

PLYMOUTH CITY COUNCIL

Breaches of planning conditions imposed upon Plan ref 11/00750/FUL (for the construction of an energy from waste plant in Her Majesty's Naval Base, Devonport.)

Committee:	Planning Committee
Date:	3 rd January 2013
Cabinet Member:	Councillor Brian Vincent
CMT Member:	Anthony Payne Director of Place
Author:	Christopher Watson of Planning Services on behalf of the Assistant Director for Planning Paul Barnard.
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Ref:	11/00750/FUL
Key Decision:	No
Part:	I

Purpose of the report:

Planning permission was granted by Plymouth City Council on 3rd February 2012 for the construction of an Energy from Waste plant in Her Majesty's Naval Base Devonport, Plymouth. The applicant was MVV Environment Devonport Limited, in association with the South West Devon Waste Partnership, of which Plymouth City Council is a member.

Construction work on the approved development commenced on site on 20th February 2012. The development work being undertaken is the subject of extensive monitoring designed to check that the work is being carried out in accordance with agreed code of construction practice type conditions. This monitoring process has identified a series of breaches of the agreed condition details in recent weeks. The purpose of this report is to clarify what action the Council is taking with regard to these identified breaches.

Corporate Plan 2012-2015:

Working with other organisations in the sub region to reduce costs in waste disposal services; dealing with waste in a way to reduce carbon emissions whilst also using planning powers as a key lever to facilitate the potential for further carbon savings, social enterprise and Community Trust development and the delivery of business support in relation to the maritime sector

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

The use of planning powers associated with the imposition and monitoring of conditions and obligations will secure acceptable development at a short, medium and long term cost to the applicants that is considered reasonable and in the community interest whilst saving public expenditure and the development itself secures a pooling of sub regional resources to address rising landfill costs. There are no abnormal financial implications for the local planning authority in monitoring conditions and clauses although the developer will have costs through providing information required by the S106.

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

The use of planning powers associated with the imposition and monitoring of conditions and obligations will secure acceptable development mindful that the principle Health and Safety and Risk Management issues and the framework for fostering good community relations has been addressed in the determination of the planning application.

Recommendations & Reasons for recommended action:

Recommendations:

The Committee are invited to note:

- (1) the position regarding compliance with planning conditions and obligations to date, and that eight reported breaches have been identified and are under investigation.**
- (2) what compliance action is being proposed, if any is to be pursued by the Council in response to the investigation.**
- (3) that a Planning Contravention Notice (PCN), subject to Section 171C of the Town & Country Planning Act 1990, has been served on MVV putting them on formal alert that further planning compliance action is being actively considered by the Council.**

Reasons for recommendation (1) and (2):

Breaches of noise or working hours limitations attached to Planning Permission 11/00750/FUL are known to have occurred, and further details of these are outlined in the attached briefing note (Appendix 1) and chronology of the incidents in question (Appendix 2).

Reason for recommendation (3):

Breaches of noise or working hours limitations attached to Planning Permission 11/00750/FUL are known to have occurred, and the issuing of the Planning Contravention Notice in respect of these breaches acts a legal precursor to possible further planning compliance action by the Council should this prove to be necessary.

Alternative options considered and reasons for recommended action:

Where a breach is identified the response has to be appropriate and mindful of any demonstrable harm arising from it. The Council is under a legal duty to investigate reports of breaches of planning control, and to consider what action might be appropriate if a breach is identified.

Background papers:

The planning conditions clauses drawings and schemes can all be found on the planning website for 11/00750/FUL

(<http://www.plymouth.gov.uk/planningonline.htm?ApplicationNumber=11%2F00750&AddressPrefix=&Postcode=&Sort2=DateReceived+DESC&innoLink=http://www.plymouth.gov.uk/planningapplications2/results.asp>)

Sign off:

Fin	PC. Plac eF PD1 213 009. 181 212.	Leg	JAR/ 1624 6A	HR		Corp Prop		IT		Strat Proc	
Originating SMT Member: N/A											
Have you consulted the Cabinet Member(s) named on the report? No											

Appendix 1 –

Breaches of planning conditions imposed upon Plan reference 11/00750/FUL
(for the construction of an energy from waste plant in Her Majesty's Naval Base, Devonport.)

Briefing Note

The construction of the energy from waste plant is a major construction project involving complex construction techniques with a potential to impact significantly during the construction phase of the development both on the local environment and on neighbouring residents. Because of this and as is normal with such major projects, the development is subject to specific planning conditions and limitations on such issues as construction noise and permitted working hours at the development. The details of these are as follows;

Condition 19 defines noise limits and requires the following:

“The noise levels indicated within the submitted Acoustics Technical Note dated 28th July 2011 are the maximum permitted levels. If during the stage 1 and stage 2 construction phases of the development noise levels exceed the approved limits then the noisy activity shall cease until such time as noise reduction measures have been carried out. Noise monitoring shall then be carried out to verify that the noise levels do not exceed the approved limits.”

Condition 18 requires the approved Construction Environment Management Plan (CEMP) to be implemented in full throughout the duration of the construction works, unless a variation is agreed in writing by the Local Planning Authority, in advance. The agreed CEMP construction hours reflect the City Council's Code of Practice and are 8am - 6pm on Mondays –Fridays and the CEMP states that “should work be required outside of these hours prior permission must be sought from the local authority including details of any noise that may result from the activities”.

Following the grant of planning permission significant efforts have been made by the developer (MVF) and the Council to set up monitoring systems to record the impact of the development on the local environment and neighbouring residents.

The majority of the requirements of the planning conditions and obligations have been, and are currently being, complied with; however, site monitoring has shown that there have been eight recorded instances of breaches of noise or working hours limitations. Details of these are set out in the attached Appendix 2.

Three of these incidents involve noise above permitted levels, while the other five involve work taking place outside of the permitted hours of construction.

It is clearly unacceptable that these incidents are occurring and it is important to note that the site developer is entirely responsible for ensuring all necessary planning conditions and limitations are being adhered to at all stages.

Although the developer has put forward specific reasons explaining the breaches and arguing on each occasion that unexpected special circumstances have given rise to these incidents, the Council cannot in any sense condone or accept that these problematic incidents should be occurring.

For this reason, and in line with normal planning compliance procedure in respect of such issues, a compliance case file has been opened (12/02114/OPR) to formally record these breaches. Furthermore in order to put the developer on formal alert that the Council is unhappy at the continuation of these reported breaches, a Planning Contravention Notice has been served on them under Section 171C of the Town & Country Planning Act 1990.

This Notice also acts a legal precursor to possible further planning compliance action by the Council should this prove to be necessary.

Paragraph 207 of the National Planning Policy Framework (NPPF), published on 27 March 2012, sets out clearly how Local Planning Authorities should approach planning compliance work, and states as follows;

Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. Local planning authorities should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where it is appropriate to do so.

Taking this guidance into account and having considered very carefully the extent of the breaches to date and the impact of these on the local environment and nearby residents, it is considered that the action taken so far is proportionate and sufficient. If further breaches are identified, and where significant environmental harm is suspected as occurring as a result, then the Council can proceed to consider further action against the developer which could include one or more of the following actions in addition to the already issued Planning Contravention Notice;

1. Planning Contravention Notice (PCN)

Section 171C Town and Country Planning Act (TCPA) 1990

- This gives a Local Planning Authority (LPA) a power to require information about activities on land
- It can be served if it appears that there may have been a breach of planning control.
- Specific information can be required in regard to certain activities which are of concern
- It is an offence under s171D for any person on whom a PCN has been served to fail within 21 days to comply with any requirement of it.
- A person found guilty of an offence shall be liable on a summary conviction to a fine.

2. **Breach of Condition Notice (BCN)**

Section 187A TCPA 1990

- This notice is mainly intended as an alternative to an enforcement notice for remedying a breach of control arising from failure to comply with any planning condition or limitation.
- The notice must allow for a period of compliance.
- If a person does not comply with the requirements of a BCN then they will be guilty of an offence.
- Summary prosecution is in the Magistrates Court.
- No right of appeal but validity of notice can be challenged by way of a judicial review.

3. **Planning Enforcement Notice (PEN)**

Section 172 TCPA 1990

- Must be some evidence of breach.
- Power to issue an enforcement notice is discretionary.
- A notice requires remedial steps to be taken within a specified time.
- Should only be used where the LPA are satisfied that there has been a breach of planning control **and** it is expedient to issue a notice having regard to the provisions of the development plan and to any other material considerations.
- Time limits apply 4 years (operational development and change of use) and 10 years for other breaches.
- There is a right of appeal against the notice.

4. **Temporary Stop Notice (TSN)**

Section 171E TCPA 1990

- Different from a Stop Notice as it is freestanding (not necessarily served in conjunction with an enforcement notice)
- Allows LPA to stop alleged breach of planning control for a limited period while a decision is taken whether further enforcement action is appropriate and what form it should take.
- Allows 28 days.
- However, there is a risk of compensation if the notice is withdrawn or activity is actually lawful.

5. **Stop Notice (SN)**

Section 183 TCPA 1990

- Allows LPA to impose a “ban” almost immediately on activities that are being carried on in breach of planning control.
- Must be used in conjunction with an enforcement notice.
- The stop notice ceases to have effect once the enforcement notice is quashed or withdrawn or when the period allowed for compliance with the enforcement notice has expired.
- There can be a risk of compensation.

6. Injunction

Section 187B TCPA 1990

- The LPA can, where they consider it expedient for any actual or apprehended breach of planning control to be restrained to apply to the High Court or the County Court for an injunction.
- Can apply whether or not other enforcement powers have been used.
- Criteria for using injunctive relief
 - (i) the LPA have taken account of what appear to be the relevant considerations in deciding whether its necessary or expedient to use this form of action;
 - (ii) there is clear evidence that a breach has already occurred or is likely to occur;
 - (iii) injunctive relief is a proportionate remedy in the circumstance of the case;
 - (iv) important to serve on appropriate parties if persons identity is unknown.
- When considering this form of action costs needs to be assessed in bringing the case to court.
- Decision to grant injunction is at the absolute discretion of the court.
- Types of injunction:
 - (i) Interlocutory – temporary
 - (ii) Permanent – final relief
 - (iii) Mandatory – demands the performance of a positive act
 - (iv) District Wide ban

Each of these possible actions is subject to potential challenge by the developer, either through the planning appeal process or by means of Judicial Review (JR), and it is for this reason that the Council must carefully heed the advice contained in the National Planning Policy Framework. For example the Council would be expected to show that it had used lower level enforcement powers initially before progressing to a higher level action such as a stop notice, or at the extreme end of the compliance action scale, injunction action.

Planning officers will continue to closely monitor the development, in conjunction with colleagues in the Council's Public Protection Service, and will consider pursuing one or more of the above further actions, over and above the action taken so far, if conditions indicate this is required.

In response to concerns about these planning permission breaches, MVV has confirmed it is taking the following steps to mitigate against further problems during the construction phase of the development;

1. Introduction of additional acoustic noise barriers.
2. Reminder of standing Instructions to contractors and sub contractors about working hours and the need for them to plan work so that it does not continue beyond permitted hours and to agree programmes of work with MVV site management.

3. Weekly monitoring of construction related noise activities (instead of fortnightly) to be implemented from January throughout the remaining piling stage (to be reviewed in February).

MVV publish details of the noise exceedances on the construction website for the purposes of transparency and have sent apologies to residents who may have potentially been affected by them in the Savage Road area (200 letters were delivered to properties in Talbot Gardens, Savage Road and Poole Park Road in November).

Although MVV are working to lower maximum noise levels than those in the Council's published Code of Practice the levels were the subject of pre-Committee discussion mindful that the proposed large construction project that in places would be in close proximity to residential areas. The maximum noise limits were approved by the December 2011 Planning Committee. MVV have been contacted on the Planning Committee's suggestion (18th October 2012 Planning Committee) that lower maximum permitted noise levels be investigated, (below those indicated within the submitted Acoustic Technical Note and condition 19 imposed upon plan ref I/00750). MVV has responded that they would not accept a reduction. MVV believe that it has compromised sufficiently over this matter prior to the determination of the planning application and pointed out that MVV would have preferred an assessment over a 10 hour average but had reluctantly agreed to work to a tighter requirement of assessments over a 2 hour average.

Finally, it should be noted that whatever planning compliance action is taken by the Council in respect of such matters; this does not prevent or preclude the Council from considering pursuing action against the developer under other statutory provisions for environmental control such as the Environmental Protection Act 1990 should such action be considered necessary.

In this respect, it should be noted that planning controls in general, and construction practice planning conditions in particular, exist to protect the quality of the local environment in a fairly wide ranging and general sense. This does include, as far as is practicable, seeking to protect the living conditions of residents living in close proximity to development sites. The powers available to the Public Protection Service provided for by the Environmental Protection Act 1990, on the other hand, are primarily concerned with protecting the health and general well being of residents in terms of the conditions they experience whilst they are in their home environment, including as a result of the impact of a local development. There is therefore some overlap here in terms of the legal extent of these controls. More specifically, the Council's Public Protection Service can look at such matters in terms of statutory nuisance, and did carefully consider these throughout the planning process, and put forward conditions to control any nuisance arising from the site. The planning controls that are in place are aimed to minimise any nuisance issues.

Appendix 2 -

Breaches of planning conditions imposed upon Plan reference

11/00750/FUL (for the construction of an energy from waste plant in Her Majesty's Naval Base, Devonport.)

Details of breach incidents;

1. 20 September 2012 - Breach of working hours beyond 6pm by 20 mins

2. 28 September 2012 – Exceedence of permitted noise level by 3dBLA and 1dBLA

3. 02 October 2012 - Breach of working hours beyond 6pm by 15 mins

4. 10 October 2012 - Exceedence of permitted noise level by 5dBLA and 4dBLA

5. 02 November 2012 - Breach of working hours beyond 6pm by 7 mins

6. 16 November 2012 - Breach of working hours beyond 6pm by 7 mins

7. 21 November 2012 - Breach of working hours beyond 6pm by 25 mins

8. 28 November 2012 - Exceedence of permitted noise level by 5dBLA and 1dBLA