

From: [REDACTED]
Planning and Architecture Division
4 December 2018

PS/Minister for Local Government, Housing and Planning

POTENTIAL RECALL OF PLANNING APPEAL – WASTE PROCESSING FACILITY, WHISTLEBERRY ROAD, HAMILTON

Purpose

1. To invite the Minister to consider whether this planning appeal should be recalled for Scottish Ministers' determination.

Priority

2. Routine.

The Proposal

3. This appeal relates to the erection of a waste processing facility including waste recovery plant and thermal treatment facility for energy recovery with associated landscaping, access, parking infrastructure and an education and visitor centre. The site is vacant brownfield land at the eastern edge of an established industrial and commercial area on Whistleberry Road, Hamilton near to the East Kilbride expressway (A725).

4. South Lanarkshire Council refused the application for the following reasons:
- *The proposal, by nature of its scale and design, would have an adverse visual impact upon the local area and a detrimental effect upon landscape character and is contrary to Policies 4, 15 and 18 of the Adopted South Lanarkshire Local Development Plan (2015) and Policies 3,5,14 and 17 of the Proposed South Lanarkshire Local Development Plan 2 (2018).*
 - *The proposal, by nature of its scale and design, would have an adverse impact upon the setting of the A-Listed Bothwell Bridge, Designated Bothwell Battlefield and the adjacent green network and is contrary to Policies 4, 14, 15 and 18 of the Approved South Lanarkshire Local Development Plan (2015) and Policies 13 and 14 of the Proposed South Lanarkshire Local Development Plan 2 (2018).*
 - *The applicant has failed to demonstrate that the proposals would not have an adverse impact on otters, contrary to Policy 15 of the Adopted South Lanarkshire Local Development Plan (2015), Policy 14 of the Proposed South Lanarkshire Local Development Plan 2 (2018) and National Guidance for protected species.*

Relevant Planning History

5. In 2014, a previous application for a similar proposal on this site was refused by South Lanarkshire Council and appealed to DPEA (Ref: PPA-380-2049). The case was not recalled. In 2015, the reporter granted planning permission subject to 24 conditions after concluding that the proposal satisfied almost all requirements of the development plan and that any conflicts were minor in nature and were outweighed by the benefits of the scheme which would:

- contribute towards the significant national shortfall in the provision of waste management facilities;
- have an acceptable impact on local communities and would cause no significant individual or cumulative environmental effects;
- have no significant impact on any of the built heritage features and has imposed a condition to secure a programme of archaeological works;
- have a localised adverse effect on the green network and consequent development plan conflict but cause very little harm to the green network as a whole;
- have limited effects on the nature conservation interests and not threaten the objectives of the designation and overall integrity of the area.

PAD Assessment

6. Ministers have committed to considering all waste processing appeals for recall. The decision at this stage centres around whether this appeal raises issues of national significance that require the decision to be taken by Ministers rather than the Reporter. The key issues for the Minister to consider in this particular case are the significance of the proposal in relation to the previous appeal which was not recalled; past precedent with other cases that have been recalled; and presentational considerations.

7. This major application involves the erection of a 21 metre high (to ridge) warehouse style building and a single stack of 3 flues with a height of 90 metre. Within the building the following processes are proposed – reception and preparation; mechanical separation/pre-treatment; fuel store; gasification; steam turbine and generator and gas treatment. This application is similar to the one previously granted on appeal, but contains some key changes: the removal of all anaerobic digestion elements; a significant increase in floor area (from 5,710 to 15,095 square metres); and the reduction from 2 to 1 flue stacks, but with an increase in height (from 25 metres to 90 metres).

8. The previous proposal generated 535 representations. This proposal has generated significant levels of local opposition - 7,080 objection letters, 2 comment letters and 0 letters of support. An online petition has attracted 2,922 signatures. Objections have been received from Angela Crawley MP, Gerrard Killen MP, Elaine Smith MSP, Margaret Mitchell MSP, James Kelly MSP, Claire Haughey MSP, Monica Lennon MSP, Richard Lyle MSP, Christina McKelvie MSP, Councillor Martin Grant Hose and Councillor Mark McGeever. North Lanarkshire Council have also submitted a letter of objection as have Cambuslang Community Council and Uddingston Community Council. There were no objections received from the internal council consultees or the statutory consultees including HES, SEPA and SNH subject to conditions.

9. The previous appeal decision has established the principle of an energy from waste plant on the application site. We are aware that the duration of the previous application was due to lapse in August 2018, but the Council has advised that works commenced in July and that application remains live.

Precedent for Recall

10. Similar 'Energy from Waste' plant applications, such as at 865 South Street, Glasgow, have been recalled by Ministers on the basis of the type of development, level of opposition and residential characteristics of the area. This case is a similar type of

development to that proposed at South Street, but the level of opposition is significantly higher, despite the site being brownfield land (adjacent to an industrial estate) and allocated for employment use in the Development Plan.

11. The information submitted with the Whistleberry application and the appeal is very comprehensive and includes all aspects such as impacts on natural and historic assets and infrastructure connections to potential district heating users individually identified. [REDACTED]

12. Another case is currently at DPEA, due to the decision of Highland Council to refuse planning permission in 2014, for a waste to energy combined heat and power plant at Cromarty Firth Industrial Estate, Invergordon. This case has been subject to legal challenge but was not recalled by Ministers as it raised no issues of national importance that required ministerial intervention.

Presentational Issues

13. Monica Lennon MSP has written to DPEA to ask why this case has not yet been recalled given Mr Neil's commitment to recall all energy from waste/incinerator cases. DPEA responded clarifying that the case was under consideration for recall, and that the commitment was not to recall all cases, but to consider them for recall. DPEA also highlighted a letter from Mr Stewart in 2016, where the Minister clarified the position on future appeals being considered for recall. In addition to this correspondence, the Minister will have noted the recent press enquiry which included a quote from Ms Lennon stating *"The SNP Planning Minister Kevin Stewart could end the misery of those campaigning against the Whitehill incinerator at the stroke of a pen, but so far he's refused to do so."* The same press enquiry also had a quote from a local resident stating that *"the previous Cabinet Secretary Alex Neil had already said that future applications would be called in by Ministers – so to go back on that now would be yet another kick in the teeth for the community."*

14. DPEA have recently received 2 FOI requests from the parliament related to the current Whistleberry appeal and to a meeting Mr Neil attended in relation to the previous appeal.

15. Ms Lennon also seems to have used the Whistleberry case as a basis for several amendments made at Stage 2 of the Planning Bill considerations. At the Planning Bill Stage 2 committee meeting on 7 November, Ms Lennon specifically mentioned the Whistleberry proposals in relation to the previous application and the potential of revocation powers under proposed Amendment 333.

Recommendation

16. This major proposal has some significant changes in terms of the design and scale of the proposal since the previous appeal. It also raises significant levels of public opposition.

17. We consider that the proposal raises issues of potential national importance and a decision by Ministers is warranted. We recommend that the Minister recalls the appeal in light of the sensitivities of this type of development and the significant level of public interest.

██████████
 Planning and Architecture Division
 ██████████

4 December 2018

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Cabinet Secretary for Communities and Local Government			X		
Cabinet Secretary for Culture, Tourism and External Affairs			X		
Cabinet Secretary for the Environment, Climate Change and Land Reform			X		

- DG Education, Communities & Justice
- ██████████ Director, LG&C
- ██████████ Director - Env & Forestry
- Chief Reporter, DPEA
- ██████████ DPEA
- Chief Planner
- ██████████ Asst Chief Planner
- ██████████ Planning Decisions
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- ██████████ SGLD
- Comms CSSE
- ██████████ Comms
- ██████████ Comms
- Callum McCaig, SpAd

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Monica Lennon MSP & Richard Lyle MSP
By email to: Monica.Lennon.msp@parliament.scot,
Richard.Lyle.msp@parliament.scot

11 July 2016

Dear Monica & Richard,

Further to our meeting on 30 June 2016, I am writing to clarify Scottish Ministers' position on incinerator/energy from waste proposals.

In a cross party letter dated 25 November 2015, Mr Neil specified that he had put in place arrangements to ensure that future appeals relating to proposed incinerators would be brought to Scottish Ministers' attention, to allow them to consider whether they wish to make the final appeal decision rather than allowing this to be made by reporters. This is still the current position. Officials in Planning and Architecture Division routinely monitor new cases with the Planning and Environmental Appeals Division (DPEA) for any relevant appeals.

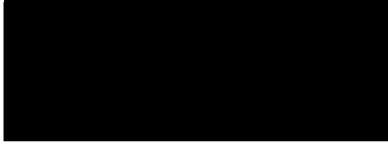
Scottish Ministers do have a general power to intervene by calling in any planning application for their own determination. In practice though, Ministers will exercise this power very sparingly, recognising and respecting the important role of local authorities in making decisions on the future development of their areas. It is not Ministers' intention to call in all planning applications relating to incinerator/energy from waste proposals.

In a letter to Scottish Ministers dated the 16th November 2015, South Lanarkshire Council's Chief Executive indicated that the Council did not propose to exercise its revocation powers at that time. Such powers, however, remain available to the Council.



Mr Neil's letter of 25 November noted that the reporter appointed to determine the Whistleberry Road incinerator appeal had done so in accordance with the development plan, taking into account all representations and that the reporter's decision notice gave detailed consideration to the issues raised. Mr Neil's letter also confirmed that Scottish Ministers did not propose to use their revocation powers in this case. I can confirm that there has been no change to Scottish Ministers' position with regard to revocation of the planning permission.

Yours sincerely



KEVIN STEWART

CLEAN POWER PROPERTIES LIMITED

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F.A.O. Scottish Ministers

Scottish Government
Directorate for Local Government and Communities
Planning and Architecture Division
Planning Decisions
Victoria Quay, Edinburgh, EH6 6QQ

14th January 2019

Dear Sirs

Statutory Appeal reference PPA-380-2078, site at Whistleberry Road, Hamilton (“the Appeal”). Direction dated 6th December 2018 that the Appeal will be determined by the Scottish Ministers (“the Direction”).

1. We refer to the above Direction. We are surprised and also concerned about the basis for and the effect of the Direction. In consequence we have sought the advice of the Senior Council who we instructed to assist in the drafting of this letter.
2. As the Scottish Ministers will be aware, the Head of Performance and Administration at the Planning and Environmental Appeals Division informed us on the 16th November 2018 that the Scottish Ministers, in exercise of the powers conferred on them by Schedule 4 of the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”), had appointed Mr Dan Jackman BA(Hons) MRTPI to determine the Appeal.
3. We point out that as with the vast majority of appeals under Section 47 of the 1997 Act it is usual for a Scottish Minister’s Reporter to determine the appeal. Reporters from the Planning and Environmental Appeals Division are ideally qualified and suited for determining such appeals and are recognised by the Courts and all those interested in the Scottish Planning system as being independent, impartial and expertly qualified in determining such appeals.
4. Accordingly, we were taken aback to read the Direction dated 6th December 2018 and in particular the reason for it contained in the second paragraph of the Direction. The Direction sets out that the “reason for this Direction is the potential national interest with the sensitivity of this type of development and the significant level of public interest.”
5. As the Scottish Ministers will be aware, none of their departments and agencies objected to the proposal or considered the proposal to raise issues of national significance.
6. In particular SNH is satisfied that the proposal does not raise any issue of importance. Historic Environment Scotland has set out that the proposal does not raise issues of national significance. SEPA has identified that the proposal is “potentially consentable” and is consistent with Scottish Government Policy. Transport Scotland has no objection to the proposal.

7. We are accordingly at a loss to understand why the Scottish Ministers consider that they do not have sufficient confidence in Dan Jackman, an experienced and highly regarded Reporter to take the decision.
8. Do the Scottish Ministers have a concern that this Reporter, or indeed any other Reporter, will not properly reflect the Scottish Ministers' approach to policy in relation to this or any similar proposal?
9. The approach set out in the Direction undermines not only the Scottish Ministers' Reporters but the whole planning appeal system and Scottish Government Policy on Waste. Our company has invested heavily in this project which supports the aims and objectives of the Zero Waste Plan and Scottish Government Policy on Waste contained in SPP. The stated reason for the Direction is likely to discourage further inward investment in Scotland for this urgently needed infrastructure. We are deeply concerned to read that the Scottish Ministers appear to consider "this type of development", to quote the Direction, as so sensitive that it is in the national interest that the Scottish Ministers determine the proposal. This type of development is fully supported by Scottish Government policy. It is actively encouraged by Scottish Government policy in order to provide the much needed infrastructure to be in place prior to the Scottish Government's landfill ban.
10. The Scottish Government's own policy identifies this type of site as ideally suited for this type of development and a Scottish Ministers' Reporter has already identified this site as appropriate for such development.

The Direction refers to a significant level of public interest. We cannot see why this on its own should result in the Scottish Ministers concluding that they should determine the application. As the Scottish Minister will be aware, the 1997 Act requires the decision maker to take his decision in accordance with the development plan unless material considerations indicate otherwise. A significant level of public interest on its own is not a material consideration. We do not see why a significant level of public interest in this case is a legitimate basis for concluding that an independent reporter should not determine the appeal.
11. We are also concerned that the Direction will inevitably lead to a lengthier period for determination of the appeal. As the Scottish Ministers are aware there is an urgent need for this type of development in Scotland. SPP sets out that the Scottish Ministers expect planning decisions to be "timely, transparent and fair". In order to understand properly why the Direction was made and to be able to make a fully informed decision on further action we ask the following questions of the Scottish Ministers:
 - (i) Did the Minister who made the Direction have before him a full set of all the documents in this Appeal, including our Planning consultant's letter of 24th October 2018?
 - (ii) What additional information was provided to the Scottish Ministers between their decision dated 16th November 2018 and the Direction taken on 6th December 2018?
 - (iii) Why did the Scottish Ministers change their position on the determination of the appeal?
 - (iv) What meetings did the Scottish Ministers (or any individual Scottish Minister) have with MSP'S, MP's, politicians and other objectors to the appeal proposal prior to the decision of 6th December 2018?
 - (v) Were minutes of the meetings referred to in (iv) above taken? If so can we have copies of the minutes and details of those people that attended the meetings and an explanation as to why our representatives were not invited to the meetings or given an opportunity to comment on what was said at the meetings?

- (vi) What regard did the Scottish Ministers have to the position of SEPA, Historic Scotland, Transport Scotland, and SNH's consultation responses and their own policy on "this type of development"?
- (vii) What advice were the Scottish Ministers given on the basis for the Direction and by whom?
- (viii) What is the basis for the Scottish Ministers considering that "there is a national interest with the sensitivity of this type of development"?
- (ix) What is the basis for concluding that "the significant level of public interest" justifies the Direction? Is this based on the number of objections?
- (x) Why do the Scottish Ministers not have confidence in the Reporter determining this application? Do they consider that Scottish Ministers' Reporters are not properly reflecting the Scottish Government's approach to policy in their decisions on this type of development?
- (xi) Will the Scottish Ministers confirm that no Minister who has had meetings with objectors to the Appeal proposals will be party to making the determination?
- (xii) What assurance can the Scottish Ministers give that the Direction will not add to the period for the Appeal to be determined?

12. We would request that these questions are answered in the next 7 days.

13. Finally, we invite the Scottish Ministers to reconsider their decision dated 6th December 2018.

Please confirm receipt of this letter.

Yours faithfully

For and on behalf of
Clean Power Properties Limited


Director

cc. Chief Planner
cc. Chief Reporter
cc. Planning Environmental Appeals Division