The Rt Hon Eric Pickles MP
Secretary of State for Communities
and Local Government
Department for Communities and Local Government
Eland House
Bressenden Place
London
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27 July 2011

Our ref:
JP/NG

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Dear Sir

Lower Sunbury Residents' Association
Application for Charlton Lane Waste Management Facility: request for Refusal Direction under Article 25 DMPO or Call-in for Secretary of State's own determination
Planning Application: 10/00947

A. Introduction

1. We act for and on behalf of Mr John Hirsh (Chairman), the Committee and members of the Lower Sunbury Residents' Association (**"LOSRA"**), who object to proposed development of waste management facilities at Charlton Lane, Shepperton, Surrey. For the reasons summarised below, we urge the Secretary of State to direct Surrey County Council (**"SCC"**) under Article 25 of the DMPO 2010 *not* to grant planning permission for this proposed development; or alternatively to call this application in for his own determination.

2. As you will know, the site is in the Green Belt. The development site currently operates, with planning permission, as a community recycling facility. But these proposals would involve the operation not only of a community recycling facility and bulk transfer centre, but also of a new anaerobic digestion plant and a new gasification plant. The proposals would thus contain thermal treatment facilities requiring the development of a polished stainless steel flue stack some 49m metres in height. The development site is *only* designated as suitable for such facilities within Policies WD1, WD2 and WD5 of the Surrey Waste Plan (2008) (which is part of the development plan for the area) if various criteria are satisfied. One such criterion is that there must be "very special circumstances" justifying development of any such facilities on this site, given its Green Belt designation, in accordance with PPG2. Another criterion is that planning permission for development involving the thermal treatment of waste at this site will only be granted if "provision is made for energy recovery".

3. In the face of considerable objection – including from the local district council (Spelthorne Borough Council) – SCC has taken a decision in principle to grant planning permission for this development, subject to referral to the Secretary of State for call-in purposes.

4. Mr Hirsh and LOSRA maintain their very strong objection to this proposal, and have very serious concerns about SCC's approach to law, to national policy, and their own development plan. We urge the Secretary of State to direct SCC *not* to grant planning permission, or alternatively to call in this application for his own determination, for three key reasons:

4.1 SCC's irrational and unlawful approach to Green Belt harm and Very Special Circumstances.

4.2 SCC's Abandonment of Development Plan requirement for Energy "Recovery".

4.3 More than local importance and conflict with other national policy (waste and climate change)

5. Unless explained otherwise, references below in square brackets are to paragraphs of SCC's planning officers' report for the committee meeting on 30 June 2011.

B. SCC's irrational and unlawful approach to Green Belt harm and very special circumstances

6. The "proposed development comprises a much larger scale of buildings than at present": [443]. In particular, it will include the construction of a 49 metre stack [392] and buildings up to 18.5 metres tall [629] where existing buildings are, at their tallest, only 13m tall [381].

7. Officers concluded that the proposed development would cause "significant adverse visual effects", some of which will be "permanent" [400], and in that context, they decided that "These new site activities and buildings / structures would have a significant impact on the openness of the Green Belt and conflict with one of the purposes of including land in the Green Belt in terms of encroachment." [629]

8. Against those findings, officers clearly misdirected SCC's planning committee in recommending the grant of planning permission. We highlight two such errors now.

9. <u>First</u>, despite planning officers' findings noted above, they directed the planning committee, in the next breath, that "the mitigation offered by the EEA is significant, so as to minimise the impact of these new buildings and structures and contribute to the objectives for the use of land in the Green Belt. Officers therefore consider that there is effective mitigation in respect of the impact on openness, which accords with the Green Belt SWP2008 KDC" [629]. The so-called "EEA" (short for "Environmental Enhancement Area") would be a 7.7 ha plot of land adjacent to the proposed waste facilities which the developer claims would contain a range of measures to mitigate some of the effects of the development and enhance the local environment [422].

10. The planning officers' conclusion [629] that the so-called "EEA" would "minimise the impact of these new buildings and structures and contribute to the objectives for the use of land in the Green Belt" flies in the face of officers' previous findings. We note in particular their findings at para [432]:

> "... Officers note that the proposed landscaping is not designed to wholly screen the development but to 'break up' views... [However] to attempt to wholly screen the proposed development (including as it does very tall structures) would be to introduce into this broadly flat landscape setting arguably incongruous features, which would in turn have a negative impact in terms of the visual amenities the landscape proposals attempt to protect."

11. If measures to screen tall parts of the development would themselves introduce incongruous features into this flat Green Belt landscape, it *must* be the case that visual impact of the tall parts of the development is not *capable* of being mitigated.

12. Officers' conclusion that the neighbouring "EEA" effectively mitigates the impact of the proposed development on the openness of the Green Belt is therefore irrational, contradictory, and both unexplained and inexplicable.

13. The <u>second</u> misdirection lies in planning officers' approach to whether "very special circumstances" exist which clearly outweigh the harm to the Green Belt, in order to justify these proposals in accordance with PPG2.

14. The Secretary of State will note from the papers referred to him that numerous objectors have taken issue with planning officers' analysis of *each* of the claimed very special circumstances in this case. We adopt those criticisms without proposing to reiterate them here. However, we make one specific point which will serve to illustrate the seriously flawed basis upon which SCC's planning committee decided that "very special circumstances" were made out. This concerns planning officers' direction that one of the very special circumstances justifying this harmful Green Belt development consisted of the "environmental *enhancement* measures for the adjoining land" [sic, with emphasis added].

15. It was the *developer* who asserted (as one might expect) that the "EEA" will *enhance* the local environment and that this "goes beyond what is required to mitigate the effects of the development from an EIA perspective but would be a key part of the scheme from a planning policy, specifically Green Belt, perspective" [422].

16. However, SCC's own Ecology Officer is clearly on record as "tak[ing] issue with this conclusion...", instead concluding that "the package of measures proposed is the *minimum necessary to integrate* the local development into the local setting..." [422].

17. Not only was the Ecology officer clearly right to reject the developer's assertion that the "EEA" proposal goes beyond mitigation. Even SCC's planning officers clearly endorsed the Ecology officer's conclusion where they say at para [439]:

> "Officers have previously noted that what is proposed, is deemed to be the 'minimum' level to mitigate the visual impact of the proposed development."

18. As already explained, Mr Hirsh and LOSRA dispute the conclusion reached by planning officers that measures relating to the neighbouring land even did the minimum necessary to mitigate harm to Green Belt openness. But given that planning officers found that such measures did *no more than* the minimum necessary to mitigate harm to Green Belt openness, it was clearly unlawful for them to have directed the planning committee to find that such measures amounted to one of the very special circumstances clearly outweighing (and therefore justifying) the harm from this Green Belt development.

19. As the Secretary of State will appreciate, mere mitigation of Green Belt harm *cannot* amount to a very special circumstance. In considering whether there exist very special circumstances which clearly outweigh the harm to the Green Belt, the decision-maker must balance the harm (whether by virtue of inappropriate development in the Green Belt alone, or further actual harm to the Green Belt) against the factors by way of benefit or advantage which might in any particular case outweigh the harm: see *Brentwood Borough Council v. (1) Secretary of State for the Environment and (2) Gray* [1996] JPL 939 @ p.944 (High Court, 1 March 1996).

20. In the circumstances, the basis on which SCC's planning committee found very special circumstances to exist is irrational and unlawful. On any view, SCC's planning committee has been seriously misdirected in its application of national Green Belt policy to these harmful proposals. On behalf of Mr Hirsh and LOSRA we urge the Secretary of State to direct refusal of this application; otherwise, to call-in the application for his own determination, to ensure that national Green Belt policy is properly applied, in a measured and balanced way, with adequate reasons provided for the conclusion ultimately reached.

C. SCC's abandonment of Development Plan requirement for energy "recovery"

21. Officers have repeatedly directed SCC's planning committee that the proposed development (including the proposed gasification plant) satisfies the allocation criteria for this particular site within Policy WD5 of the Surrey Waste Plan 2008 (**"SWP2008"**).

22. Criterion (ii) of Policy WD5 provides that permission for development involving the thermal treatment of waste (such as the proposed gasification plant) will *only* be permitted on this site if "provision is made for energy recovery".

23. In submissions dated 7 March 2011 we made clear to SCC's committee and legal department the following:

23.1 Under European Community case law and the Waste Framework Directive, a waste facility cannot be *both* a recovery operation *and* a disposal operation: it must be one or the other. See Case C-6/00 *Abfall Service AG v. Budesmeister fur Umwelt, Jugend und Familie* [2002] ECR 1-1961 at para [63]

23.3 The proposed gasification plant is a waste "disposal" facility, *not* a waste "recovery" facility, under European law. See Case C-228/00 *Commission v. Germany* [2003] ECR I-1439;

see also Case C-116/01 *SITA EcoService Netherland v. VROM* [2003] ECR I-2969; Case C-458/00 *Commission v. Luxembourg* [2003] ECR I-1553.

23.3 The High Court has specifically considered the meaning of criterion (ii) of Policy WD5 of the Surrey Waste Plan, in *Capel Parish Council v. Surrey County Council* [2009] EWHC 350 (Admin) making it quite clear that it is *not* enough that development of thermal treatment facilities on this site may make *some contribution towards* waste "recovery": to accord with the development plan, any such facility has to actually *consist of* a waste recovery operation. The High Court could not have been clearer when it said (at para 40) that Policy WD5 refers:

> "...specifically to other methods of dealing with waste than disposal. Thus any application for other than recovery should fail since it would not be in accordance with the plan." [emphasis added]

23.4 Therefore, the development of the proposed gasification plant on this site is contrary to the development plan, and permission for the proposed development should be refused.

24. The Developer and SCC now accept that the proposed gasification plant is a "disposal" facility and not a "recovery" facility under European Union law [145]. Nevertheless, SCC's officers have persisted in misdirecting the committee that criterion (ii) of Policy WD5 is satisfied by these proposals, on the basis that [233]:

> "Whilst the gasification [plant] is viewed as disposal under the [European Waste Framework Directive] it nonetheless constitutes the provision for energy recovery in accordance with criterion (ii) of Policy WD5 of the SWP2008"

25. This flies in the face of the established principle of European law that waste operations cannot be both disposal and recovery operations. And it defies the High Court's judgment in the *Capel* case. In the circumstances, the proposed grant of planning permission flies in the face of the development plan.

26. Those fundamental errors are further compounded by the fact that, although proposed conditions would require the gasification and anaerobic digestion plants, and photovoltaic cells to have a combined generating *design capacity* of not less than 5.16MW, there is no condition whatsoever would require *any* of the facilities on this site actually to *produce* a minimum amount of energy, so as to ensure that even the anaerobic digestion facility actually amounts to a recovery operation once in operation: see proposed conditions 44 to 46, the reasons given for which make clear, once again, that planning officers have misdirected the committee by wrongly claiming that the contribution of *some capacity* for energy provision is enough to satisfy criterion (ii) of Policy WD5.

27. In those circumstances, not only has SCC's planning committee been seriously misdirected as a matter of fact and law into concluding that the proposed development is in accordance with Policy WD5 of the Surrey Waste Plan. SCC has also seriously erred by failing to explain to the Secretary of State that the proposed development ought to be referred for potential call-in as a departure from Green Belt policy, but also as a departure

from High Court precedent, European law, and the clear site allocation in criteria for this sensitive site in Surrey's own development plan.

28. For these reasons also, we urge the Secretary of State to direct refusal of this application; otherwise, to call this application in for his own determination.

D. More than local importance and conflict with other national policy (waste and climate change)

29. Finally, we urge the Secretary of State to call this application in for his own determination because (in line with paragraph 26 of *The Planning System: General Principles*) it is not only hugely controversial locally, but is clearly of *more* than local importance, bearing in mind the scale of the proposed waste facilities and the geographical areas which they claim to serve, and the reliance of the proposed development on new and emerging technologies.

30. In addition, there are serious concerns that this proposed development conflicts with other national policy, relating to waste, energy and climate change. We have seen the submissions of other objectors (including, e.g. Mr Jonathan Essex) which raise a number of serious concerns about compliance with national policy on the waste hierarchy and climate change. Without reiterating those points here, we adopt their substance.

31. We note that the Secretary of State has recently called in the application for a combined waste combustion/Energy Recovery Facility at the Former Rufford Colliery, Nottinghamshire (APP/L3055/V/09/2102006) "because the proposal may conflict with national policies on important matters" (paragraph 2 of the Secretary of State's decision letter of 26 May 2011). If the Secretary of State is not minded immediately to direct refusal of planning permission, we respectfully urge the Secretary of State to call the application in for his own determination, given the serious and cumulative errors of SCC and its planning officers, and the important issues to which this extremely contentious application gives rise.

32. Please acknowledge receipt by return and confirm that this letter will be placed before the Secretary of State for his consideration before 5 August 2011.

Yours faithfully

cc. The National Planning Casework Unit