

# Public Document Pack



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Date: 17 August 2012

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## TO FOLLOW

## PLANNING COMMITTEE

**Date:** Thursday 23 August 2012

**Time:** 2pm

**Venue:** Council House, Armada Way, Plymouth

**Members:**

Councillor Stevens, Chair

Councillor Tuohy, Vice Chair

Councillors Mrs Bowyer, Darcy, Sam Davey, Mrs Foster, Nicholson, John Smith, Stark, Jon Taylor, Vincent and Wheeler.

TO FOLLOW – Please find enclosed additional information for your consideration under agenda item number 6.

**Bob Coomber**

Interim Chief Executive

## **PLANNING COMMITTEE**

### **6. ENERGY FROM WASTE PLANT - INDEPENDENT LEGAL ADVICE - TO FOLLOW (Pages 1 - 36)**

At the request of the City Council on 30 July 2012 (Motion on Notice No 1 – Combined Heat and Power Plants refers), the Interim Chief Executive will submit a written report attaching independent legal advice received from Foot Anstey LLP, Solicitors, on the implications of the Council terminating the current contractual arrangements for an energy from waste plant at North Yard and revoking the current planning consent.

Foot Anstey LLP, Solicitors, have been invited to attend the meeting to present their findings.

**PLYMOUTH CITY COUNCIL**

**Subject:** Energy from Waste Plant – Independent Legal Advice  
**Committee:** Cabinet and Planning Committee  
**Date:** 23 August 2012  
**Cabinet Member:** Councillor Evans  
Chair of Planning Committee: Councillor Stevens  
**CMT Member:** Bob Coomber, Interim Chief Executive  
**Author:** Tim Howes, Assistant Director for Democracy & Governance & Monitoring Officer  
**Contact:** Tel: 01752 305403; email: tim.howes@plymouth.gov.uk  
**Ref:**  
**Key Decision:** No  
**Part:** I

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**Purpose of the report:**

At a meeting of the Council on 30 July, the following Motion on Notice was approved in respect of the seeking of independent legal advice in regard to the Energy from Waste Plant being constructed in the North Yard, HM Naval Base, Devonport.

In view of the on-going, serious and deeply felt concerns of many residents regarding the location of the proposed Waste Plant at North Yard, the Council should fully investigate the options available which would prevent the plant being constructed in its current location. To this end, the Council instructs the Interim Chief Executive to seek independent legal advice on the implications of the Council terminating the current contractual arrangements and revoking the current planning consent and for this advice to be considered by Cabinet and the Planning Committee respectively as a matter of urgency.

Attached to this report is the independent legal advice that the Interim Chief Executive has received from Foot Anstey LLP, Solicitors whom have also been invited to the meetings to present their findings.

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**Corporate Plan 2012 – 2015:**

There are no Corporate Plan implications arising from this report.

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**Implications for Medium Term Financial Plan and Resource Implications:  
Including finance, human, IT and land**

Other than the costs of the advice itself, there are no immediate financial implications arising from it. Any further actions which affect the contracts or the planning permission do carry significant financial implications as referenced in the independent legal advice.

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**Other Implications: e.g. Child Poverty, Community Safety, Health and Safety, Risk Management and Equality, Diversity and Community Cohesion:**

N/A

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**Recommendations & Reasons for recommended action:**

Members of Cabinet and the Planning Committee respectively are asked to consider the independent legal advice provided by Foot Anstey Solicitors and decide what, if any, action they wish officers to take as a result.

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**Alternative options considered and reasons for recommended action:**

The independent legal advice was sought on the instruction of a meeting of Council on 30 July.

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**Background papers:**

Independent legal advice attached.

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**Sign off:**

Fin	MCI2I 3.007	Leg	TH0 049	HR		Corp Prop		IT		Strat Proc	
Originating SMT Member: Tim Howes											
Have you consulted the Cabinet Member(s) named on the report? Yes											

**REPORT TO PLYMOUTH CITY COUNCIL**

**ADVICE ON CONTRACTUAL ISSUES IN CONNECTION WITH  
THE ENERGY FROM WASTE FACILITY**

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Report to Plymouth City Council on Options Relating to Waste Treatment Contracts

**1. Scope of Review**

- 1.1. We have been asked to consider whether Plymouth City Council (“the Council”) can lawfully withdraw from:
- (a) the Joint Working Agreement (“JWA”), dated 28 April 2008, between the Council, Devon County Council and Torbay Council, which established the South West Devon Waste Partnership (“the Waste Partnership”); and
  - (b) the Residual Waste Treatment Contract (“Project Contract”), dated 25 March 2011, between the Waste Partnership’s members and MVV Environment Devonport Limited (“MVV”), whereby MVV was required to build the waste treatment facility (“the Facility”) at North Yard for handling the Waste Partnership’s combined waste.
- 1.2. If it is possible to withdraw from the above contracts, we have also been asked to explain how such withdrawal would take place, and what the legal, financial and operational consequences for the Council would be.

*Methodology*

- 1.3. We are, of course, aware of the background and sensitivities surrounding the JWA, the Project Contract and the Facility’s location. Our role is to provide robust, fact-based, independent advice in response to the questions set out above. We understand that a key aim of any withdrawal from the relevant contracts would be to stop the Facility being built at North Yard, and have factored that into our advice.
- 1.4. We have focussed our advice on the JWA and the Project Contract (and, to the extent relevant, to considering any possible withdrawal of PFI credits, the Final Business Case and the Promissory Note and PFI Credits Letter issued by Defra).
- 1.5. MVV is not in breach of the Project Contract, and nor has there been any “Prohibited Act” (which is essentially bribery or corruption of public officials), which would allow the Waste Partnership to terminate the Project Contract for Contractor Default.
- 1.6. We will give broad indications of the extent of the likely exposure which the Council would have arising from the respective options to withdraw. In the event of a withdrawal, the sums payable will be extremely significant to the Council and are likely to run into hundreds of millions of pounds. The precise amounts would be calculated by reference to claims that would be made at that time.

## 2. Executive Summary

2.1. There is no scope for successfully arguing that either the JWA or the Project Contract was entered into unlawfully (and is therefore void in the first place), so a legitimate withdrawal becomes necessary if the Council wishes to exit from the arrangements.

2.2. It is possible for the Council to lawfully withdraw from the JWA and the Project Contract, but:

- (a) to do so would almost certainly be extremely expensive – with a figure in hundreds of millions of pounds being likely (the precise amount depending on the specific circumstances and method of any withdrawal);
- (b) at an operational level, the Council would effectively still need to find an alternative waste disposal solution to meet its needs;
- (c) the political repercussions, in terms of relations with Devon County Council and Torbay Council, as well as in terms of the Council's attractiveness as a business partner in the wider commercial marketplace, warrant consideration; and
- (d) perhaps most crucially given current concerns within the Council, **the Council withdrawing from the JWA and / or the Project Contract would not necessarily stop the Facility being built at the North Yard site.**

2.3. Because withdrawal from the relevant contracts seems unlikely to be an attractive option both in terms of preventing the construction of the facility and because of the significant financial implications, we have also briefly considered whether any variation to the scope of the Project Contract would achieve the aim of re-siting the Facility, but:

- (a) such a material amendment is likely to be beyond the scope of what the Waste Partnership can legitimately require MVV to do (even if the Council could convince the other members of the Waste Partnership to agree to it, which must be in some doubt);
- (b) even if this difficulty could be overcome, it is likely to lead to a legal challenge from unsuccessful participants in the original procurement exercise, and;
- (c) Defra would almost certainly have the right to withdraw the PFI credits awarded to this project, and for these reasons we do not consider this to be a viable alternative to withdrawal.

2.4. We have also briefly considered whether or not there may be scope to prevail upon the MoD to use any termination provisions in the lease for the Facility's site to effectively halt construction. We do not consider this to be a viable option.

2.5. We have also briefly considered using the contract variation mechanism under the Project Contract (by agreement with the other Waste Partnership members) to temporarily halt construction whilst alternative solutions are re-explored. Again we do not consider this to be a viable option for the Council to pursue.

2.6. We therefore see no sure-fire options which would enable the Council to withdraw from the relevant contracts and / or prevent construction of the Facility at North Yard without the Council incurring significant claims for breaches of contract under the existing contractual documents from MVV, Devon County and Torbay that would result in the payment of significant sums of compensation running into hundreds of millions of pounds . Even if the Council did withdraw from the relevant contracts, this would not now necessarily stop construction of the Facility at North Yard.

### **3. Detailed Analysis – Withdrawal from the JWA**

3.1. We have first considered whether there is any merit to any argument that the JWA was entered into by the Council *ultra vires*, i.e. in excess of its powers. If it was, this would mean that the JWA (at least so far as it concerns the Council) would be legally treated as if it had never existed, which would in turn mean that there would be no need to “withdraw” from it.

3.2. We have found no evidence that the Council entered into the JWA *ultra vires* would succeed – section 101(5) of the Local Government Act 1972 clearly contemplates this type of arrangement, the JWA concerns a legitimate function of the Council, and the necessary procedural steps were taken by the Council when entering into it.

3.3. The project is now in what the JWA defines as the “Service Phase”, meaning that the Council can lawfully withdraw from the JWA on giving the other Waste Partnership members 24 months’ notice. The required form of notice is simply in writing and addressed to the Chief Executive of each of the other Waste Partnership members, at their principal offices.

3.4. However, this ability to withdraw entails certain operational and financial consequences which may affect its practical viability:

- (a) construction of the Facility would (assuming no undue timetable slippage) be nearly complete by the time such withdrawal takes effect;
- (b) the Council would remain financially liable under the Project Contract and the JWA, even after such withdrawal from the JWA



- (c) the Council would have to pay the other Waste Partnership members any losses they may suffer as a result of such withdrawal
- (d) the Council's withdrawal from just the JWA would not affect the Project Contract or the Planning Consent, meaning that, by itself, such withdrawal would have little impact in terms of stopping construction of the Facility at North Yard;
- (e) the Council would cease to have a "seat at the table" of the Waste Partnership, meaning its ability to influence and oversee operational matters would be significantly curtailed; and
- (f) such withdrawal would be likely to have adverse political consequences, both in terms of how the Council is seen as a business partner in general, and how willing Devon County Council and Torbay Council will be to engage in significant collaborations with the Council in future.

3.5. To expand on the financial impacts referred to above:

- (a) The direct consequence for the Council of any withdrawal by the Council from the JWA in terms of existing financial liabilities under the JWA and Project Contract would be as follows:—the Council would continue to owe what it already owes under both contracts (i.e. its share of the monthly payment and any other financial commitments under the Project Contract, and its share of any "Contract Management Costs" as set out in Schedule B to the JWA).

However, if withdrawal from the JWA is also accompanied by the Council deciding not to deliver its waste to the Facility, this would:

- (i) in practice mean that the Council would be paying twice to dispose of its waste – once to honour its ongoing obligations under the JWA / Project Contract, and again in respect of the actual disposal of its waste to a third party; and
  - (ii) make it harder for the other Waste Partnership members to fulfil the Minimum Tonnage requirement under the Project Contract, in turn making it more likely that they would have to pay MVV an additional amount [per tonne actually delivered] than would be the case if the Minimum Tonnage was met, with the Council then having to bear most or all of that additional amount
- (b) It is hard to precisely quantify the level of any losses which the other members of the Waste Partnership would suffer as a result of the Council's withdrawal from the JWA – clause 17.2 of the JWA refers to certain types of loss, including re-procurement costs, and increased Landfill Tax and LATs costs associated with not being able to access the Facility, but we do not consider these to be types of loss which would arise just as a

result of the Council's withdrawal from the JWA (because it does not automatically follow that just because the Council has withdrawn from the JWA the whole project collapses and needs to be re-procured / is unavailable for use by the other Waste Partnership members). It should however be clearly understood that it is highly likely that these sums would be significant

A more likely type of loss is the potential for Defra to withdraw PFI credits on the basis that the Council's withdrawal represents a 'departure from the approved Final Business Case' In theory, Defra could take a range of steps, including ceasing payment of all future PFI credits, and recovering any PFI grant already paid (of which there may not be any given that the Facility is not yet operational). In practice, whether or not Defra takes such steps will largely depend on what impact the Council's withdrawal from the JWA has on the viability of the overall project, and it is hard to see how withdrawal from the JWA by itself could have such a material impact that it causes Defra concern – it is more likely to be withdrawal from the Project Contract which would raise such issues. However, the risk remains that the Council could have to pay out to cover losses incurred by the other Waste Partnership members arising from the Council's withdrawal from the JWA, and if such losses include withdrawal of PFI credits then the amounts involved could run well into hundreds of millions of pounds.

#### **4. Detailed Analysis – Withdrawal from the Project Contract**

4.1. The first point to note when considering the Project Contract is that the Council is not the only counterparty to MVV (i.e. it is not the only entity comprising "the Authority", which means that:

- (a) the Council cannot unilaterally terminate the Project Contract – it would need Devon County Council and Torbay Council to agree to do that (which is most unlikely in the current scenario); and
- (b) as a consequence, even if it is possible for the Council to exit the Project Contract, the Project Contract will continue to exist as between MVV and the other members of the Waste Partnership.

4.2. Turning now to what is meant by the Council "withdrawing" from the Project Contract, there are three possibilities which we can see:

- (a) a termination of the Project Contract as a whole, requiring agreement and concerted action from all members of the Waste Partnership;
- (b) the parties agreeing to the Council ceasing to be a party to the Project Contract; or

- (c) the Council unilaterally declining to support the Waste Partnership's obligations under the Project Contract.

4.3. Taking the above possibilities in turn:

**Termination of the Project Contract by all members of the Waste Partnership**

- (a) It is currently hard to see why the other members of the Waste Partnership would agree to a concerted termination of the Project Contract, given the significant and negative financial and operational consequences of doing so, including:
  - (i) under Schedule 17 (Compensation on Termination) to the Project Agreement, such a voluntary termination by the Waste Partnership would see the Waste Partnership having to pay MVV (in summary) redundancy costs, costs associated with terminating MVV's sub-contracts, costs arising from early termination of MVV's foreign currency hedging arrangements, an amount to cover MVV's projected future (and now lost) income from contracts with third parties (including the heat and energy supply agreements with the MoD), and a profit element (less an amount representing what MVV's projected costs would have been had the Project Contract run its course and also, where the Waste Partnership does not require the site lease to be assigned to it (which would not be the case if stopping construction was the goal), less the value of the site – it is self-evident that these would be very substantial amounts, running into hundreds of millions of pounds;
  - (ii) the fact that the costs of the original procurement would effectively have been wasted, and more costs would need to be incurred to procure any replacement solution;
  - (iii) the need to continue existing landfill waste disposal options, at greater expense (and associated environmental impact), at least until an alternative solution is put in place;
  - (iv) the loss of PFI credits from Defra (with no guarantee that any new PFI credits would be forthcoming for any replacement solution) – a loss of £95 million at today's values, or £177 million when indexed over the life of the existing project; and
  - (v) the real possibility that any alternative solution would be more expensive than the existing MVV solution (which entails gate fees which are significantly below the national average).

**The parties agreeing to the Council ceasing to be a party to the Project Contract**

(b) It is unlikely that the other parties to the Project Contract (and this would need to include pMVV) would agree to the Council ceasing to be a party, especially since this would mean that the remaining Waste Partnership members would have to bear a greater share of both the cost and the need to supply the Minimum Tonnage of waste, and would make it far less likely that the Facility would be able to operate at maximum capacity (and may even damage MVV's ability to honour its commitments to the MoD and others under its various contracts to provide / process heat, power and other incineration by-products). There is also the possibility that at least the Council's "share" of the PFI credits would be withdrawn and possibly that all PFI credits would be withdrawn

**The Council unilaterally declining to support the Waste Partnership's obligations under the Project Contract.**

(c) The Council's main obligations (in the ordinary course of things) under the Project Contract consist of:

- (i) paying its share of the monthly payment due to MVV; and
- (ii) contributing to the Waste Partnership's ability to meet the Minimum Tonnage threshold (the Project Contract provides that if the Minimum Tonnage is not being met that the Waste Partnership will have to pay more to MVV, rather than being a breach of contract).

A "withdrawal" may therefore consist of the Council not fulfilling these obligations. The way in which the Project Contract and the JWA work together means that even if the Council does not deliver any waste to the Facility, it is still obliged to pay its share of the monthly payment to MVV (and possibly more, if the overall Minimum Tonnage is not met). Therefore, even though in theory the Council could stop paying MVV, it would be in breach of contract, and either MVV could claim the due payment as a debt from the Council, or it could claim the Council's share of the payment from the other Waste Partnership members, who could in turn claim it from the Council under the JWA – so the Council would ultimately still end up paying the relevant sums and these sums are large with the compensation under the Project Agreement running into hundreds of millions of pounds. In addition of course there would be the claims that could be made by Devon County Council and Torbay Council.

If the Council does not pay its share of the monthly payment MVV could instead opt to terminate the Project Contract for Authority Default and claim compensation, but in practice it is unlikely to want to do so unless the profit projections in the project's

financial model look to be significantly more favourable than what can actually be achieved, and in any case the other Waste Partnership members would almost certainly avert such a termination by paying MVV the amounts owed by the Council and then reclaiming them from the Council under the JWA – which they can still do even after the Council has withdrawn from the JWA.

Again, there must also be some doubt as to whether Defra would continue to fund the PFI credits, either at all or at the same levels, if the Council is in fact not delivering waste to the Facility which is part-funded by those PFI credits.

4.4. Each of the three options described above has the following in common:

- (a) significant obstacles to overcome in actually implementing the withdrawal from the Project Contract;
  - (b) a high level of cost for the Council both in terms of finding an alternative solution/method for waste disposal in the interim until a new facility is provided and the compensatory payments it will be required to make to MVV and Devon County/Torbay; and
  - (c) as existing waste disposal arrangements are not sustainable, an operational need to procure an alternative solution – which, even if some head-start is provided by the work done under the previous procurement, is still likely to be a relatively long process (with the additional expense that would entail), due to the need to run a new procurement process and obtain all necessary planning and regulatory consents.
- 4.5. In addition, the negotiated withdrawal option described above (which is highly unlikely), and the unilateral “withdrawal”, both have the effect of leaving the overall project substantially intact, with the consequence that construction of the Facility at North Yard can continue.
- 4.6. To summarise the above, it seems likely that the only way under the contract arrangements that would enable the Council to achieve the aim of halting construction of the Facility in North Yard would be for all other parties to agree a termination of the contract arrangements. We do not consider this to be a viable option.

## **5. Alternative Approaches – Re-Siting by Contract Variation**

5.1. The Project Contract contains a fairly standard mechanism allowing the Waste Partnership to require certain changes to the contract and its scope. We do not advise that this would provide a practical way forward due to the fundamental change in the nature of the contract and the likely resistance from the other contract partners.

**6. Alternative Approaches – Termination of the Lease**

6.1. Clearly if the lease of the North Yard site between the MoD and MVV could legitimately be terminated, this would have the practical effect of halting construction of the Facility. We do not consider this to be a viable option, as the other parties would have no reasonable grounds to embark on that course of action. The lease provides valuable benefits for both parties.

**7. Alternative Approaches – Pause to Re-Examine Alternatives**

7.1. We note that one of the main obstacles to the Council satisfying itself and the other Waste Partnership members that an alternatively sited solution would be preferable is the lack of any such concrete alternative.

7.2. The contract variation mechanism under the Project Contract could, in theory, be used to temporarily halt construction whilst alternative solutions are re-explored.

7.3. However, this would inevitably involve cost to MVV in terms of re-arranging its construction schedule (and associated sub-contracts), and cost to the other Waste Partnership members (and the Council itself) in terms of a delay to the point from which cheaper waste disposal can be accessed. The Project Contract's variation mechanism would require MVV to be compensated, and the other Waste Partnership members would almost certainly require the Council to cover such compensation in its entirety, as well as covering the costs to the other Waste Partnership members themselves.

7.4. Such a delay may also be sufficient grounds and motivation for Defra to withdraw the PFI credits, and again the other Waste Partnership members would almost certainly require the Council to make good such a financial loss if it materialised.

7.5. If a viable alternative solution is found, there would then almost certainly be a need to terminate the Project Contract, with the associated compensation on termination payment as described above. It is likely that the other Waste Partnership members would require the Council to cover most, if not all, of this payment to MVV.

7.6. Of course, there is also a realistic chance that no suitable alternative solution will be found, in which case the Council will have incurred substantial delay and considerable cost for nothing.

7.7. In summary, this approach would entail considerable expense for the Council, would require support from Devon County/Torbay, and has no guarantee that it will result in any better solution.

7.8. We advise that it is not a course of action that the Council can consider unilaterally and as such is not a viable proposition.

## 8. Conclusions

8.1. As stated in the Executive Summary above, a “withdrawal” from both the JWA and the Project Contract may be theoretically possible, but would be prohibitively expensive with levels of compensation that could exceed £400 million. Taking such a controversial decision about such a high-profile project also entails a real risk that one or more parties may seek to challenge the decision by way of judicial review. Accordingly, the reasons for such a decision need to be proportionate and robust based on reasonable consideration of the issues.

8.2. In reaching such a decision, the Council should have regard to the ‘Wednesbury test’ it is one of the tests used by the courts in deciding whether a decision by a local authority is proportionate and reasonable. The *Wednesbury* case (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 22*) broadly said, that in coming to a decision, an authority:

- Must not take into account irrelevant considerations
- Must take into account relevant considerations
- Must not reach a decision that was so unreasonable that no reasonable authority would ever make such a decision

8.3. To set this in context, administrative decisions have been set aside where:-

- a decision is devoid of plausible justification; and
- where a decision-maker has made an erroneous finding of fact on a point that is fundamentally important in the case.

8.4. It is therefore crucial that if a decision to withdraw from the contractual arrangements is made, that it is made after consideration of the relevant issues and that the decision that is made is not irrational or unreasonable and based on sound judgement that is backed by robust evidence to support it.

8.5 If a decision were made to consider alternative waste disposal solutions, that would leave the Council susceptible to a challenge from one of the unsuccessful parties to the original procurement by means of judicial review , as well as the contractual claims that would arise from the existing contracting parties.

8.6 From our examination of the material there are no rational grounds to consider withdrawing from the current contractual arrangements. In the event the Council decides to withdraw from the current contractual arrangements, it is considered highly likely that an interested party will commence judicial review proceedings to challenge such a decision. Any decision by the Council to withdraw from the contractual arrangements will in our view be found to be unreasonable and unlawful.

**Foot Anstey LLP**

**16 August 2012**



## REPORT TO PLYMOUTH CITY COUNCIL

### ADVICE ON REVOCATION OF PLANNING CONSENT IN CONNECTION WITH THE ENERGY FROM WASTE FACILITY

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**Report as to potential revocation of the planning consent for the MVV Energy From Waste Facility and the financial implications**

**1. Introduction**

1.1 I am asked to provide advice to Plymouth City Council as to whether the Council could revoke the planning permission granted for the energy from waste plant on 3 February 2012.

1.2 I will seek in this report to consider the statutory framework and to then examine the decision making process and the evidence provided in connection with that process and then consider the policies within the development plan and other material considerations and conclude whether there is a robust prospect of revoking the planning consent for the energy from waste plant.

**2. Statutory Provision**

2.1 The power to revoke a planning permission is contained in section 97 of the Town and Country Planning Act 1990. If it appears to a local authority that it is expedient to revoke or modify any permission to develop land granted on an application, the authority may by order revoke or modify the permission to such extent as they consider expedient.

2.2 It further provides that in exercising their power of revocation/modification the authority shall have regard to the development plan and to other material considerations. It has recently been clarified that the amount of compensation to be paid is a relevant consideration for an authority.

2.3 The power conferred by Section 97 may be exercised at any time before operations permitted under the planning consent have been completed or where the permission relates to a change of use at any time before the change of use has taken place.

2.4 The term “expedient” is not defined by the 1990 Act, what the courts have held is that it is for the local planning authority to justify the making of the order and this includes, if the order is opposed, to satisfy the Secretary of State that it is a proportionate course of action.

2.5 Revocation orders have been upheld where a development has been held to conflict with all relevant policies of the development plan or where a development is seriously prejudicial to the proper planning of an area.

- 2.6 This is essentially the context within which the current planning consent must be considered.
- 2.7 It should also be appreciated that a statutory procedure has to be followed and that if a Local authority makes a revocation order, unless that order is unopposed it has to be referred to the Secretary of State for confirmation.
- 2.8 In this matter if a revocation order is contemplated, then it is highly likely to be opposed by the company that has the benefit of the planning consent and other parties to the South West Devon Waste Partnership.
- 2.9 The order must be served giving any interested parties 28 days to make representations to the Secretary of State and in the event of objections and representations being received, the matter will be determined normally by means of a public inquiry. It would be for the Council to promote the revocation and the reason for making the order and for the other interested parties to make representations as to why it should not be revoked.
- 2.10 Clearly with such a significant proposal to revoke the planning consent, the public inquiry would extend over at least 2 weeks and it is likely that if the Council were found to have acted unreasonably that the other parties costs may be recoverable from the Council.
- 2.11 The legislation at Section 100 of the 1990 Act also has what is effectively a intervention power whereby the Secretary of State can, if suitable circumstances arise, intervene and make a revocation order which again is subject to consultation with interested parties. The Secretary of State will intervene where a decision to grant planning permission is grossly wrong or the evidence indicates that favouritism has been shown to an applicant or class of applicant with no planning justification, thus giving the appearance of undue influence. I do not consider this a scenario that will arise in the context of this planning permission. It will be for the Council to determine whether a revocation is appropriate.
- 2.12 A consequence of a revocation being made and confirmed is that compensation is payable pursuant to Section 107 of the 1990 Act.
- 2.13 The compensation relates to loss or damage incurred as a consequence of the revocation and can include the diminution of the value of an interest in land and the loss of any anticipated future profits under contract consequent to the grant of planning permission. In the context of the current planning consent and associated contractual commitments these amounts will be significant and are likely to run into hundreds of million of pounds. It has recently been clarified in a case involving the Health

and Safety Executive and Wolverhampton City Council that when considering whether it is expedient to make an order the consideration of the financial consequences on the public purse is a relevant consideration. In this case the financial consequences of a revocation would have significant implications for the Council in view of the large amounts of compensation that would be payable.

### **3. Expediency of making a Revocation Order**

3.1 In order for a local authority to consider making a revocation order, it has to determine that this is an 'expedient' course of action for the authority to take and that if the order is opposed there will be a requirement that will fall on the authority to satisfy the Secretary of State that what is proposed is a proportionate course of action.

3.2 The local authority will have to examine the process by which the planning application was considered and the considerations that were taken into account and how these were applied in the decision making process.

3.3 In reaching a decision as to whether to revoke the local authority will have to reach its conclusion by being proportionate and reasonable, so that any decision is robust and not vulnerable to a judicial review and would be able to withstand scrutiny if the decision were the subject of an examination at a Public Inquiry.

3.4 The 'Wednesbury test' is one of the tests used by the courts in deciding whether a decision by a local authority is proportionate and reasonable. The Wednesbury case (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 22*) broadly said, that in coming to a decision, an authority:

- Must not take into account irrelevant considerations
- Must take into account relevant considerations
- Must not reach a decision that was so unreasonable that no reasonable authority would ever make such a decision

3.5 To set this in context, administrative decisions have been set aside for where:-

- a decision is devoid of plausible justification.
- Where a decision-maker has made an erroneous finding of fact on a point that is fundamentally important in the case.

- Where the decision-maker has failed to have regard to planning policy or guidance.

3.6 It is therefore crucial that if a decision to revoke is made, that it is made after consideration of the relevant issues and that the decision that is made is not irrational or unreasonable and based on sound judgement that is backed by robust evidence to support it.

3.7 In addition a further relevant consideration that has to be considered in a possible revocation, is the effect of the level of compensation on the public purse. In this matter the level of compensation if the order were approved is likely to run into hundreds of millions of pounds.

#### **4. The Current Permission**

4.1 In considering the current permission, it follows that those instructing me are asking me to consider whether it would be expedient and proportionate to revoke the existing planning consent.

4.2 In order to reach a judgement I am directed by section 97(2) of the 1990 Act to consider the Development Plan and any other material considerations as the basis for advising as to whether it would be expedient and proportionate to revoke the consent.

4.3 To approach this matter in a logical and structured way, those decision makers who granted planning consent considered the application pursuant to section 70(2) of the Town and Country Planning Act 1990 which provides that they had to have regard to the provisions of the Development Plan, so far as material to the application and to any other material considerations.

4.4 I have therefore approached the matter by first examining the provisions of the Development Plan and the other material considerations that were taken into account in the decision making process to seek to identify whether there are grounds to recommend a revocation that would be robust and reasoned as to withstand a public examination if an order is made. Any such advice has to be framed on the basis of the consideration of current development plan documents and other material considerations.

4.5 The documents that constituted the Development Plan at the date of the grant of planning consent are as follows:-

- National Planning Policy Statements
- Regional Strategy for the South West (RS) (formerly RPPG10) (2001)
- Council's adopted Core Strategy (2007)
- Plymouth Waste Development Plan 2006 – 2021 (Adopted 2008)

- Adopted Area Action Plans/Development Plan Documents including Supplementary Planning Documents. (SPDs)

4.6 It is clear that the primary issues that fell to be considered by the committee in its deliberations were the site, its location and environs and the closely related environmental impacts of the proposed development.

## **5. The Site**

5.1 It is well documented in the planning report that the application site was not one of the sites identified in the Plymouth Waste Development Plan ('PWDP') as a suitable strategic waste management site following the original site search exercise carried out when the plan was being drafted.

5.2 The site became available following MVV's own site search process undertaken as part of the procurement process. The company assessed Ernesettle as an option, but did not proceed due to the lack of potential heat and steam users nearby, and the attendant cost of connecting the site to potential users. It also considered Coypool as an option and due to the landownership issues and an inability to negotiate with the owners to purchase the site in the procurement timetable decided not to proceed with that site.

5.3 In 2009 MVV looked for alternative sites and entered into discussion with Ministry of Defence ('MOD') as to the availability of the application site, which had not been available at the time of the original site selection for the PWDP.

5.4 MVV through the procurement process developed two alternative proposals, one at Ernesettle and the other at the application site, and in March 2010 it indicated that it would be only pursuing the application site, and indicated that it considered the main advantages to be the location next to the Dockyard so that heat and steam could be supplied to the dockyard as soon as the plant became operational, with the aim of improving the plant's energy efficiency and cost effectiveness for the SWDWP and improving the sustainability of the dockyard.

5.5 As a consequence of their site selection it fell upon the planning committee to consider the site in accordance with the relevant provision of the development plan and all other material considerations.

5.6 The guidance contained in PPS10 provides that planning applications for sites that have not been already allocated in a development plan document as suitable for development for new or enhanced

waste management facilities should be considered favourably when consistent with national policies and the Waste Planning Authority's Core Strategy.

5.7 To apply this to the application site it will be necessary to examine the application against the Development Plan to arrive at a view as to whether the conclusions reached by the committee were reasonable and proportionate as to the location of the site and its implications for the locality.

5.8 The Development Plan and its Policies have been examined and the contents applied in the analysis of the decision making process.

#### **6. Analysis of the Decision Making Process**

6.1 Members of the Council will be well aware of the process as to how a decision should be reached in respect of a planning application. There is a statutory test whereby the application is considered against the documents that comprise the Development Plan as well as other material considerations that have to be taken into account. As part of that decision making process members have to have regard as to whether issues emanating from the application can be dealt with by the imposition of conditions and /or the use of a planning agreement in a satisfactory way, if they can then a recommendation of an approval subject to the imposition of conditions and a 106 agreement may be appropriate .

6.2 If an application is contrary to the development plan and the outstanding issues cannot be dealt with by the imposition of conditions or a planning agreement then the correct course of action is a decision of refusal.

6.3 In respect of the application site the Committee considered the report , the presentation by the officers and determined that the application should be approved subject to a number of planning conditions and a 106 agreement. This leads to a view that the Committee considered the application was broadly in accordance with the development plan, that issues of mitigation could be addressed by condition or 106 obligations and that any perceived adverse impacts could be mitigated and monitored by the use of conditions and or planning obligations.

6.4 It now falls to consider how they reached the decision and whether the consideration of any aspect of the application was not considered in a way that was appropriate and robust, and/or conditioned appropriately, and subject to the provisions of a 106 agreement.

6.5 The most appropriate way to address this is to consider the analysis presented in the committee report under the headings set out in section 10 of the original report to planning committee. In doing so I have commented in bold at the end of each section.

**Analysis of issues from Section 10 of the Committee Report**

**7. Justification of Need and Consideration of Alternatives**

**Diverting the sub regions residual waste from landfill**

7.1 It is common ground that Councils have a duty under EU landfill directives to divert residual waste from landfill. There is a current lack of facilities to process this waste and the Council has in its own waste plan a set of sites that were identified following a site search and a set of criteria based policies by which unallocated sites such as the application site can be assessed . Policies W7&8 of the PWDP.

**7.2 The need to provide waste disposal facilities to divert waste from landfill, is undisputed and was a relevant consideration to apply when considering the application. Of interest is how the criteria of policies W7&8 were considered as part of the overall decision making process.**

**8 Choice of Waste Disposal Facility**

8.1 In terms of the nature of the facility that was chosen clearly the nature of the proposal has developed from the procurement process and from input from the constituent authorities of the SWDWP, an energy from waste plant is not per se inappropriate for a waste disposal facility , however the issue for the committee was whether the type of facility proposed was appropriate on the application site. Clearly as part of the assessment process the amenity /environmental issues were considered and will be addressed in more detail later in the report.

**8.2 I do not consider the choice of facility in itself to be inappropriate, this is reflected in the waste plans that the Council has adopted, the proposal has the benefit of a user for the heat and steam that is produced It is the implications of that choice and how they were addressed which is important, this needs consideration in the context of its environmental effects.**

**9. Alternative Sites**



9.1 As set out above the application site is not an allocated site in the PWDP, however the document acknowledges that during the life of the plan other sites may come forward and there is a need to retain some flexibility in the process. In this regard the PWDP contains policies W7& W8 which are criteria based to enable the council to consider non- allocated sites. The policies contain broadly two themes firstly the proposal must conform with the broader aspects of waste disposal strategy , but more importantly the facility if it creates any impact on amenity that those impacts are minimised by effective mitigation measures and any harmful effects on human health shall be minimised by appropriate mitigation measures.

9.2 These criteria would have been the basis upon which the matter was considered by the committee when the decision was made.

**9.3 There is clear evidence that the nature of the facility and its ability to be efficient and deliver heat to the dockyard was another important consideration taken into account in the decision making process and this is not unreasonable.**

#### **10. Carbon /Renewable Energy Benefits/Efficiency**

10.1 It has been demonstrated that the facility will deliver a number of energy benefits and could deliver significant amounts of green energy, as well as a good overall efficiency in terms of its operation, and will deliver carbon savings and within the 106 agreement the company is required to pay a low carbon infrastructure contribution of £2 million which is to be applied for low carbon infrastructure purposes in the city.

**10.2 These benefits and advantages subject to a satisfactory consideration of the amenity and health issues are appropriate.**

#### **11. Flood Risk**

11.1 In practice less than 5% of the site(a small area of the access road) is within a Flood Zone 2 -- the officers have carried out the sequential Test required by PPS25 -- the net result being that mitigation measures are proposed to take that small area of the access road out of flood zone 2 into flood zone 1 and make it acceptable.

**11.2 This is an appropriate way for the Council to deal with Flood risk in the context of the application.**

**12. Transportation and Access Issues**

12.1 The transportation and access issues broadly fall into two types, the implications for the development on site both in terms of construction and when operational and the wider impact of the facility on the highway network.

12.2 In terms of the local on site issues , during construction there will be a construction workers travel plan to control vehicle operations and then once operational there are a range of measures on site including a travel plan and a variable pricing structure to seek to encourage deliveries of waste at time when the highway network has additional capacity and avoiding peak hours. This is complemented by a noise management plan which has to be approved by the Council prior to the main development commencing, and a contribution towards low noise surfacing at the Weston Mill junction.

12.3 In terms of the wider highway network traffic assessments, these have been carried out, and do not indicate that the proposal will have an significant effect on the highway network. One issue identified is the need to improve Weston Mill Drive Junction and a 106 contribution has been secured to address this.

**12.4 In terms of traffic/access issues, it is my view that the issues have been adequately addressed in the determination of the application, by means of an assessment followed by imposition of planning conditions and planning obligations.**

**13. Economic and Employment Issues**

13.1 The facility is seen as a means to maintain existing job opportunities in the Naval Base due to the benefit of the cost of the heat and steam generated by the facility. The application has been supported by the Navy and Babcock. In addition a 106 contribution has been negotiated to deal with a local employment scheme, construction trade apprentices , operational apprenticeships and work experience.

13.2 The use of the site is allocated as part of a marine employment complex and the loss of this land is contrary to policy CS3 in the Core Strategy. However as part of the consideration the committee took into account the job creation opportunities presented by the facility and the wider economic benefits of the facility and determined that the economic benefits of the proposal outweighed the loss of the land for marine based uses.

**13.3 This is a reasonable judgement to reach based on the facts.**

**14. Design and Visual Impact Issues**

**Merits of the Applicants Design**

14.1 The approach of the design in this location has been to design a building to be seen and the South West Regional Design Panel have not raised any objection in terms of the scale of the building in its setting, and whilst English Heritage response raised issues limited to any impact on large dockyard features. English Heritage did not raise any objection in terms of the scale of the proposed building in its setting. There are clearly objections and representations from the public as to the design on the building.

**14.2 Design itself is a subjective assessment and not all persons will share the same view , however from examining the papers there are no issues in terms of the design that would lead to the consideration of revocation.**

**15. Landscape Design**

15.1 Clearly a building of this size in this location will give rise to issues with regard to those residents that are closest to the facility. In that regard on site landscaping is proposed and improvements to local green spaces such as Blackies wood which is currently inaccessible.

15.2 It is acknowledged that the onsite planting will take time to mature, before it becomes effective. The improvements to Blackies Wood and other landscape improvements are contained in as series of obligations in the 106 agreement. The decision taken by the committee was that the package of landscaping was appropriate as part of a package of measures that would be acceptable to mitigate the design of the building.

**15.3 This is a logical and reasoned assessment of the issue.**

**16. Effect on Landscape Character**

16.1 The report considers the location of the site and its effect on wider landscape character, the greatest influence is said to be the impact on tidal estuaries and inland areas, it is acknowledged that there may be effects during the construction phase and the building of the new bridge. However after

these works once completed, would blend back in to the landscape. The facility however would be a significant structure in the landscape initially that would integrate into the wider landscape with time as a consequence of the tree planting and landscaping.

**16.2 The judgement reached by the Committee on landscape character is reasonable.**

**17. Effect on Visual Amenity**

17.1 In terms of visual amenity, the application was assessed as to how the structure would be seen from a broad area surrounding the site of the structure.

17.2 There were considerations of the view from longer distance from Cornwall and across the river Tamar, whilst the structure may be visible it is not considered to be an issue that will have any significant effect on visual amenity.

17.3 There was a major focus on the effect of the proposal on the residential neighbourhoods surrounding it and it concluded that there were 450 homes within 250 metres of the proposal and then sought to analyse the effect on these properties. The closest properties to the facility are in Talbot Gardens and Savage Road some 60 metres from the main building.

17.4 The consideration of visual amenity was considered both during the construction phase and the operational phase of the development.

17.5 I consider it important to focus on those Talbot Gardens and Savage Road as these are the areas which will have the greatest effect on the residents visual amenity.

**17.6 The proposal would not result in an unacceptable loss of daylight and sunlight in accordance with guidelines published by the Building Research Establishment for the properties in Talbot Gardens and Savage Road.**

**17.7 Talbot Gardens – Visual Amenity**

17.8 In Talbot Gardens it is acknowledged that during the construction period there will be a significant visual impact due to the storage of building materials, on 'Table Top Mountain' - the site has been used for the storage of materials but the project would represent an intensification. In addition there would be a significant deterioration of view for those residents in the most easterly flats, particularly the flats at the top of the building once the works are completed. On site tree

planting is contemplated and the retention of belt of boundary trees is seen as beneficial to improving visual amenity.

17.9 However the report concluded that even with those measures there would be a significant adverse effect on visual amenity to a limited number of properties and suggests in the report that this need to be weighed against the compelling need for the facility.

#### **17.10 Savage Road – Visual Amenity**

17.11 It is stated that the residents will experience a significant effect to their visual amenity from the construction phase and major significant effect once the facility is constructed, due to loss of the panoramic view and views of the dockyard, and a high degree of exposure to the view of the facility.

17.12 It is stated that given the scale of the proposed building, the proposed planting and maintenance obligations in the 106 agreement will serve to ameliorate the impact , by creating a screen, this screen will need to mature and the long term maintenance obligations for Blackles Wood will assist, but it will not provide a total screen from the development.

#### **17.13 Other Views – Visual Amenity**

17.14 The report then discusses the effect on visual amenity at Hamoaze Avenue, Carlton Terrace, Bridwell Road, North Prospect Road, Salash Road (North), Alexandra Park Keyham, St Budeaux Recreation Ground and Cardinal Avenue.

17.15 The effect on Bridwell Road would be to place the development at the end of the street- this would result in a loss of an existing view. For the remainder of the locations the development would present itself as a new element within an existing longer view.

#### **17.16 Conclusion**

17.17 The report sets out that the proposal will not result in a total loss of visual amenity for any property and that in terms of mitigation the requirements set out in the 106 agreement for landscaping and an ongoing maintenance fund will provide a degree of mitigation.

17.18 In respect of more distant views from local viewpoints the landscaping measures in the 106 agreement will provide a means to allow the building to become established with effective landscaping.

17.19 The judgement reached by the committee is one that balances the effect on visual amenity of the proposal with the wider needs and benefits of the proposal. It is noted that there is not a total loss of visual amenity and those affected by the proposal will still have alternative views.

**17.20 The view reached is a supportable view to reach. This is a logical and reasoned assessment.**

**18. Impacts upon the Historic Environment and Listed Buildings**

18.1 This consideration applies to the listed buildings in the dockyard and the report after an assessment concludes that there would be no adverse effect on the historic buildings in the dockyard.

**18.2 This is a logical and reasoned assessment.**

**19. Impacts upon the Natural Environment and Amenity Issues**

19.1 The Environment Agency commented on a series of ecological issues in response to the application, concerning reptile habitat creation, biodiversity enhancement of the existing swale and an updated ecological management plan.

19.2 They requested general watercourse improvements and clearance works. Natural England were satisfied with the Habitats assessment.

19.3 In light of the conclusions reached by the competent authorities in respect of the issues, the proposal was deemed to comply with the development plan and with the provisions of a 106 obligations providing a £250,000 contribution to facilitate improvements and enhancements to agreed sites in the locality it was considered that the proposal result in no ecological loss on site and the contribution in the 106 will deliver a biodiversity gain.

**19.4 In light of those findings it is a reasonable conclusion on those issues.**

**20. Pollution mitigation and Cumulative Effects at Sensitive Locations**

**Air Quality**

20.1 The report sets out the facts that letters of representation have raised concerns over the air quality of the emissions from the proposed stack, and its constituent elements. The report suggests that the regulation of this is a function of the Environment Agency through its permitting regime and to an extent this is correct, and reference to the avoidance of duplication of roles in the planning process is made.

20.2 The question for the committee to determine is whether there would be an unacceptable effect on air quality with the permit and if appropriate planning conditions/106 obligations were in place.

20.3 The EA permit contains provisions to control the materials to be incinerated, the incineration process and the nature and extent of processes to deal with emissions to the air. The permit contains a full monitoring regime and sets out timescales for the monitoring of outputs and a reporting mechanisms (the draft permit is at pages 351 – 386 of the original committee report).

20.4 Clearly the competent authority for the monitoring of air quality were satisfied with the proposed operation and the means to monitor the operation of the facility. In addition to the competent authority being satisfied, the Council on recommendation of its Public Protection Service Unit ('PPSU') have requested additional independent monitoring of air quality by the Council and this is contained in the 106 Agreement.

20.5 It contains air quality management plans and contributions to enable the Council to participate in monitoring of air quality.

**20.6 Based on the advice and permit from the competent authority and the additional provisions inserted by the Council to in effect carry out further monitoring, issues of air quality were appropriately considered by the committee.**

**21. Adverse Impact on Amenity**

**Noise impact**

21.1 As part of the assessment of the application the PSSU have provided expert advice to the council as to other potential amenity issues relating to the operation of the plant. They have carried out a technical analysis to test the noise impact conclusions of the applicants Environmental Statement

21.2 They have identified that there is the potential for the residents of Talbot Gardens to be affected both during the construction of the facility and by its ongoing operation.

21.3 In respect of the construction phase of the development there is a Construction Environmental Management plan which is imposed by a condition in the consent and a condition to control noise levels during construction to an acceptable level.

21.4 Once the facility is operational and there are a whole range of conditions imposed in the consent to control operation of the plan including noise protocols, site traffic protocols litter and dust management plan, a series of noise monitoring and mitigation measures.

21.5 The advice in the report is that with the mitigation regime proposed and the imposition of conditions and the 106 obligations this will be appropriate to mitigate the noise impact of the proposal to acceptable levels.

21.6 The noise impact has been assessed by technical officers and then a series of mitigation measures have been suggested.

**21.7 This is an appropriate consideration of the issue**

**22. Safety Concerns**

22.1 There have been letters of representation raising issues with regard to threats to nuclear safety, and the wider fears of risk to the public in the event of a significant failure of the plant.

22.2 The applicant as part of their application for an environmental permit submitted an accident management plan to set out their response to a range of on site incidents- this was considered by the EA before the permit was granted.



22.3 They have since prepared an updated safety statement to address the operational risks and this has been considered by the council's officers and they advise that the only issue they seek to cover of is a prohibition of any low level radioactive waste being processed at the facility.

**22.4 In terms of safety issues the matter is contained in the permit from the EA, and there is a supplementary planning condition in the planning consent. This is an appropriate course of action.**

### **23. Health and Wellbeing**

23.1 There is documented within the letters of representation clear and understandable concern as to the direct and indirect health impacts of an energy from waste facility in this location.

23.2 The applicant submitted a Health and Wellbeing Assessment ('HWBA') with its application which was a desk top review of six key sources of literature and a brief discussion upon selected determinants of health.

23.3 The Council sought the advice of the Primary Care Trust('PCT') who responded having taken the advice and being in agreement with the Devon Health Protection Team of the Health Protection Agency('HPA'). They indentified limitations with the applicants original submission and have conducted what is termed a Rapid Prospective Health Impact Assessment of the proposal.

23.4 The proposal was conducted by the PCT (and is at pages 288-350 of the original committee report) and identified 6 themes from the literature review that would form the basis of their assessment:-

- Previous studies
- Emissions and pollutants
- Health and Social Impacts
- Public Concern
- Mitigation measures
- The Precautionary Principle

23.5 They assembled a multi professional steering group, and sought to apply professional public health judgement to the proposal and likely impacts on health. The Response of the PCT and the HPA are set out below and are extracted from the committee report:

‘The PCT states that it is not possible to be conclusive about whether new generation incinerators per se will not affect health. “For this reason **precautionary approaches must be applied with rigorous pollutant data monitoring of the new EJW facility, contributions to scientific investigations (where appropriate) and application of policy guidance that promotes and protects health as it emerges. This particularly applies to those at most risk from exposure – operatives, those living or working close to the facility, the young and those with existing respiratory conditions”**’.

23.6 The Health Protection Agency view of the research examining the links between emissions from municipal waste incinerators and effects on health suggests that while it is *not possible to rule out adverse health effects* from modern, well regulated municipal waste incinerators with complete certainty, any potential damage to the health of those living close-by is likely to be very small, if detectable.’

23.7 Therefore the Committee in their deliberations had the advice from two competent authorities as to the issue of health impacts in relation to the proposal.

23.8 The PCT recommended the adoption of a precautionary approach in respect of the issue. It is important to understand the nature of this approach. The recommendation of a precautionary approach is not a suggestion that there is not a robust and appropriate statutory process for assessing the proposal. It is an approach which requires a judgement to be made on scientific uncertainty based on the evidence that exists at the time a decision is made.

23.9 Therefore the judgement that the Committee had to consider at the time was whether applying the precautionary principle the Committee can be satisfied that any residual risk to health subject to the application of all controls within the EA permit and the proposed conditions and 106 obligations is acceptable.

23.10 As part of that decision making process it had to be acknowledged that the technology as proposed in the facility is relatively new and there are not detailed studies to assist to inform that judgment.

23.11 The position faced by the Committee was that the Health Protection Agency following a review of assessments and literature came to a view that ‘properly regulated well run facilities of this kind should pose little risk to health’, and the PCT by their adoption of the precautionary approach do not suggest that the proposal should be rejected. From a consideration of the literature in their report and the application of professional public health advice that was based on current evidence for plants

of this nature, subject to suitable controls being imposed by means of the environmental permit, planning conditions and planning obligations, it would give a robust methodology to monitor the facility on an ongoing basis.

23.12 The PCT also sought a series of planning conditions and planning obligations to mitigate what they saw as direct and indirect potential impacts and these extended to the establishment of the north Yard Community Trust and a Community Fund which are set out in the 106 agreement.

23.13 The committee at the time of the decision, were presented with the views of the competent authorities being the HPA and the PCT, the advice could not be absolute due to the evolving nature of the technology, however by adopting the precautionary approach, there was a means to effectively monitor the ongoing situation, should issues arise.

23.14 The competent authorities had suggested other mitigation measures which were built into the final determination of the application as conditions and planning obligations.

**23.15 I have based this judgement on the evidence and documents available to the committee as set out in the committee report. It is a reasonable approach to adopt.**

**24. Human Rights Act**

24.1 It is apparent that human rights were considered during the process, both in respect of residents and the development rights of the applicant, the committee has sought to apply the provisions of the development plan and material considerations. The committee received advice that the decision struck a fair balance between the need in the public interest for the scheme and the interests of those affected by it.

**24.2 That is a reasonable approach to adopt.**

**25. Debate on the motion at Full Council on 30<sup>th</sup> July 2012**

25.1 I have also reviewed the webcast of the part of the full council meeting, where the motion was debated and reference was made to a 'Polytechnic Report'. I have obtained a copy of that report(stamped 'draft') from council officers so that I can consider the same. The report was commissioned by the Environmental Health Department of the Council in March 1991 in connection with the proposed development of a Power Station at Prince Rock which did not eventually proceed.

It considered an assessment of an Environmental Impact Assessment (relating to air quality and aquatic ecology) that had been prepared in connection with the project by Powergen.

25.2 The nature of the project was for a power station fuelled by natural gas, in replacement for the then existing oil fired power station. The nature of the proposal did not proceed, and the proposal for the energy from waste plant is different in terms of location nature and technology, from that within the report. Therefore the report and its findings are not directly comparable in respect of those considerations to the proposed facility.

**25.3 I cannot find it on that basis a consideration that would justify revocation.**

## **26. Conclusions**

26.1 The application for the facility has been extremely contentious and has already given rise to scrutiny of the decision by an application for judicial review which has been considered by the Administrative Court and the Court of Appeal, and that process would have involved the applicants and their solicitors considering the approach of the committee in their consideration of the application.

26.2 It would have involved the application being examined in detail to ascertain whether the Council had erred in law or has applied inappropriate considerations to the determination of the application. The aim being to discover whether the Council acted unreasonably or irrationally. Those applications did not result in a successful challenge.

26.3 In considering whether revocation of the consent is expedient, I have had cause to consider the proposal in the context of the provisions of the Development Plan and other material considerations.

26.4 I have looked at the documents that comprise the development plan and the policies that were applied in the consideration of the application, together with the application of those policies to the proposal.

26.5 I have then sought to apply the consideration of those policies and material considerations to the various themes that were considered in section 10 of the original committee report so I could assess whether there are any considerations or approaches that could lead me to a view that there is a possibility of considering revocation of the consent.

26.6 Whilst many of the judgements that were made in respect of the application are finely balanced, I cannot find any considerations that were not backed by evidence or application of advice by a competent authority or professional officers.

26.7 Clearly issues concerning the amenity aspects and health implications of the proposal and its impact on the nearby residents are important considerations.

26.8 In terms of the amenity aspects these have been considered and determined by the appropriate imposition of planning conditions and I06 obligations. In respect of the health implications these have been considered by the competent authorities and the HPA and the PCT are supportive of the precautionary approach that has been recommended and consider there is a robust and adequate means to monitor the activity on site and have the ability to continue this.

26.9 In addition to considering the development plan and material considerations it is also essential to have regard to the contractual implications of a revocation of the planning consent (a separate report on the contractual implications has been prepared). The authority has entered into a Joint Working Agreement with Devon County Council and Torbay Council as well as a Project Contract with Devon County, Torbay and MTVV. In the event of a revocation of the planning consent, this would prevent the project from proceeding, and the Council would be liable to compensate the other parties as a result of such a revocation – the likely compensation is measured in hundreds of millions of pounds.

26.10 Accordingly if revocation is contemplated there are extremely significant financial consequences that will flow from such a revocation of the planning consent.

26.11 In considering the Development Plan and all other material considerations that the committee considered at the time of the decision, and the financial consequences of revocation, I cannot identify any grounds for revocation of the consent.

**Foot Anstey LLP**

**16 August 2012**

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