot, reasonably be considered as material to the determination of the application in any event.

- 2.8 Once a Core Strategy has been adopted, the Council will no doubt go back to considering site allocations, but it will need to do so from the beginning of the process - including renewed public consultation, and there can be no guarantee that the application site will, if still promoted, be a preferred option of the Council next time round. In the meantime, given the withdrawal of the Preferred Options Report there is no reasonable basis for concluding that the decision to include the application site as a preferred option this time round was a credible and robust one.
- 2.9 It is submitted, therefore, that whilst applicants may wish to take the Statement into account when putting together proposals, the Council should be extremely cautious about giving this document any weight whatsoever in the determination of applications for planning permission, as the status of the document as a material consideration is at best doubtfully tenable.

3.0 ENVIRONMENTAL STATEMENT

- 3.1 No planning permission can be granted for EIA development (i.e. development likely to have significant effects on the environment by virtue of its size, nature or location) unless the decision maker has first taken into account “environmental information” (Regulation 4(2) Town and Country Planning (Environmental Impact etc) Regulations 1999) (‘the EIA Regulations’).
- 3.2 An Environmental Statement (‘ES’) submitted in support of a planning application is but a step in an evaluative procedure, and should provide certain specified information for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out, including a description of the development, the data necessary to identify and assess its main environmental effects, a description of the likely significant effects and, where significant adverse effects are identified, a description of the measures envisaged to avoid, reduce or remedy them.
- 3.3 The adequacy of the ES is primarily a matter of judgement for the decision-maker, however a failure to deal with an issue which plainly requires to be dealt with in an ES, or as part of the environmental assessment process, will be grounds to strike down a permission granted in reliance on it².
- 3.4 Having from the outset expressed concerns about the objectivity and veracity of the ES submitted on behalf of this particular application, not least because the Company who compiled and submitted the ES were at the time (but apparently are no longer) a shareholder in the applicant Company, CAI commissioned RSK Environmental Ltd to undertake an independent review of the ES (see report (February 2009) attached as Appendix 1 (‘the RSK report’)).
- 3.5 The key objectives of the Study are set out in paragraph 1.2 i.e.
- *to be rigorous but realistic and objective in reviewing each of the components of the environmental impact assessment presented; and*
 - *provide transparent observations, taking account of legislative and best practice requirements, ensuring [CAI] and, where appropriate Derbyshire County Council are properly informed*
- 3.6 The methodology is set in Chapter 2 and the findings of the Review in Chapter 3. The Conclusions (Chapter 4), are frankly startling: i.e.

² See e.g. *R v Cornwall CC Ex p. Hardy* [2001] Env.L.R. 25).

“...the review of the Sheepbridge Resource Park ES by RSK has revealed a number of significant observations and, more importantly, omissions. Of greatest importance are the Tier 1 observations as these relate to what are considered as **direct non-compliances with the EIA regulations and European directives**. These observations are compounded by a **further 40 or so Tier 2 observations that relate to instances where it is considered that implementation of the requirements of the EIA regulations and European directives is inadequate or poor**. This further compounded by **in excess of 55 Tier 3 observations that relate to instances where poor practice has generally been adopted ranging from inconsistencies across and between the ES chapters through to little detail provided in terms of mitigation proposals**.

To that end, it is considered, following the objective review of the submitted ES, that there is **insufficient information provided, even when considering subsequent addendum reporting, upon which to base a decision on the application under the terms of the EIA regulations”**

(Emphasises added)

- 3.7 Furthermore, CAI have received advice from their Highways Consultants, Waterman Boreham, who, in addition to observing the absence of a formal Transportation Assessment, have noted inter alia that the traffic survey carried out on behalf of the applicant was undertaken during school holidays and before the Bridge Business Park was occupied which is clearly inappropriate, the speed survey was not carried out to the required standard and is thus flawed, no other off-site surveys were undertaken, the forward visibility approach from the west on the B6050 Dunston Road appeared not to have been checked out, the traffic impact calculations had been carried out using HGVs only, and no accident breakdown or descriptions of accidents at off-site locations had been submitted (see copy letter attached at Appendix 2).
- 3.8 In response to these deficiencies, Waterman Boreham have now carried out a more detailed assessment of the proposals which raise serious concerns about the same on highways grounds.
- 3.9 In *R. (Blewett v Derbyshire County Council* [2004] Env LR 29, at paragraph 41 Sullivan J remarked:

‘In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant’s environmental statement will always contain ‘full information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. **There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations...but they are likely to be few and far between”**

(emphasis added)

- 3.10 It is respectfully submitted that the deficiencies in the ES submitted in support of the Sheepbridge application, identified by RSK and Waterman Boreham, are such that the ES cannot reasonably be described as an environmental statement as defined by the Regulations.

- 3.11 There are of course a number of direct non-compliances with the EIA Regulations identified in the RSK Report, of which we highlight but two:
- the failure of the ES adequately to address the issue of alternative sites and their environmental considerations, to which can legitimately be added the failure to adequately consider alternative forms of waste management – given that the Waste Management Hierarchy within the European Commission Community Strategy for Waste Management (1989) places the recovery of energy from waste as the second least favourable option for waste management, marginally above landfill; and
 - the failure of the ES to consider cumulative impacts i.e. of the development in combination with other proposed developments – including those identified in the report i.e. the EcoDome and Chesterfield Rugby Club³;
- 3.12 The absence of a full Transport Assessment is a further significant omission and contributes towards an overall environmental assessment process which, as it stands, must be considered to be fundamentally flawed.
- 3.13 The implications for the planning application of these deficiencies are obvious and profound – the County Council must either require the applicant to remedy the defects in the ES by providing substantially more information pursuant to Regulation 19 of the EIA Regulations, or refuse the application altogether.

³ Although other planned development, including e.g. Chesterfield Football Club and associated developments, will also need to be taken into consideration

4.0 HIGHWAYS

4.1 Both the absence of a full Transportation Assessment and the inadequacy of the information that has been provided in the ES in relation to Highways matters have already been noted above.

4.2 In a letter to Derbyshire County Council (Highways) dated 3 February 2009, however, a number of preliminary observations upon the application were made on behalf of CAI by Waterman Boreham (see Appendix 2) including:

- DCC (Highways) appear not to have reviewed the highways information set out in the ES;
- The proposed junction needs to be redesigned to provide a 4.5 metre set back (note that amongst other things this would result in a significantly greater loss of protected trees);
- Visibility splays need to be measured to the nearside kerb and not to the centre of the opposite carriageway as set out in the ES drawing for the eastbound visibility splay;
- There has been no assessment of the feasibility or prospect of accessing the application site from the land to the north and through the existing industrial estate as anticipated in the assessment of the site prior to its inclusion in the now withdrawn Preferred Options Report;
- The parking spaces provided at the Material Recycling Facility ('MRF') and Energy Recovery Building ('ERB') (39 spaces) would encourage the use of the car and would therefore not be conducive to sustainable travel;
- The TRICS assessment needs to be re-worked based upon appropriate, rather than all available sites;
- The conclusions on the traffic impact calculations are inaccurate and misleading;

4.3 The 3 bus stops identified in the ES as being within walking distance of the site are in fact over 500 metres away which is in excess of the maximum walking distance (400 metres) set out in National Guidelines. In any event no footways are proposed to link the site to existing footpaths, thus there will not be adequate pedestrian access to the site and this will not allow the promotion of walking or public transport (walking to/from bus stops) as sustainable alternative modes of transport to the car. Furthermore the bus frequency for all services (one bus every hour) is not considered conducive to public transport use, especially for shift work.

4.4 Following more detailed assessment of the proposals, including:

- Speed survey on Dunston Road at the location of the proposed access;

- Accident analysis of data included in the ES
- Review and assessment of HGV traffic generated by the proposed development;
- Review of the County Council’s WSA report (now withdrawn and re-issued as the ‘Statement to Assist Applicants...’)

Waterman Boreham wrote again to the County Council (Highways) on 25 February (see Appendix 3) confirming:

- (i) On the basis of the speed survey and volume of HGV traffic predicted, a recommendation that a setback of 4.5 metres, rather than the 2.4 metres proposed in the planning application is required;
- (ii) A significant number of accidents have been recorded on Dunston Road within the past five years. Thus any increase in traffic due to the proposed development on Dunston Road and at the Whittington Moor roundabout is likely to be detrimental and, following a more detailed analysis, appropriate mitigation measures will be required.
- (iii) On proper analysis i.e. using sites of a similar nature to those proposed at the application site, the estimated HGV generation is significantly higher than that predicted in the ES. It is therefore considered that the impact of the development on the local highway network has been underestimated.
- (iv) The traffic impact calculations in the ES, carried out using HGVs only, are misleading, and on the basis of the revised TRICS based values, which are significantly higher, there will be a much greater impact. Thus the ES conclusions on highway impact are inaccurate and misleading.
- (v) The WSA Report (now withdrawn and re-issued as the ‘Statement to Assist Applicants...’) describes the existing Dunston Road Access as “...not satisfactory for large numbers of vehicles, especially HGVs” and that “...large number of HGVs could have a detrimental impact on the operation of the roundabout junction at Whittington Moor”. The Report also recommends that the built environment at the site, including a footpath to the south-west of the site, should be enhanced. No such enhancements are, however, proposed by the application.
- (vi) The WSA also states that “Traffic Assessments should consider the adequacy of the access and service bridge and the potential impacts of the A61 Whittington Moor junction, before planning application submitted”. This has not been done.

4.5 On the basis of the above, Waterman Boreham conclude that there have been “...some serious omissions and misleading calculations and statements in the submitted ES in terms of traffic”, and recommend to the Highways Authority that “...the planning application, as it stands, should be refused on highways grounds, at least until further information is provided, including a complete

Transport Assessment, to include junction capacity assessments and modal split assessment” and that there are sufficient grounds to substantiate a highways objection to the proposals.

- 4.6 There can surely be little doubt that it would now be appropriate for the Highway Authority to be re-consulted on the application in the light of the conclusions of Waterman Boreham. CAI would, in the circumstances, frankly consider any continued absence of a highways objection to the application from the County Council (Highways) as highly controversial.

5.0 PUBLIC CONCERNS ABOUT SAFETY

The following propositions may be suggested on the basis of case law:

- 5.1 Public safety is clearly capable of being a material consideration in determining planning applications. The fact that fears and concerns are held by members of the public may itself constitute a material consideration, if:
- (i) they relate to a matter (e.g. public safety, interference with reasonable use of adjoining land) which itself is a material consideration; or
 - (ii) they are objectively justified⁴. If the proposed development would introduce or increase a risk of danger, that must be a factor to be assessed and weighed in the balance;
 - (iii) if the fact that they exist, even if baseless, may itself have land use consequences⁵
- 5.2 Differences over safety usually boil down to the acceptability of different degrees of risk, rather than a clear conclusion that the fear is either justified or baseless. The primary task of the decision maker in such a case must be to determine the acceptability of the risk.
- 5.3 Thus in *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1994] 1 P.L.R. 85 at 95 Glidewell L.J. said:
- “Public concern is, of course, and must be recognised by the Secretary of State to be, a material consideration for him to take into account”.
- 5.4 In *Newport Borough Council v Secretary of State for Wales* [1998] Env. L.R. 174 the Court of Appeal accepted that even fears that have shown to be unjustified may continue to be a material consideration i.e.:
- “...local fears which are not, in fact, justified can rank as part of the human factor...and can be given direct effect as an exceptional or special circumstance”.
- 5.5 It is submitted that CAI’s concerns over the risk to public health of a gasification plant in close proximity to homes and businesses is entirely justified, however it must follow from the above, that even if such concerns were found to be unjustified, they could on their own justify a refusal of planning permission.

⁴ *West Midlands Probation Committee v Secretary of State for the Environment* [1998] J.P.L. 388.

⁵ *R v Broadland District Council Ex p. Dove* [1998] N.P.C. 7)

6.0 MATTERS REGULATED BY OTHER CODES

- 6.1 Provided a consideration is material in planning terms, the authority are entitled to have regard to it notwithstanding that other machinery may exist for its regulation.
- 6.2 Thus the fact that before the MRF and ERB can operate they will require an Environmental Permit under the Environmental Permitting Regulations 2007 issued by the Environment Agency should not divert the planning authority away from taking all material planning considerations into account in the determination of the planning applications including the environmental effects of the development.

7.0 CONCLUSION

- 7.1 The planning application, originally predicated on the inclusion of the site in a Preferred Options Report which has now been withdrawn by the Council, is clearly premature in advance of the adoption of a Waste Core Strategy. Indeed the applicant can no longer rely upon the withdrawn Preferred Options Report, and the Council should be extremely cautious about giving the (non-statutory) Statement to Assist Applicants any weight whatsoever in the determination of the application.
- 7.2 The independent assessment by RSK of the ES submitted in support of the application has identified a number of serious flaws in the environmental assessment process to-date which, it is submitted, casts doubt upon the entire credibility of the development proposals.
- 7.3 CAI's concerns, expressed from the outset, about the environmental impacts of the proposed development on the lives, homes and businesses of the local community have only been heightened by the findings of the independent report, and by advice received from independent highways consultants.
- 7.4 Thus, CAI are continuing to examine the merits of the application on a number of other fronts, including landscape and ecological, and reserve the right, in due course to provide further evidence to the County Council in support of such matters. To this extent, CAI's current position should not be regarded as its final say upon the application.
- 7.4 In the meantime, it is submitted that there can be no question of the County Council being in a position to grant planning permission in relation to the proposals on the information currently submitted. At the very least the County Council should require the significant omissions in the environmental information to be provided pursuant to Regulation 19 of the EIA Regulations or it should simply refuse the application altogether.

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27 February 2009