Planning & Development Group,

County Hall,

Kingston upon Thames,

Surrey KT1 2DY

1ST January 2011

FAO Mr Alan Stones

From: Hon. Chairman, Lower Sunbury Residents' Association (LOSRA)

Sirs,

Town and Country Planning Act 1990 – Consultation on Application for Installation of Waste Management Facility at Charlton Lane, Shepperton

Having viewed the application for the installation of an EfW incinerator and anaerobic digester at Charlton Lane Shepperton, I make the following representation and ask that these matters be taken into account when determining this application.

It is notable that at Part 6 (Planning Policy Context) on page 97 of the Application, no mention is made of a recent (2009) and highly significant judgement by Mr Justice Collins in the Queen's Bench Division of the High Court. The Judgement to which I refer concerns a claim brought by Capel Parish Council against Surrey County Council under section 113 of the Planning and Compulsory Purchase Act 2004* in which the former challenged the inclusion in the Surrey Waste Plan Development Plan Documents (DPDs) of a site known as Clockhouse Brickworks, as one in respect of which planning permission can be granted for development involving waste disposal or recovery and specifically for thermal treatment, namely incineration of waste. Capel Parish Council succeeded in having the planning permission quashed as their counsel was able to satisfy Mr Justice Collins that the decisions to grant planning permission were based upon unlawful policies in the Development Plan..

(An application to the High Court under s.113* to the Planning and Compulsory Purchase Act of 2004 must be made on the grounds that the document (Surrey Waste Plan) is not within the appropriate power, as a procedural requirement has not been complied with).

(*The purpose of this section is to prescribe the procedure to be followed in relation to a challenge to any of the specified documents. These are when a specified document is in some respect outside the scope of the powers under which it should have been made; and/or where a procedural requirement has not been complied with in relation to a document.)

In his judgement, Mr Justice Collins says:

- "Mr Village (for Capel Parish Council) submits that the provisions of the Act show that the development plan documents which include LDDs or DPDs forming part of the adopted policies, must themselves be sound. The system now in place requires the policies to be independently examined and approved or otherwise by an inspector. Unless they have gone through this process, they cannot be relied on as a development plan and so will not be able to be given the status indicated by s.38(6) of the Act. That submission is clearly right and that is the reason why the planning permissions cannot survive the successful challenge to the adoption of the policies *including* (my italics) Clockhouse Brickworks as one appropriate for the relevant waste disposal purposes, in particular incineration or what the jargon describes as energy from waste (EfW) or thermal treatment of waste."

- Mr Village submits that it is implicit... that the core strategy should come first and should be submitted to an inspector before the further documents which will deal with specific allocations and particular development control are produced. The sense of that is obvious**. If the core strategy is not sound in any respect, it will be impossible to produce a site specific DPD which is itself sound to the extent that it accords with an unsound core strategy** (my bold). Unfortunately, SCC chose not to follow this course and so the inspectors had to deal with the whole of the Surrey Waste Plan (SWP), both strategy and allocation, at the same time. They were unhappy with this. At one stage of the examination they indicated that they might report on the Core Strategy separately, but in the end they decided to treat the whole SWP as having three functions, as Core Strategy, Waste Development and Waste Development Control DPDs. In [their report] they criticise SCC's approach in that it was not prepared in accordance with the requirements of the scheme. In particular, strategic and non-strategic material was not readily distinguishable. But because of the **'urgency to adopt a set of coherent policies to redress long running uncertainty in planning for the management of waste in Surrey' and in order to avoid delay, they decided to 'continue with a single process of independent examination of the SWP'."** (my bold)

- PPS12 makes clear that there must be early and continuing involvement of those likely to be affected by DPDs in the process of preparing them. The process must 'include consideration of all the alternative options derived from the development of the evidence base, the authority's awareness of local issues, the views of stakeholders and community involvement' (para 4.2 of Inspector's report)' The

paragraph concludes: 'Key decisions on the spatial strategy should be taken at the earliest possible stage to allow for full community involvement and sustainability appraisal'."

At this point Mr Justice Collins draws attention to the following paragraph 4.24 of the Inspector's Report: "The presumption will be that the development plan document is sound unless it is shown to be otherwise as a result of evidence considered at the examination." He states that this statement incorporates an error in law and quotes as his authority *Blyth Valley BC v Persimmon Homes (Nth) Ltd & Others [2005) EWCA Civ 861.* The Court of Appeal considered the role of an inspector and whether soundness could be presumed. It noted that PPS12 had been amended so that the offending sentence had been removed and there had been substituted: "The starting point for the examination is the assumption that the local authority **has submitted what it <u>considers</u> to be a sound plan**." (my bold and underline).

- "It was therefore incumbent on the inspectors to consider for themselves whether the policies were sound. Thus they would have not only to consider any specific points made by objectors but also any material matters which could indicate unsoundness. This would, in relation to specific allocations, include consideration of whether the process whereby the sites were chosen and others said to be more appropriate rejected was satisfactory...." "The policies under attack will not have been within the appropriate power if the recommendation made by the inspectors which led to its incorporation in the relevant document was itself legally flawed."

- **It seems to me that the erroneous application of the presumption of soundness provides the correct starting point. If it has tainted the relevant conclusions, they cannot stand".** (my bold)

- Mr Drabble (for Surrey CC) submitted that the evidence before the inspectors from the SCC showed that there had been a substantial exercise carried out to make an informed assessment of suitable sites and to reject those which were unsuitable. That may be so, but the inspectors were not entitled to assume that that had been done correctly, particularly where the evidence given on behalf of the claimant questioned on plausible grounds whether the exercises had indeed been satisfactory..." "It is difficult to see that the presumption of soundness played no part in the conclusions reached".

- **SCC's errors could have undermined the whole process of identification of suitable sites and certainly it was necessary in my view for the inspectors to look at the whole process afresh."** (my bold).

Mr Justice Collins continues to make a very significant observation in relation to the selection of the Capel Brickworks site and his comments may be applied equally to the Charlton Lane site:

- "Mr Village submits that [the inspectors' report] shows an erroneous application of the presumption of soundness. Whether or not that is so, Mr Drabble submits that the Inspectors' approach was not wrong since such issues would inevitably be dealt with if any application for permission were made since an EIA (Environmental Impact Assessment) would be required. While I recognise that it is not appropriate in the examination carried out by the inspectors to go into great detail, an issue such as this, which would, if established, show that the site was unsuitable should be subjected to careful consideration. It would not be right for it to be within (policy) if inevitable damage to health would occur and the inspectors were in my view correct to express surprise at the lack of investigation in the site assessment process. Mr Drabble says that the point is a bad one since when the application for planning permission was made the tests showed, and the Environment Agency agreed, that the concerns about health risks were not established**. But that is not a complete answer since, as Mr Village correctly points out, the purpose of requiring an inspector to consider site assessment at the stage in question is to enable there to be an independent consideration of important issues. SCC has been satisfied since, <u>but SCC is not independent</u>. It seems to me that there was a failure by the inspectors to ensure that the issue was properly considered so that, if they were persuaded that air quality would be adversely affected, the site could be deleted."** (my bold and underlining).

- In this context and in dealing with site allocations generally, it is important to remember that Test 7 in PPS 12 requires that they are 'founded on a robust and credible evidence base'. The inspectors concluded that a small number of sites had to be excluded to achieve compliance with Test 7, but that overall 'the SWP and its land allocations are founded on a robust evidence base that now includes the requisite statutory assessments which would not have altered the selection of particular sites'. It is not entirely clear precisely what the inspectors mean by this, since the evidence base, to be robust, should have included all that was needed and the word 'now' suggests that it may not have done**. However, in reaching their conclusion the inspectors wrongly applied the presumption of soundness and that tainted their whole approach."** (my bold).

Mr Justice Collins concludes his judgement by making a telling observation on the subject of incineration, a term which he rightly feels no embarrassment about using:

- "Furthermore, the whole of their approach is on the basis that there must be incineration somewhere in Surrey. That assumption is not accepted by the claimant; an unsuitable site cannot be regarded as appropriate. Rather the possibility of incineration must be reconsidered. If the proximity principle is applicable, as the inspectors believed it was, their approach to it is in my view flawed..."

In his closing paragraph, the Judge states that his quashing of the Clockhouse Brickworks application may affect the overall validity of the Surrey Waste Plan; and the consequential effect of quashing is a matter for SCC to deal with as it thinks appropriate.

Conclusion

The application you will be considering is predicated on the Surrey Waste Plan, a plan which is held to be flawed. The Judgement of the High Court is highly significant and whilst it dealt specifically with the Brickworks site at Capel, the broader implications of the judgement must necessarily inform your determination of the application by SITA for the Charlton Lane site.

It is true that the judgement followed the granting of an application for the Brickworks site but now that the judgement has been made, it would surely be folly to allow this application to succeed.

Yours faithfully,

John Hirsh,

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cc. Head of Planning Services, Spelthorne Borough Council