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Mr M Robertson

ADDRESS
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SENT BY FIRST CLASS POST & EMAIL: REDACTED.

Your ref:

Our ref: Legal/56100/NS

03 November 2014

Dear Sirs

Re: Proposed Application for a Judicial Review of the grant of planning permission dated 25 September 2014 (and 15 March 2012 as below) to the County Waste Contractor, Sita Surrey Ltd in respect of Charlton Lane Waste Management Facility, Shepperton, Surrey, TW17 8QA

Described as "Changes to the planning conditions attached to the Charlton Lane Eco Park planning permission (Ref SP10/0947, dated 15 March 2012) in order to incorporate Minor Material Amendments to the approved scheme comprising a revised gasification technology, 3 new sub stations, other minor material amendments to the layout, buildings, structures and ancillary elements of the scheme, and a minor reduction in tonnage of waste that would be managed at the site".

Background & general

1. This is the reply on behalf of Surrey County Council ('the Council') to your letter before claim herein dated 21 October 2014 received on 24 October 2014.
2. The Council granted planning permission SP/10/0947 in respect of the Eco Park development by notice dated 15 March 2012 ('the March 2012 permission'). The Planning & Regulatory Committee ('P&RC') resolved to approve the planning application underlying that permission ('the March 2012 application') on 30 July 2011. The March 2012 application was referred to the Secretary of State, who decided not to call it in. The P&RC re-considered that application in accordance with its 'Kides' procedure prior to planning permission being issued. The March 2012 permission was not the subject of any claim for judicial review.

3. Planning permission SP13/01553/SCC, which you propose to challenge, was granted by notice dated 25 September 2014 ('the variation permission'). The P&RC resolved to approve the application underlying that permission ('the variation application') on 17 March 2014. The variation application was referred to the Secretary of State, who decided not to call it in. The variation permission was issued following further consideration of the application on 24 September 2014. The printed minutes of the P&RC meeting on 24 September 2014 (referred to below) were agreed as a true record at its meeting on 15 October 2014.
4. A number of preliminary points arise in respect of your proposed issues (or grounds):
 - (i) it appears to the Council that all or many of the proposed issues are, in substance, attempts to re-open the planning merits of the decisions taken, whereas the court will be concerned only with any errors of law;
 - (ii) several of the proposed grounds concern the March 2012 permission and do not concern the variation permission and the changes to the March 2012 permission authorised by the variation permission. One even concerns the validity of the Surrey Waste Plan ('SWP') & Joint Municipal Waste Management Strategy ('JMWMS'). The judicial review period in relation to the March 2012 permission, however, has long-since expired. It is not permissible to endeavour to challenge the March 2012 permission now or raise issues that concern the March 2012 permission and not the variation permission; and
 - (iii) it is noted that you make no specific criticism of any error within or omission from Officers' reports to the P&RC meetings on 17 March and 24 September 2014 ('the March 2014 report' & 'the September 2014 report') at which it considered the variation application.
5. Your reference, at para. 2, to the Human Rights Act 1998 is noted; but the Council does not consider that it granted the variation permission in breach of that Act. This matter was considered most particularly at paras. 345 & 346 of the March 2014 report in the context of that report as a whole.
6. Your reference to the Aarhus Convention is also noted; but you do not seek to describe any specific breach of its provisions.
7. Your proposed issues/grounds are addressed below under the same paragraph no. references as appear in your letter.

Issue 1: Paragraphs 8-14 (Air Quality ('AQ'))

8. Your paras. 8-11 appear to focus on the Borough-wide Air Quality Management Area ('AQMA') designated by Spelthorne BC ('SBC') and elevated levels of NO₂ resulting from the development. Para. 210 of the March 2014 report sets out SBC's specific planning policy on air quality. The March 2014 report considers AQ and human health extensively at paras. 209-226 & 299-306. Officers' consideration of further AQ information provided by SBC is at paras 13-16 of the September 2014 report.
9. The variation permission was not granted on the basis that existing breaches of Air Quality Objectives were '*one offs*' and the Council was entitled as a matter of judgment and law to consider that emissions of pollutants would be '*negligible*' when the background concentration was taken into account (para. 213 of the March 2014 report). The key conclusions in the context of your proposed challenge appear to the Council to be that the conclusions of the AQ and human health assessments were unchanged (paras. 223 & 306); and Issue 1 does not challenge the lawfulness of those particular conclusions.
10. Your references to COMEAP and WHO (para. 12) are properly to be considered in the context of Officers' overall conclusions at paras. 223-226 of the March 2014 report including those on the absence of changed conclusions and compliance with relevant planning policy. The general points that you make in relation to air pollution and its effects do not *ipso facto* justify the conclusion that the Council acted unlawfully, including contrary to Article 2 of the Human Rights Act 1998, when granting the variation permission.
11. Turning to heavy metals (your para. 13), paras. 302-306 of the March 2014 report sets out Officers' consideration of the detailed health risk assessment submitted in support of the application, where levels of cadmium are expressly considered. Though the combined impact of cadmium from existing background sources and plant contributions would, at the point of maximum impact, be 138.89% of the ingestion TDI for children, process contributions would be exceptionally small.
12. The Public Health England report (your para. 14) is considered at para. 17 of the September 2014 report, and the conclusions of the original assessment are at paras. 223-226 of the March 2014 report. The P&RC's consideration and conclusion that there were unlikely to be significant effects on the air quality, with emission levels well within the legislative levels, were entirely lawful.

Issue 2: Paragraph 15-19 (Fire and Explosion)

13. Surrey Fire & Rescue were not a statutory consultee so far as the variation application was concerned. Officers' decision on the scope of non-statutory consultation varies from proposal to proposal and site to site. The small-scale biomass plant proposal at Depot 46 involved the use of wood waste as a fuel source on a site with overhead electrical powerlines above. Officers judged for that reason that Surrey Fire & Rescue were a necessary non-statutory

consultee. Pages 23-24 of the March 2014 report drew members' attention to objections received regarding lack of consultation with Surrey Fire & Rescue. Page 9 of the recent Environmental Permit Variation Decision Document (30 October 2014) confirms that the Environment Agency ('the EA') consulted Surrey Fire & Rescue before issuing the permit variation. Para. 310 of the March 2014 report explained that the Health & Safety Executive (which did not advise against the grant of planning permission) were to be consulted by the EA as part of the permitting process

Issue 3: Paragraphs 20-28 (The Landgrab of Metropolitan Green Belt ('MGB'))

14. Planning permission SP10/0883 was granted in respect of the permanent retention of the existing waste management facility by notice dated 4 March 2011 ('the retention permission'). It was entirely logical and lawful that the application underlying that permission should be determined in advance of the March 2012 permission.
15. This issue concerns the retention permission and the March 2012 permission insofar as they authorised the development of land north and east of the existing waste facility in its current form. The existing facility and that additional land all lie within the MGB. The variation application didn't propose and the resulting permission didn't authorise any change to the March 2012 permission so far as the development of that land outside the existing facility is concerned. Issue 3 is, therefore, without foundation because it does not relate to any change resulting from the variation permission.
16. Even if that were not so, it was not unlawful for the retention permission to be determined ahead of the March 2012 application. There is, moreover, no question of members having determined to grant any of the retention, March 2012 or variation permissions in reliance on Counsel's Opinion whose existence has not been disclosed. No such Opinion exists. Officers did not consider that there was any necessity for further Counsel's opinion to underpin the lawful determination of the variation application.

Issue 4: Paragraph 29 (Procedure)

17. Issue 4 adds nothing and is not supported by any evidence. The P&RC was advised as to the role of the Surrey Waste Contract in its planning decision at paras. 111-3 of the March 2014 report.

Issue 5: Paragraph 30-34 (Minor Material Amendments)

18. Para. 21 of the March 2014 report explained that although some of the 43 changes would more properly be described as '*non material amendments*' - and thus be determined under a separate, simpler determination procedure - the applicant had applied for all 43 changes at the same time such that the Council judged that these more minor amendments formed part of a package of '*minor material amendments*'. Appendix A to the March 2014 report shows that the increased width of the stack and height of the biogas holder were

considered to be '*minor-material*' amendments (not '*minor*' as you refer at paras. 31 & 32; see Appendix A rows 34 & 42). The March 2014 report referred clearly to the inclusion within the gasification building of pre-treatment plant & equipment (see paras. 23 & 33), and these were considered to be '*minor*' changes (Appendix A row 3). You refer to no substantial reason why the Council's judgment in relation to these matters should be considered irrational or otherwise unlawful beyond mere assertion to the contrary founded largely on inaccurate description of the Council's analysis.

19. The application to the EA for a permit variation was part of an entirely separate statutory process and the characterisation of the changes in that context does not affect or reflect on the Council's acceptance of the Section 73 approach for the variation application (the planning regime does not refer to '*substantial*' in this context).

Issue 6: Paragraphs 35-39 (Misdescription)

20. Officers explained at para. 38 of the March 2014 report that they considered that the proposal could properly be described as '*gasification*' and authorised as such for planning purposes notwithstanding the absence of detail so far as syngas processing was concerned. They did so in light of the advice of the County Waste Management and Energy Recovery Consultant at para. 63 of that report.
21. Paras. 125 & 126 of the March 2014 report provide further explanation of: the facts that planning policy itself does not favour one technology over another and that the key issue for the planning authority is, whatever the chosen technology may be, whether the proposed treatment facility is considered appropriate in accordance with the development plan; and the conclusion that gasification as proposed is in accordance with the development plan. The definition of the term '*gasification*' is found in a number of sources, not only s.61 of the Energy Act 2013. Syngas created from the gasification process proposed is to be used to produce steam in a boiler to drive a turbine to generate electricity and condition 44 of the variation permission secures that the electricity generating plant will be installed in association with the gasification and anaerobic digestion plants with (alongside photovoltaic cells) a combined generating design capacity of not less than 5.586 MW. Electricity generation is therefore to be achieved by these means.
22. As to your para. 35, the Council considers, as indicated at para. 32 of the September 2014 report, that the variation permission is effective to authorise the development of '3 new substations' (as described in the description of development) and does not fail to authorise 'a very large switchroom' (as you describe). Officers confirm that Approved Drawing No 1224 PL – B004 Revision C (General arrangement Plan) shows a building to the east of the main Gasification building , subdivided into a LV switch/ MV switch. The description of development was agreed between the County Planning Authority (CPA) and the applicant's agent on 6 September 2013. The substation's purpose is to transform one voltage class to another voltage class and switchgear is utilised within substations to protect equipment from vulnerabilities in this power flow and transformation process. On the basis that

switchgear is found within substations, officers considered that the description to include "3 new substations" rather than ' 2 new substations plus an electrical switchroom ' was clear and precise.

Issue 7: Paragraph 40-45 (Kides procedure)

23. The 'Site Warning Notice' issued in respect of the current operation of the Charlton Lane site by the EA was considered at the P&RC meeting on 24 September 2014. The Update Sheet presented to committee explained that the EA's action to secure improvements at the Charlton Lane site, following their investigation of complaints by residents, demonstrated that their monitoring of the Charlton Lane site is being undertaken effectively. The minutes record that: *"A letter had also been sent to the monitoring officer from Mr Malcolm Robertson. The Principal Lawyer felt that the concerns raised in the letter had been addressed in the update sheet. Any issues that had not been addressed in the update sheet would be addressed by the monitoring officer in a separate letter to Mr Robertson."* The Site Warning Notice and its implications for the proposed development were, therefore, properly considered by the P&RC.

Issue 8: Paragraph 46-48 (Conflict of Interest)

24. ~~NAME REDACTED~~ of RPS has provided advice to the Council on this matter pursuant to a contract whereby RPS is required to identify any conflict of interest arising by reason of the project and subject area concerned and 'opt out' where there is a potential conflict of interest. Discussions are undertaken on a case by case basis, at an appropriate stage, to ascertain whether RPS should provide advice on air quality/odour/dust, landscape and lighting to the Council or to the third party concerned. Where a conflict of interest has been identified the Council has referred the request for advice to a second, back-up framework consultant. In other cases RPS has elected not to give advice where they are currently or have been involved with a specific project providing advice to the applicant on the same subject area. This approach is standard practice.

It is not clear what is being referred to when you assert that RPS wrote at least two reports in support of the planning application variations. RPS did undertake a ground investigation study in 2007 at Charlton Lane – and an extract of this was one of nine such historic studies by 8 different geotechnical consultants included in Appendix F of Appendix 10.1 of the variation application's Environmental Statement.

25. ~~NAME REDACTED~~ advised the Council in relation to the March 2012 permission and the variation permission, and no conflict of interest has been identified at any stage. There is, again, no substance at all in your suggestion that there has been any conflict of interest affecting the Council's consideration of the variation application.

Issue 9: Paragraph 49-54 (Precautionary Principle)

The quotations at paras. 49 & 50 of your letter (which form the basis of this issue) are from a Stage 2 complaint response by Carole Mackay, Customer Service & Relationship Officer. They played no part in informing and formed no part of advice given to members as part of the process of determining the variation application and were not otherwise referred to by members.

26. Issue 9 is stated in very generalised terms and appears to relate to the Council's consideration, in the context of the variation permission, of changes to technology (ie the adoption of gasification) and the implications for human health, and maybe safety.
27. Officers' consideration of these matters in the March 2014 report was expressly in the context of concern that the precautionary approach dictates that the proposal should not be allowed to proceed because the plant is untried and untested (p. 25 of the March 2014 report). Their discussion of the gasification technology proposed, human health & safety is at paras. 121-127, 209-226, 299-306 & 311-314 of the March 2014 report. The Council's consideration of these matters was entirely rational and lawful in the context of the proper application, in the planning context, of the precautionary principle.

Issue 10: Paragraph 55-59 (Invalid Consultation)

28. You presented a petition with 1665 signatures to the Council's Spelthorne Area Local Committee on 21 September 2010, ie before the application underlying the March 2012 permission was validated. That petition did not relate to the variation application, did not form part of the record of consultation as part of the planning process for that application and has no bearing on its validity.
29. The complaint to the ASA to which you refer (in respect of the SITA newsletter of May 3013) concerned the use within that newsletter of the words "household waste". The complainant considered that that term was misleading in that some commercial and industrial wastes were also be treated at the Eco Park and "municipal" waste should be used instead. SITA refuted that claim but SITA agreed by email to the ASA on 1 August 2013 that: "*we will avoid the unqualified use of the term 'household waste' in future communications relating to the gasification facility*". The Community Involvement Statement (CIS) is factually correct, in this context, since it states (about the newsletter distributed in May 2013) that: "*The newsletter was distributed on Tuesday 28th May (2013) to the nearest 11,840 households to the Charlton Lane site...*" The planning supporting statement and the ES Addendum in support of the variation application use the terms "municipal waste" or "Dry non-hazardous household, commercial and industrial wastes (inc municipal wastes)" and the application did not refer to "household wastes" (consistent with SITA's undertaking to the ASA).

Issue 11: Paragraph 60-62 (Missing Environmental Statements ('ESs'))

30. Para. 60 of the March 2014 report explained that the applicant proposed two grid connections to enable the gasification and AD facilities to export electricity independently to the national grid. This necessitated two new substations near the site entrance.
31. A drawing showing a suitable Grid connection route was provided by the applicant in the course of the Council's determination of the March 2012 permission. Para. 239 of the June 2011 report explained that the applicant had provided a drawing showing a suitable Grid connection route, which did not (in Officers' opinion) raise issues requiring its incorporation within and consideration as part of the Eco Park application because it would be the subject of a separate application. Para. 336 of that report further explained that, so far as Appropriate Assessment under the Conservation of Habitats and Species Regulations 2010 (Habitats Regulations) was concerned, Officers considered that works associated with the National Grid connection along the route proposed were unlikely to have a significant effect on the South West London Waterboards SPA. Natural England concurred with this judgment.
32. The National Grid connection route was therefore considered when the original 2010 ES, ie the ES supporting the March 2012 application, was reviewed. That ES (& supporting Regulation 19 information) and an Addendum was submitted in support of the variation application. Para. 74 of the March 2014 report sets out the County Environmental Assessment Team's assessment that the ES submitted in support of the variation application satisfied Part II of Schedule 4 of the EIA Regulations 2011 and provided as much of the information listed under Part I of the EIA Regulations 2011 as may be reasonably required. The County Environmental Assessment Team concluded, overall, that the ES was sufficient to inform the determination of the variation application.
33. If connection to the National Grid is to be by means of an underground cable, it will not involve activities that fall within the relevant categories of development listed in Annex I (paragraph 20 - construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km) or Annex II (paragraph 3b - industrial installations for carrying gas, steam and hot water, transmission of electrical energy by overhead cables (projects not included in Annex I)) of the EIA Directive 2011/92/EU. A further ES will not therefore be required.
34. If connection to the National Grid is to be by means of an overhead cable, it will fall within either Annex I or Annex II of the EIA Directive 2011/92/EU and may require EIA. That requirement would not, however, arise under the provisions of the Town & Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011 No. 1824). The relevant consenting regimes would instead be either: (a) the Nationally Significant Infrastructure Projects ('NSIP') regime (the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009 No.2263) applying); or (b) the Electricity Act 1989 regime (Section 37) (the Electricity Works (Environmental Impact Assessment) (England & Wales) Regulations 2000 (SI 2000 No.1927) & the Electricity Works (Environmental Impact Assessment) (England &

Wales) (Amendment) Regulations 2007 (SI 2007 No.1977) applying). If the NSIP regime applies, whether EIA is required will be determined by the Secretary of State for Communities & Local Government. If the Electricity Act applies, whether EIA is required will be determined by the Secretary of State for Energy & Climate Change.

Issue 12: Paragraph 63-64 (Eutrophication of nearby waterbodies)

35. The impact of emissions on nearby waterbodies by means of eutrophication and acidification was addressed in the Ecology and Air Quality Chapters (9 & 13) of the 2010 ES and 2013 ES Addendum. See (a) section 9.5 (pp.198-202) of the 2010 ES, (b) paras. 13.5.20-27 (pp.306-307) of the 2010 ES, (c) section 4.7 (pp.34-40) of Appendix 13.1 to the 2010 ES, (d) paras. 9.5.12-18 (pp.74-75) of the 2013 ES Addendum, (e) paras. 13.7.3-19 (pp.154-160) of the 2013 ES Addendum. See also (f) section 9 (pp.45-48) and (g) Appendix C (pp.80-86) of Appendix 13.1 to the 2013 ES Addendum. Thames Water had no comments to make in relation to the variation application (see para. 77 of the March 2014 report). Issue 12 is without foundation.

Issue 14: Paragraph 65-68 (SWP and JMWMS)

36. It is entirely inappropriate to seek to use the proposed claim as a means of challenging SWP and JMWMS. Their status and terms were, in any event, unchanged in the context of the variation permission compared with the March 2012 permission. The validity of SWP is not dependant, as you allege, upon any secret document. JMWMS refers to advanced thermal treatment but contains no commitment to a precise technology. The options referred to by way of examples include BOS Technology and your suggestion that the proposal does not, as a matter of law, comply with JMWMS is without foundation.

Issue 15: Paragraph 69-70 (Invalid Vote)

37. Cllr Margaret Hicks is a long-standing member of the P&RC and is familiar with the issues arising in relation to the variation application. She has attended training, including sessions on AQ, and attended the site visits that members of the committee were invited to. It is acknowledged that she did leave the room for a few minutes, unavoidably, while the Air Quality Consultant was responding to a question from Mr Christian Mahne about air quality data. The Surrey Code of Best Practice in Planning Procedures is intended, however, to ensure Members receive all the information necessary before voting. Cllr Hicks left the room for a short period but requested, upon her return, that the key information provided while she was absent be repeated. The Air Quality Consultant repeated the information provided. It was agreed, on this basis, that Cllr Hicks could vote. Her vote was not, therefore, invalidated. The printed minutes record Cllr Hicks' absence and steps taken upon her return (paras. 12-17)
38. Even if Cllr Hicks' vote were to be set aside, the vote would still have been to grant planning permission since the actual vote was 7 for, 4 against and 1

abstention and setting aside Cllr Hicks' vote would result in 6 for, 4 against and 1 abstention.

Issue 16 Paragraph 71-74 (Lack of Training)

39. The Planning & Regulatory Committee has had the following relevant training regarding the Eco Park application considered on 17 March 2014 and 24 September 2014:

Induction training followed the May 2013 elections for Members and named substitutes. This covered the planning process. For some Members this was a refresher as they have received the basic training during previous inductions. A Briefing Pack was made available to all Members via the Council's intranet.

27 January 2014 - Waste Recycling and Energy Recovery Technologies - three presentations were given: Gasification and Anaerobic Digestion of Waste; Gasification of Waste; Waste Disposal Authority Action Plan.

27 January 2014 - site visit to Charlton Lane to view the site other proposed Eco Park. Members were shown the existing site with reference to the internal layout and views of the entrance area, eastern perimeter and adjoining uses.

7 February 2014 - site visit to Bergamo Waste Treatment Plant, Italy. The visit was to a waste gasification plant producing electricity and utilising waste heat for use in local homes. The tour included an explanation of process and members were shown each element in terms of the plant's operation including waste delivery, processing, combustion and air filtration.

20 February 2014 - site visit to Wallingford Anaerobic Digester Plant, Oxfordshire. The members were shown an operational plant receiving green waste, in turn processed to create methane gas which is burnt to generate electricity. The tour included an explanation of the technical process and members were able to view the storage and processing of waste and the operation of plant and appreciate management and amelioration processes and techniques.

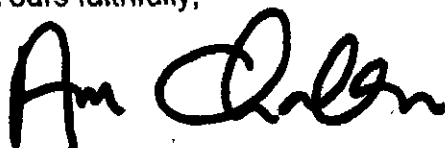
40. Christian Mahne joined the committee at the Annual Council Meeting in May 2014. He had received the induction training as a substitute Member in 2013, was provided with relevant written materials regarding the Eco Park and was offered an opportunity to discuss issues with planning officers. Helena Windsor stood in as a substitute just prior to the meeting on 24 September. She had received the induction training in 2013 and discussed the application with the Member she was substituting for.
41. The variation application was subject to substantial written reports on both occasions when considered by the P&RC and these considered matters relating to AQ and human health (see paras. 209-226 & 299-309 of the first report 7-11 & 13-22 of the second report). The Council's response to your

substantive criticism of Officers' and the P&RC's consideration of those matters is at Issue 1 above. Members of the P&RC are able to request clarification or additional information from Officers at any time during the planning process. The Council's Air Quality Consultants were present at and responded to members' questions on air quality at both of the P&RC meetings referred to here. The Planning Development Control Team Manager explained, on 17 March 2014 that the committee had had air quality training (minutes para. 15). Your suggestion that members were unaware of the issues arising in relation to any of the issues arising is without foundation.

Action you expect the Council to take

42. The Council has made all environmental information relating to the variation application publically available in accordance with the Environmental Impact Regulations 2011 and Environmental Information Regulations 2004. I am not aware which documents you have and have not seen and am therefore not able to respond to your request for disclosure.
43. The County has provided above a detailed answer to each of the issues raised within the timescale to which you refer.
44. The Council will resist any application you may make for permission to claim judicial review in relation to planning permission SP13/01553/SCC (the variation permission) and does not consent to an order to quash that planning permission. The Council confirms, for the avoidance of doubt, that it does not dispute that your proposed claim would be an Aarhus Convention claim for the purposes of any award of costs.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Ann Charlton', written in a cursive style.

Ann Charlton
Director of Legal and Democratic Services
Surrey County Council

