

Special Meeting of the Council – 24 March 2010**ENERGY FROM WASTE PLANT AT SHORE ROAD, PERTH
CASE FOR REVOCATION OF OUTLINE PLANNING CONSENT****Report by the Depute Chief Executive, Head of Legal Services and Head of Planning**

This report considers the case for the revocation of the outline planning consent for an energy from waste plant at Shore Road, Perth and recommends that it would not be expedient for the Council to revoke the consent at the present time. This is because reserved matters approval and landlord's consent are still required before the risk of the incinerator proceeding arises and there is a significant possibility that one or both of these will not be obtained thus rendering revocation unnecessary.

1. RECOMMENDATION

The Council is asked to agree that it would not be expedient at the moment to revoke the outline consent for the 'proposed relocation of existing waste recycling centre and formation of a waste to energy facility (in outline)' (05/02318/OUT) but that the matter be kept under review.

2. BACKGROUND

2.1 On 24 November 2009 a special meeting of the Development Control Committee refused the planning application by Grundon Waste Management (Grundon) for the 'relocation of existing waste recycling centre and formation of a waste to energy facility' (09/00348/AMM). This was an application for 'Approval of Matters required by Condition on a Planning Permission in Principle' (i.e. what was previously known as a 'reserved matters' application). The proposed energy from waste (EfW) plant would have a throughput of 90,000 tonnes per annum. The building would measure 120m by approximately 35m, would be predominantly 25m in height, stepping up to 35m over the part of the building which would house the incineration facilities and boilers. An 80m x 7m wide twin stack would vent exhaust gases. The reasons for refusal are given in Appendix 1. In addition, the Committee 'instructed that officers prepare a report on the subject of revocation of the outline consent previously given, for submission to an early meeting of the Council.'

2.2 At the time of finalising this report it was learned that Grundon have appealed the reserved matters refusal.

3. OUTLINE PLANNING CONSENT

3.1 An outline planning application for the 'upgrade of existing waste recycling centre to include a waste to energy facility' (05/02318/OUT) on the same site was submitted by Holden Environmental Ltd on 1 December 2005. The application was dealt with under delegated powers and planning consent in principle was granted on 9 March 2006 for the 'proposed relocation of existing waste recycling centre and formation of a waste to energy facility (in outline)'. Appendix 2 gives the conditions attached to that consent.

3.2 It should be noted that although various background papers were submitted with the application, these do not form part of the planning consent which consists of the decision letter and a plan with a red line round the site; in practice, all this consent does is establish the principle of an EfW plant on this site and gives no commitment in principle to any particular type or scale of such a facility. Such a plant could range in size from very small to large and the scale of any facility would be an important consideration in a reserved matters application.

3.3 As the Head of Planning's report to the Development Control Committee on 24 November 2009 makes clear, objectors claim there were errors in the way the outline application was processed in 2006. Notwithstanding these concerns, this is a valid outline planning consent and cannot now be legally challenged due to the passage of time. These alleged errors and an assessment of their impact are set out below:

Alleged error	Comment/Impact
Failure to screen for an Environmental Impact Assessment at the outline application stage.	This is accepted but the impact has been negated by undertaking an EIA at the reserved matters stage, which is permitted.
Failure to recognise that part of the site was zoned for business rather than industrial uses.	Accepted, although the then draft 2004 Local Plan identified the whole site for 'employment uses' which included both industrial and business uses. If the business use had been recognised, different tests would have been applied but it would be conjecture to predict what the outcome would have been.
Failure to notify Scottish Ministers of the Council's interest in the application as owner of part of the site. (Referral to Ministers was required at that time for applications in which the Council had an interest where the proposal was either contrary to the development plan or where there was a significant volume of objections to it.)	The application was not referred since the applicant failed to disclose the ownership of the site on his application form. Referral was only required because part of the site was zoned for business uses and Ministers would have been most unlikely to have called in such an application which generated no objections.
The application was not advertised as a development affecting the setting of a Listed Building (Perth Prison), nor as being contrary to the Development Plan.	The application was publicly advertised in the Perthshire Advertiser as a 'bad neighbour' development, and at that time there was no requirement to specify the reason for advertising, although it was the Council's practice so to do. Even if advertised under these headings it would not have resulted in an additional advertisement, but merely additional reasons in the same advertisement.
Historic Scotland was not consulted on a planning application which might have affected the setting of a Listed Building (Perth Prison).	The judgement was made that Historic Scotland did not need to be consulted since the application was in outline only and therefore it was not possible at that stage to judge any impacts of the proposal on the Prison. It should be noted that Historic Scotland did not object to the reserved matters application.

Failure to take account of an objection from SEPA on the grounds of lack of information on potential environmental impacts.	The objection from SEPA was referred to in the delegated report, although it is accepted that it was unwise not to have paid more heed to their comments.
Determining the application without the submission of the additional information from the Applicant which was originally sought.	The applicant was requested to provide more details but refused to do so on the ground of cost to him in that it was an application in principle only. The application could have been refused on the basis of lack of information. The impact of this error depends upon the effect of the permission granted which is discussed more fully in this Report.
Failure to impose proper conditions on the outline consent which limited the reasons for refusing the reserved matters application.	Although the outline consent was very 'open', the extent of matters reserved by condition meant it was possible to provide robust reasons for refusing the reserved matters application.
The application should not have been determined under delegated powers.	Officers had the authority to determine the application in terms of the Scheme of Administration in force at that time but they may not have acted wisely in choosing to use delegation. Even if it had gone to Committee, it does not necessarily follow that Members would have reached a different decision on the information available at that time.

3.4 Whatever view is taken of the process by which the outline consent was granted, the most significant aspect of it is that the principle of development has been accepted. However, it requires to be borne in mind that the outline consent still provides a significant element of control in any subsequent reserved matters application through the imposition of planning conditions or by a refusal.

3.5 Some of the objectors to the reserved matters application, in expressing concern about the process and the grant of outline consent, have been pressing for the revocation of the outline consent. The report to the November Committee made reference to revocation, but noted that this was not a matter delegated to that Committee. The Committee was also advised that it was necessary for it to determine the reserved matters application before any consideration could be given to the question of revocation; if the Committee had approved the reserved matters application, it would have been most unlikely to have supported revocation.

4. CASE FOR REVOCATION

4.1 Statutory Process

Section 65 of the Town and Country Planning (Scotland) Act 1997 allows a planning authority to revoke or modify a planning consent "to such extent as they consider expedient" and in doing so shall have regard to the Development Plan and other material considerations. Case law in Scotland on this issue is very limited and there is no Scottish guidance on the use of revocation powers. Guidance does however exist for England and Wales and in such a situation that guidance would be considered to be relevant in a Scottish context.

4.2 An Order to revoke has to be submitted to the Scottish Ministers for confirmation and, before doing so, they must give any party affected by the Order, who wishes to oppose it, an opportunity to be heard by a person appointed to act on the Scottish Ministers' behalf. Therefore, revocation would not be within the control of the Council unless unopposed. The process to be followed for an application for revocation would be the same as for any appeal against refusal of the reserved matters application. In other words, if any party objected to a revocation, before confirming or rejecting it, Scottish Ministers would ask the Directorate for Planning and Environmental Appeals (DPEA - formerly the Reporters' Unit) to consider the issues – effectively to treat it as an appeal case and report to Ministers who would make the final decision.

4.3 Legal Position

The law allows revocation of a planning permission if the planning authority considers it 'expedient' so to do, and although that is a very wide test, it has to be for planning reasons and based on the development plan and other material considerations, like any other planning decisions. English ministerial advice on revocation is that revocation should only be chosen "*if the original decision is judged to be grossly wrong, so that damage is to be done to the wider public interest*". Case law describes this as being in reality a single test as opposed to a two stage test with the emphasis being more on the overall outcome rather than the degree of error.

4.4 It is important to note there is currently no approved development which could be implemented – only an outline consent for an EfW plant – and there may never be any approved development; that would depend on Grundon successfully appealing their current refusal of the reserved matters application or the submission and approval of a fresh application and thereafter being able to implement the consent.

4.5 Therefore, in order to take a view on the expediency of revocation the Council requires to assess the likelihood of a successful appeal and the ability of the developer to implement it. The reasons for refusing the reserved matters are considered to be robust and any appeal is very likely to be dismissed; the current proposal is simply too large for its site and its setting.

4.6 Even if the reserved matters application was dismissed on appeal, some are concerned that another proposal may emerge on the back of the outline consent. It is accepted that in terms of determining future reserved matters applications, the Council could not go behind the principle of development as embodied in the outline permission. However, the outline consent does not give a commitment to any particular size or type of facility and the Council would not be required to approve any facility which by reason of its layout, design and external appearance was unacceptable as the Development Control Committee has already done.

4.7 It should also be noted that the outline consent has limited life; any further reserved matters application would need to be submitted before 14 June 2010 or within 6 months of the dismissal of an appeal.

4.8 The most obvious reason to revoke now would be if it were thought that the outline permission significantly weakened the Council's ability to refuse an EfW plant, defend that decision on appeal and that the development could subsequently be implemented. That is initially a planning judgement. It is considered, as already

mentioned, that the reserved matters do give the Council a significant element of control and that the principle granted by the outline consent is qualified by those reserved matters for which approval is required. Therefore the Council's position is not significantly weakened.

- 4.9 On the other hand, if a reporter did grant consent for the reserved matters proposal by Grundon, including the size of the building and the chimney, it would be on the basis that he considered the proposals to be acceptable in planning terms. In that case, a reporter would be most unlikely to recommend to Scottish Ministers that an outline consent, which gave no commitment to any particular size or type of EfW plant, should be revoked. In other words, if any appeal against the reserved matters refusal was upheld, then it would be illogical for a reporter to revoke something unspecific if he considered something very large and specific to be acceptable.
- 4.10 It is possible that a reporter might feel that given the principle of the EfW plant was established by the 2006 consent that it would be hard to refuse a reserved matters appeal primarily for that reason. However, that would still be subject to satisfaction of the reserved matters viz. size, scale and appearance and it has already been considered by the Development Control Committee that the application is not acceptable in these terms. Importantly, a reserved matters application granted on appeal primarily because of the existence of an outline consent would give considerable justification for seeking revocation. In this unlikely scenario the Council could reconsider revocation at that time.
- 4.11 It should also be borne in mind that even if the outline consent were to be revoked, there would be nothing to prevent a fresh application being lodged for another scheme on the same site. Whilst legislation does permit the planning authority in certain circumstances to decline to determine a fresh application (eg following the dismissal of an appeal) this power does not extend to an application submitted on the same site following revocation.

5. COMPENSATION

- 5.1 The legislation makes provision for the possible payment of compensation following a revocation. It would be payable to any "person interested in the land" which is likely to be interpreted broadly and may very well include both Holden and Grundon although the Council has no information about the nature of their relationship. The measure of loss may include future profits. At this stage it is impossible to say with any certainty how much compensation would be payable and to whom following revocation.
- 5.2 Section 65 of the Town and Country Planning (Scotland) Act 1997 states that in considering revocation the Council "shall have regard to the development plan and to any other material considerations." That has been interpreted in an English case (Alnwick DC v. SOSETR & Safeway Stores plc [2000] JPL 474) as excluding compensation as a consideration in the decision whether to revoke or not (although there is very recent English case law to suggest that compensation is a relevant consideration). However assuming the position is as stated in Alnwick it would not be appropriate to take into account the possible amount of compensation in deciding whether to revoke or not. In considering the test of "expediency" compensation can have an influence on **when** the decision is to be made if events are likely to take place which will influence whether compensation is payable at all. In other words in this case the failure to obtain full planning permission or landlords consent (see

below). It is therefore legitimate to postpone the decision until those processes have taken place with the probability that revocation will not be required.

6. COUNCIL'S LANDLORD INTEREST

As indicated above, approximately half the site (the southern part) is owned by the Council as part of the Common Good and leased to Holdens. The lease contains provisions whereby any change of use or the erection of new buildings or structures would require landlord's consent subject to a requirement not to unreasonably withhold consent which would ultimately be determined by a court. It should be noted that in respect of its role as landlord the Council would not be acting as Planning Authority and would therefore not be operating within the same constraints. It is important that the Council does not decide on these property matters before it has received a request as that may in itself be deemed to be unreasonable. Without prejudging the matter, there is clearly scope for a reasonable refusal should that eventually be the wish of the Council. After having received a request and in determining whether it would be reasonable to withhold consent, the Council can take into account a wide range of issues, including the land use and design issues, its own proprietorial interests and wider community interests. This is a further factor to be taken into account in assessing the expediency of revocation at the present time.

7. CONSULTATION

No other officers have been consulted in the preparation of this Report.

8. RESOURCE IMPLICATIONS

Revocation of the outline planning permission may result in significant, but currently unquantifiable costs to the Council. Whilst this may not be a relevant consideration in making a decision on revocation it is nevertheless relevant to the timing of that decision.

9. COUNCIL CORPORATE PLAN OBJECTIVES 2009-2012

The Council's Corporate Plan 2009-2012 lays out five Objectives which provide clear strategic direction, inform decisions at a corporate and service level and shape resources allocation. This report impacts on the following:-

- (i) A Safe, Secure and Welcoming Environment
- (ii) Healthy, Caring Communities
- (iii) A Prosperous, Sustainable and Inclusive Economy
- (iv) Confident, Active and Inclusive Communities

10. EQUALITIES IMPACT ASSESSMENT (EqIA)

An equality impact assessment needs to be carried out for functions, policies, procedures or strategies in relation to race, gender and disability and other relevant protected characteristics. This supports the Council's legal requirement to comply with the duty to assess and consult on relevant new and existing policies. The matters presented in this Report were considered under the Corporate Equalities Impact Assessment process and it was concluded that no equalities issues arose.

11. STRATEGIC ENVIRONMENTAL ASSESSMENT

Strategic Environmental Assessment (SEA) is a legal requirement under the Environmental Assessment (Scotland) Act 2005 that applies to all qualifying plans, programmes and strategies, including policies (PPS). However, no action is required as the Act does not apply to the matters presented in this report.

12. CONCLUSION

- 12.1 Revocation of the outline planning consent for the EfW plant is not a step the Council should take lightly; it should be undertaken only as a last resort and only where the Council believes it would be expedient to do so. The Planning Act advises that the test of expediency must have regard to the development plan and other material considerations. Guidance advises that an assessment of the likely damage to the wider public interest is required.
- 12.2 The risk of “damage to the wider public interest” is dependent on a reserved matters consent being granted on appeal and it being capable of being implemented. It is considered that there are robust grounds for defending such an appeal.
- 12.3 If, for any reason, a reporter upheld a reserved matters appeal on its planning merits, it is very unlikely that a reporter would recommend the revocation of the outline consent. If an 80m chimney was considered acceptable in planning terms, then he would be unlikely to be offended by a consent which merely established the principle of such a use in Shore Road.
- 12.4 To proceed with revocation would require a similar process to that of an appeal. If opposed it would need to be referred to Scottish Ministers who would ask the DPEA to consider the matter and report back to Ministers for decision, so it would be a process over which the Council had little control. The compensation payable might be considerable and the Council would need to consider the expediency of opening itself up to significant payment in respect of a development which may well not proceed, not least because it could be stopped by other means.
- 12.5 In this case that the Council is owner of half the site and the tenant would need the Council’s consent as landlord for the development to proceed. There are a number of factors which the Council could reasonably take into account in responding to such a request which broadly reflect and expand upon the Council’s concerns regarding this application. This process would be a further means by which the Council could assess and, if appropriate prevent the development taking place.
- 12.6 Given the various processes that still require to be gone through before any public damage might be done it is considered not to be expedient at this stage to seek revocation.

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NOTE

Background Papers – None except those mentioned in this Report.

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**APPENDIX 1 - REASONS FOR REFUSAL OF RESERVED MATTERS APPLICATION –
Dated 14 December 2009**

Resolved:

Refuse the reserved matters application, for the following reasons:

- (1) The proposed development is not in accordance with Environment and Resources Policy 8 of the approved Perth and Kinross Structure Plan 2003 and Policies 48, 49 and 58 of the adopted Perth Area Local Plan 1995.
- (2) The proposed scale, design and appearance of the Energy from Waste (EfW) plant and stack would have a serious detrimental impact on the visual amenity of the city of Perth when viewed from sites both within the city and from surrounding viewpoints. Such development would conflict with the objectives of Environment and Resources Policies 14 and 18 and Environment and Resources Policy 4 of the approved Perth and Kinross Structure Plan 2003; Policies 48 and 49 of the adopted Perth Area Local Plan 1995; and National Planning Guidance set out in SPP 10 (paragraphs 48 and 50); PAN 63 (paragraphs 22, 80 and 81), PAN 68 and *Designing Places – A Policy Statement for Scotland*). In the opinion of the local Planning Authority, any waste management benefits arising from the proposal would not outweigh, in this instance, the visual harm resulting from the design and appearance of the proposed development.
- (3) The proposed building by virtue of its height and design, particularly the stack, would have a serious detrimental impact on the setting of the Perth Central Conservation Area and would conflict with the City's historic skyline. Such development would conflict with the objectives of Environment and Resources Policies 8 and 18 of the approved Perth and Kinross Structure Plan 2003; Policy 58 of the adopted Perth Area Local Plan 1995; National Planning Guidance set out in *Designing Places – A Policy Statement for Scotland* and PAN 68. In the opinion of the local Planning Authority, any waste management benefits arising from the proposal would not outweigh, in this instance, the visual harm resulting from the design and appearance of the proposed development.
- (4) The proposal represents over-development of the site which is smaller than that recommended for such facilities in the Scottish Environment Protection Agency's National Waste Strategy Guidance, May 2007 and would compromise the operation of the site and its ability to deliver the heat plan. It does not offer sufficient buffer to surrounding land uses as defined in SPP 10 paragraph 20 in that it is less than 100 metres from the nearest sensitive receptor. The limited information submitted has not satisfied the local Planning Authority that an acceptable standard of amenity can be secured at this site and in relation to surrounding uses.
- (5) The proposal represents over-development of the site and demonstrates an unacceptable layout which would conflict with the objectives of Environment and Resources Policy 18 of the approved Perth and Kinross Structure Plan; Policies 48 and 49 of the adopted Perth Area Local Plan 1995; and national planning guidance set out in *Designing Places – A Policy Statement for Scotland*. Any waste management benefits arising from the proposal would not be sufficient to outweigh, in this instance, the harm to amenity.

- (6) The applicant has failed to demonstrate adequately, to the satisfaction of the local Planning Authority, that alternative sites have been fully explored and insufficient information has been given as to the identification of alternative sites and the selection of the preferred site as recommended by the Environmental Impact Assessment (EIA) Regulations, particularly in light of the Scottish Environment Protection Agency's comments.
- (7) The proximity of the proposal to a Listed Building (i.e. Perth Prison – category A) is considered detrimental to the setting and amenity of that building and would conflict with Environment and Resources Policy 8 of the approved Perth and Kinross Structure Plan 2003.
- (8) The applicant has failed to demonstrate adequately, to the satisfaction of the local Planning Authority, that the proposed development will not have an adverse effect on the amenity of the surrounding area in terms of noise and odour.

Justification

The proposal is considered not to be in accordance with the terms of the Development Plan and there are no material considerations which would justify a departure from it. The proposal is also contrary to National Guidance and the Environmental Impact Assessment Regulations.

APPENDIX 2 –CONDITIONS ON OUTLINE CONSENT –Dated 9 March 2006

1. The following reserved matters: the layout, design and external appearance of the development, the means of access to the site, and parking and vehicular circulation arrangements, shall all be as approved by the Planning Authority.
2. The reserved matters shall be submitted for the approval of the Planning Authority in the form of a written application accompanied by detailed plans not later than:
 - (i) the expiration of 3 years from the date of the grant of outline planning permission or
 - (ii) the expiration of 6 months from the date on which an earlier application for such approval was refused, or
 - (iii) the expiration of 6 months from the date on which an appeal against such refusal was dismissed; whichever is the latest.
3. The development to which this permission relates must be begun not later than:
 - (i) Five years from the date of the permission; or
 - (ii) Two years from the date of the final approval of all reserved matters.
4. Detailed measures for the control of noise, dust, and other forms of potential air pollution shall be submitted to the Council as Planning Authority for approval as reserved matters, and shall thereafter be fully implemented to their satisfaction.
5. No development shall be started until a contaminated ground investigation has been carried out in respect of the site by a suitably qualified consultant, and a scheme to deal with any contamination on the site has been submitted to and approved by the Planning Authority. The scheme shall include the following details:
 - I. The nature, extent and types of contamination on the site including any source, pathway or receptor linkage.
 - II. Measures to treat/remove contamination to ensure the site is fit for the use proposed.
 - III. Measures to deal with contamination during construction works
 - IV. Condition of the site on completion of remedial measures
6. All matters regarding access, car parking, road layout, design and specification (including street lighting and disposal of surface water) shall be in accordance with the standards required by the Council as Roads Authority.
7. Turning facilities shall be provided within the site to enable all vehicles to enter and leave in a forward gear.

These conditions were imposed for the following reasons:

1. This is an application in outline.
2. In accordance with the terms of Section 59 of the Town and Country Planning (Scotland) Act 1997.
3. In accordance with the terms of Section 59 of the Town and Country Planning (Scotland) Act 1997.
4. To minimise and control any environmental impacts from the proposal.
5. The site is likely to be contaminated by previous industrial processes
6. In the interests of pedestrian and traffic safety and in the interests of free traffic flow.
7. In the interests of pedestrian and traffic safety and in the interests of free traffic flow.

