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URGENT: FOR 8 MARCH 2011 PLANNING & REGULATORY COMMITTEE MEETING

Dear Madam

Lower Sunbury Residents' Association – Charlton "Eco-Park" Application
Written representations

1. We write on the instruction and authority of Mr John Hirsh (Chairman), the Committee and members of the Lower Sunbury Residents' Association ("**LOSRA**"), in relation to SITA's application for development of an "Eco-Park" at Charlton Lane. These written representations have been produced in collaboration with Peter Village QC and David Loveday of 4-5 Gray's Inn Square.
2. LOSRA's position is clear: it opposes the application, and urges the Committee to reject it.
3. However, having now had the opportunity to read the Surrey County Council ("**SCC**") officer's report prepared for the benefit of SCC's Planning and Regulatory Committee, we have been asked to highlight two new and significant areas of concern for LOSRA which we urge the Committee to address specifically when considering the application tomorrow:

- (1) Contrary to what is said in the Officer's report, the proposed gasification facility is actually not in accordance with development plan site allocation for Charlton Lane (Surrey Waste Plan Policy WD5), because the proposed development does not make provision for energy recovery. (See paragraphs 5 to 11 below).
- (2) Neither the planning application, nor SCC Officer's report to the Committee, adequately addresses new evidence from the Health and Safety Executive as to fire, explosion and toxic risk, inadequacy of design and layout safeguards, and inadequacy of risk assessment relating to the Eco-Park's proposed gasification plant. (See paragraphs 12 to 23 below).
4. Both issues gives rise to serious concerns both as to the adequacy of assessments undertaken so far concerning the appropriateness of this proposed development, and as to the legality of any decision the Committee may reach to grant planning permission tomorrow afternoon.

GASIFICATION PLANT NOT IN ACCORDANCE WITH DEVELOPMENT PLAN BECAUSE ECO-PARK DOES NOT "MAKE PROVISION FOR ENERGY RECOVERY"

5. SCC's officer's report advises the Committee that officers "have concluded that this proposal accords with SWP 2008 Policies WD1, WD2 and WD5"¹.
6. When it comes to the proposed gasification plant, that conclusion is wrong.
7. DEFRA guidance makes clear that treatment such as the gasification proposed is a form of thermal treatment (see para 83 of SCC's Officer's report). As such the proposed gasification plant is not in accordance with the Charlton Lane site allocations in Policies WD1 ("Civic Amenity Sites") or WD2 (other processes "excluding thermal treatment"). And the proposed gasification facility would only be in accordance with the Charlton Lane site allocation in Policy WD5 "provided" the development satisfies criterion (ii) which requires that "provision is made for energy recovery".

¹ Paragraph 571

8. Criterion (ii) does not simply mean that a proposed gasification plant on the Charlton Lane site will be in accordance with the development plan if it provides the *capacity* for *some* energy recovery. Commenting specifically on Policy WD5 of the Surrey Waste Plan, the High Court expressed the view in the Capel case (para 40)² that this policy 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]

9. In taking that approach, the High Court clearly interpreted Policy WD5 criterion (ii) consistently with the established principle of European waste law that any treatment of waste must be classifiable as either disposal or recovery, it cannot be both³. To be classified as a recovery operation under European law (rather than a disposal operation), the following particular criteria have hitherto been required to be satisfied⁴:

² Capel Parish Council v. Surrey County Council [2009] EWHC 350 (Admin)

³ see Case C-6/00 *Abfall Service AG v. Bundesmeister für Umwelt, Jugend und Familie* [2002] ECR I-1961 at para [63]

⁴ See Case C-228/00 *Commission v. Germany* [2003] ECR I-1439; see also Case C-116/01 *SITA EcoService Nederland v. VROM* [2003] ECR I-2969; Case C-458/00 *Commission v. Luxembourg* [2003] ECR I-1553. The revised European Waste Framework Directive 2008 (“WFD 2008”) which the UK was required to implement by 12 December 2010, defines “recovery” to mean “any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy: so far as we are aware, it remains to be clarified by European case law whether this will be taken as superseding the criteria established in earlier case law, or whether the WFD 2008 definition of “recovery” will be interpreted to remain consistent with those established criteria. The WFD 2008 does specifically provide that incineration facilities dedicated to the processing of municipal solid waste will only amount to “recovery” operations if they meet certain specified energy efficiency parameters calculated by a formula comparing the amounts of energy produced as heat or electricity, with the amounts of energy input to the system from the fuels contributing to the production of steam, energy contained in the treated waste (calculated using its net calorific value), energy imported excluding the above, and energy losses due to bottom ash and radiation. But in relation to gasification plants, that new parameter-based formula does not apply. See paragraphs R1 and R3, together with footnotes (*) and (**) in Annex II of the WFD 2008.

- (1) The main purpose of the operation must be to use the waste as a means of generating energy: i.e. the energy generated and recovered from the combustion must be greater than the amount of energy consumed by it.
- (2) The conditions in which the operation takes place must give reason to believe that it is indeed a means to generate energy: i.e. part of the surplus energy produced must be used immediately, either in the form of heat or electricity.
- (3) The waste must be used principally as a fuel or other means of generating energy: i.e. most of it must be consumed and most of the energy generated must be recovered and used.

10. LOSRA is therefore deeply concerned at officers' apparent conclusion that the gasification facility for which they recommend granting permission satisfies criterion (ii) of Policy WD5: nowhere in this Eco-Park proposal does provision appear to be made for energy recovery at all, and in any event, the proposals for which Officers recommend permission be granted do not satisfy what have hitherto been the established legal criteria for "recovery" under waste law:

- (1) SITA seeks permission for "Development of a Waste Management 'Eco Park', comprising: a Gasification Facility; Anaerobic Digestion Facility; Community Recycling Facility; Recyclables Bulking Facility; Education / Visitor Centre and Offices; Other Associated Infrastructure including Infiltration Basin and Landscaping; and the diversion of Public Footpath 70". There is no mention there of energy recovery at all, or of any specific details that would bring the gasification facility within scope of an operation amounting in law to a "recovery" operation.
- (2) Officers are not proposing that permission for the Eco-Park should be subject to any condition that will require the proposed gasification facility (or anaerobic digestion facility) to recover any energy at all, let alone produce any minimum proposed of heat, electricity or other form of energy compared to waste arising, or energy consumed from the operations on site. Indeed, not only are the proposed conditions completely silent

as to electricity generation, proposed condition 44 clearly envisages that the proposed gasification plant will be permitted to operate even if heat exportation from the gasification plant does not prove feasible or viable⁵.

- (3) Therefore, even though SITA's planning application document may assert that energy would be generated from the proposed gasification facilities,⁶ and even though officers' draft reasons for granting the recommended permission say that "the Eco Park will... provid[e] a combined generating capacity of 5.16MW of electricity, the greater part to be exported to the local electricity distribution network"⁷ [emphasis added], this does not actually follow from the terms of the currently recommended permission. The permission which SCC's officers are recommending be granted do *not* make any concrete provision whatsoever for energy recovery from the gasification plant or from the Eco-Park generally, and in any event does not satisfy what have hitherto been the legal criteria for a "recovery" operation. Either way, it does not satisfy Policy WD5 criterion (ii).

Conclusion

11. The planning application now before this Committee seeks permission for a deeply controversial thermal treatment facility which is not in accordance with the development plan's stipulated criterion (ii) for such development at Charlton Lane. There are no material considerations indicating that the Committee should depart from that clear stipulation in the development plan and give permission for the proposed gasification plant on this Green Belt site (on the contrary, the highly material

⁵ 44 ("Heat exportation"): "Prior to the gasification plant becoming operational a study detailing the feasibility and commercial viability of exporting heat from the gasification plant for use by local domestic, commercial and/or industrial users (together with the demand for such heat) shall be submitted to and approved in writing by the County Planning Authority. If at the time the Gasification Plant becomes operational the study concludes that exporting heat from the plant is not feasible or commercially viable, then a timetable for the review of the study shall be agreed in writing with the County Planning Authority. Pass out valves should be provided and maintained at appropriate heat take-off points as described at paragraph 5.8.9 of the Environmental Statement Volume 1: Main Report." [emphasis added]. The reasons for this proposed condition are said to be "To enable the re-use of waste heat in accordance with [among other things] ... Surrey Waste Plan 2008 Policy WD5 criterion ii."

⁶ See paras 1.4.17, 1.4.25, 1.4.26, 1.4.29, 1.4.30 of SITA's planning application document

⁷ See page 156 of Officer's Report ("Renewable Energy and Climate Change")

considerations addressed below also point to refusal). The Eco-Park application should be rejected.

FIRE, EXPLOSION AND TOXIC RISK FROM GASIFICATION PLANT

12. More than once, SCC's Officer's report on this planning application says that the Health and Safety Executive ("HSE") "Do not advise, on safety grounds, against the granting of planning permission in this case." (see e.g. para 39). This gives the impression that the HSE has identified no health and safety grounds for objecting to the proposed Eco-Park.
13. However, Mr Hirsh and LOSRA were alarmed to discover recently the existence of an email which clearly indicates that the HSE's Hazardous Installations Directorate in fact *refuses* to endorse the current Eco-Park planning application, on health and safety grounds, specifically relating to fire, explosion and toxic risk associated with the gasification plant proposed for the Charlton Lane site.
14. We refer to an email from John Hazeldean (an officer of the HSE's Hazardous Installations Directorate) to the Environment Agency concerning fire and explosion risk arising from the Eco-Park's gasification plant (copy attached). This email was sent on 16 February this year, and is stated to be "in response to [the Environment Agency's] request for HSE comments on the planning application submitted by SITA to [SCC] for redevelopment of the Waste Treatment facility at Charlton Lane..."
15. We have not seen the contents of any correspondence HSE may have entered into with SCC. And it is unclear to us whether SCC and its officers have previously seen this email from the HSE to the Environment Agency. But on any view, this email to the Environment Agency raises highly significant and urgent concerns.
16. Specifically:

- (1) The HSE officer's email makes clear that the proposed gasification plant is a "relatively new and complex technology whereby waste materials are heated in a reactor to produce the highly flammable and toxic material known as syngas".
- (2) His email makes clear that this technology carries with it a real risk of fire, explosion and toxic waste, unless adequate safeguards are in place.
- (3) It also refers to published "Guidelines for Safe and Eco-Friendly Biomass Generation" of the European Commission. We have not found a Commission document under that title, but we have located a copy of a "Guidelines for Safe and Eco-friendly Biomass Gasification" (November 2009, Intelligent Energy Europe – co-funded by the European Commission) which we now attach.⁸ We urge the Committee and interested parties to read these Guidelines in full. Without repeating them here, they confirm that gasification plant technology does carry with it real fire, explosion and toxic risks in the absence of adequate safeguards:

"During operation of a biomass gasification plant there is an increased hazard potential due to the fact that a potentially explosive, toxic and combustible gas mixture is produced and consumed. The producer gas and residues (ash, liquids, exhaust gases) may cause the following major hazards/risks:

- an explosion and/or fire;
- health damage to humans (poisoning, danger of suffocation, noise, hot surfaces, fire and explosion); and
- pollution of the environment and plant vicinity.

To counteract these adverse effects, appropriate measures must be taken to meet the requirements for successful market introduction of a safe and eco-friendly biomass gasification technology."⁹

- (4) The HSE officer is clearly of the view that the risk of fire and explosion from the proposed gasification plant has not been adequately assessed on this planning application. Indeed, he says that "the proposals submitted do not include any

⁸ Available online at: http://www.gasification-guide.eu/gsg_uploads/documenten/D10_Final-Guideline.pdf

⁹ See Guidelines, bottom of page 12 to top of page 13

information on the fire and explosion hazards associated with the dangerous substances handled or produced by the process and no hazard analysis or risk assessment is presented to demonstrate how the safety of the staff will be ensured” [emphasis added]. To our knowledge, that criticism appears to be absolutely right. In particular, we note that the analysis in the Air Quality Assessment appendices of SITA’s environmental statement as to the health risks associated with plant emissions “assume[s] that the gasification plant will continually operate at the maximum emission limits allowed under the Waste Incineration Directive”.¹⁰ Neither in the Air Quality Appendices of the environmental statement, nor elsewhere, does there appear to be any analysis of risk to human health (from emissions or otherwise) in the event of a fire or explosion or, in turn, any analysis of the risk of a fire or explosion itself occurring.

- (5) Those omissions in the information accompanying this planning application are the more startling, and troubling, given that the Guidelines to which the HSE officer refers includes various guidelines on how to properly assess fire, explosion and toxic risks arising from proposed gasification plant¹¹ (a risk assessment procedure which the Guidelines warn “should not be taken as a straightforward process”¹²).
- (6) Moreover – and crucially – the HSE officer is clearly of the view in this email that the current proposals for the Eco-Park fail to make adequate provision safeguarding against these fire and explosion and associated toxic risks.

The need to address these risks *before* determining this planning application

17. The HSE officer’s concerns are very specific. These are not matters which SCC can legitimately ignore and assume will be adequately dealt with outside of the planning system, on the premise that the “relevant pollution control regime will be properly applied and enforced” (see paragraph 519 of SCC’s officer’s report), and that

¹⁰ See the Fichtner Air Quality Assessment, Section 8 (“Conclusions”), paragraph (1)(a).

¹¹ See e.g. Guidelines, pages 34 to 38

¹² See Guidelines, page 36

environmental permitting and pollution controls will adequately address fire, explosion and toxic risk.

18. As is clear from a full reading of PPS10 para 27 (the national guidance from which paragraph 519 of SCC's Officer's report selectively cites), "Pollution control is concerned with preventing pollution through the use of measures to prohibit or limit the release of substances to the environment to the lowest practicable level. It also ensures that ambient air and water quality meet standards that guard against impacts to the environment and human health". However, the HSE officer's email states specifically that although "some of the safety measures [required to address those fire and explosion risks] will depend on the final design and operation of the gasification unit..."

"... some will depend on the plant and building construction and need to be considered at any early stage as part of the building and site proposals."
[emphasis added]

19. Indeed, as stated in the Guidelines to which the HSE officer refers:

"Typically, the application for a permit to construct and operate a biomass gasification plant will have to include the items listed below:

...

- description of special hazards (fire, explosion, hazardous substances) and precautionary measures,

...

Occasionally, additional third-party certificates and expert opinions may be required, e.g. on ... fire and explosion protection."¹³ [emphasis added]

20. Aspects of the design and layout of the proposed Eco-Park which particularly concern the HSE officer are:

¹³ See Guidelines, page 28

- (1) the absence in the proposed design and layout of the Eco-Park of any “effective separation of people from the fire, explosion and toxic hazards arising in the gasification plant”
 - (2) “the integration of the education and visitors centre within the gasification building”
 - (3) “providing public viewing windows into the process areas” and
 - (4) the failure of the proposed design and layout to comply with “good design practice [which] recommends that the storage and reception area for the waste should be separated from the gasification unit by a distance or high performance fire curtain” – the Eco-Park plans include neither those nor any other measures “for achieving effective separation” of waste storage/reception and gasification.
21. In the circumstances the stated conclusion in the SCC Officer’s report on the question of health risk (“Health effects were covered and were not found to present a risk to public health, in view of the regulation over such facilities, through the [environmental permitting] regime”¹⁴) is flawed and inadequate.

Legal implications

22. In view of the above, Mr Hirsh and LOSRA are desperately concerned that granting permission for this Eco-Park park proposal tomorrow afternoon would not only be irresponsible, but would also be unlawful, for either or both of the following reasons.
- (1) First, the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“**the EIA Regulations**”)¹⁵ forbids SCC from granting planning permission for this Eco-Park, unless SCC has first taken into consideration “environmental information”¹⁶ which includes the following:
 - (i) The data required to identify and assess the main effects which the development is likely to have on the environment¹⁷

¹⁴ See para 567 of the officer’s report

¹⁵ Regulation 3(2)

¹⁶ Regulation 2(1) [definitions of “environmental information” and “environmental statement”]

¹⁷ Schedule 4, Part II, paragraph 3

- (ii) A description of the measures envisaged to avoid, reduce and if possible, remedy significant adverse effects¹⁸, and
- (iii) Insofar as the following is reasonably required to assess the environmental effects of the development and which SITA can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile¹⁹:
 - (a) A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary negative effects of the development, resulting from the existence of the development, the emission of pollutants, the creation of nuisances and the elimination of waste²⁰
 - (b) A description by SITA of the forecasting methods used to assess the effects on the environment²¹
 - (c) A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment²²

Given the terms of HSE's email, and the Guidelines it refers to, LOSRA urges SCC to recognise that SITA should be required to properly compile such information relating to fire and explosion risks arising from the currently proposed Eco-Park, before SCC may lawfully grant permission for the proposal. It is still open to SCC to require that information from SITA under Regulation 19 of the EIA Regulations before this planning application is determined. But in any event, LOSRA is deeply concerned that any grant of permission tomorrow afternoon in the absence of such information would contravene the EIA Regulations, and would therefore be unlawful.

- (2) Second, the Environmental Permitting (England and Wales) Regulations 2010²³ require SCC to exercise its function of determining this planning application "for the purposes of

¹⁸ Schedule 4, Part II, paragraph 2

¹⁹ Regulation 2(1) [definition of "environmental statement", sub-paragraph (a)]

²⁰ Schedule 4, Part I, paragraph 4

²¹ Schedule 4, Part I, paragraph 4

²² Schedule 4, Part I, paragraph 5

²³ See Schedule 25, Part 1, paragraph 1 [definitions of "authority", "planning authority", "planning permission", "specified functions"] Schedule 25, Part 1, paragraph 2(1)(b)(i); and Schedule 25, Part 2, paragraph 1(a)

implementing Article 4 of the Waste Framework Directive” 2006 (“WFD 2006”), which says:

“Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

(a) without risk to water, air or soil, or to plants or animals;

(b) without causing a nuisance through noise or odours;

(c) without adversely affecting the countryside or places of special interest.”

[emphasis added]

The courts have repeatedly made clear that those requirements (which are repeated in Article 13 of the new Waste Framework Directive 2008) are a central objective of the environmental permitting regulations, that SCC is required always to keep this objective in mind when determining this planning application, and that this objective is more than just a material consideration on this planning application. See *Thornby Farms Ltd v. Daventry District Council* [2002] JPL 937; *R (Adriano) v. Surrey County Council* [2002] EWHC 2471 (admin); and *R (Blewett) v. Derbyshire County Council* [2004] EWCA Civ 1508.

Conclusion

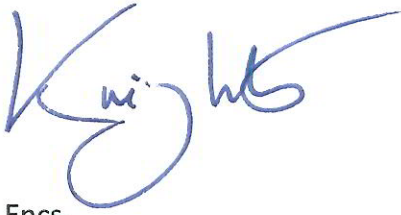
23. Whether one takes those requirements of the EIA Regulations and the environmental permitting regulations individually or together, LOSRA urges SCC not to grant permission for this proposed Eco-Park tomorrow afternoon, in the absence of the information and risk assessments which the HSE officer refers to in his email, and in the absence of adequate safeguards against fire, explosion and toxic risk in the design and layout of the proposed Eco-Park. Not merely are these clearly material considerations which the Committee must take into account when deciding this planning application; the Committee would be failing in its legal duties under the EIA Regulations and the

environmental permitting regulations cited above if it were to grant permission in the absence of such information, assessments and safeguards.

OVERALL CONCLUSION

24. Mr Hirsh and his fellow members of LOSRA are deeply concerned by the Eco-Park proposals. Contrary to what is said in SCC's Officer's report, the proposed gasification plant is not in accordance with the development plan's site allocation for Charlton Lane. There has been wholly inadequate assessment of very real fire and explosion risks associated with this kind of facility. No account appears to have been taken of published Guidelines for Safe and Eco-friendly Biomass Gasification. And the Committee has apparently not received any advice spelling out the concerns of HSE's Hazardous Installations Directorate as to fire, explosion and toxic risks arising from the design and layout of the proposed Eco-Park, concerns which the relevant HSE office has said will "need to be considered at any early stage as part of the building and site proposals".
25. The Committee should consider this contentious application with extreme care. Whatever the outcome of tomorrow's meeting, LOSRA asks the committee specifically to address both of the issues raised in this written representation when determining the Eco-Park application. But for all the reasons given, LOSRA urges the Committee to refuse permission for this unwelcome, and inadequately assessed planning application.
26. This matter is dealt with by our Mr Pavey. This letter is addressed to you, as we believe it appropriate for us to correspond with you as its principal solicitor, rather than with the County Council's planning officers. Our client's chairman has, nonetheless, sent a copy of this letter and its attachments to the County Council's Planning Department.
27. Please acknowledge receipt and please confirm that a copy of this letter, with its enclosures, will be forwarded to members of the Planning and Regulatory Committee in advance of tomorrow's meeting.

Yours faithfully



Encs.

- (A) HSE Correspondence
- (B) Guideline for Safe and Eco-friendly Biomass Gasification