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Our ref JD.Day-Dove  
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John Dunkley  
Charlie Hopkins

Mr Rupert Clubb  
Director of Transport and Environment  
East Sussex County Council  
County Hall  
St Anne's Crescent  
Lewes  
BN7 1UE

19 December 2007

Dear Sir,

**Grant of planning permission for an Energy Recovery Facility on land at the north end of North Quay Road, Newhaven**

**Applicant: Veolia ES South Downs Limited**

**Planning permission reference: LW/462/CM(EIA)**

This is a pre-action letter under the Judicial Review Pre-Action Protocol in support of an application for permission to apply for judicial review to quash the grant of planning permission for the Newhaven Energy Recovery Facility ("the incinerator").

***Our Clients:***

DOVE2000 Limited (incorporated 3<sup>rd</sup> May 2006) of Headland House, Harping Hill, Piddinghoe, Newhaven BN9 9AJ, and Mrs Nicola Louise Day of 22 Murray Avenue, Newhaven, Sussex BN9 9SF. Please note that we are currently working for Mrs Day under the LSC Legal Help scheme.

***The Decision in question:***

Planning permission for 'construction and operation of an Energy Recovery Facility together with ancillary infrastructure including waste transfer station, administration/visitor centre, landscaping and highway works. Land at northern end of North Quay Road, Newhaven' under reference LW/462/CM(EIA) and dated 12<sup>th</sup> November 2007.

***Orders Sought:***

The following orders will be sought from the Court:

- (i) a quashing order quashing the grant of planning permission LW/462/CM(EIA);
- (ii) costs.

***Factual Background:***

On 21<sup>st</sup> November 2005 Veolia ES South Downs Limited (“Veolia”) applied for planning permission to construct the Newhaven Energy Recovery Facility. On 5<sup>th</sup> February 2007 judicial review proceedings were brought against the Pollution Prevention and Control permit (“PPC permit”) for the same proposed incinerator.

The County Council’s Planning Committee resolved to grant planning permission subject to a planning obligation on 21<sup>st</sup> February 2007, but that resolution was never acted upon. Instead the application returned to the Planning Committee on 7<sup>th</sup> November 2007. The committee resolved to grant planning permission, again subject to a planning obligation.

A purported planning obligation was made on 9<sup>th</sup> November 2007. The planning permission was granted on 12<sup>th</sup> November 2007.

On 5<sup>th</sup> December 2007 the High Court quashed the PPC permit, with the consent of the Environment Agency and Veolia.

***The Grounds:***

- (i) the County Council erred in law and had regard to an immaterial consideration in relying upon the PPC permit which had been unlawfully granted and was subsequently quashed by the High Court;-

The committee report of 7<sup>th</sup> November 2007 made 112 references to the Pollution Prevention and Control regime. Members were informed of the judicial review proceedings but advised that the relevance of the permit was unaltered (para 8.136). Whilst paragraph 8.137 said that Members must be satisfied that there is no conflict with planning policies dealing with air quality and pollution irrespective of any authorisation under PPC, the report then relied upon the PPC consideration (para 8.144, 8.146). The responses to representations on air quality, pollution and emissions (schedule, section O) were answered in the great majority of cases with reference to the PPC regime. 11 of the Council’s comments were expressly taken from the PPC Decision Document and the final comment was ‘Health aspects have been considered by the Environment Agency and a IPPC permit has been issued’. The odour section (P) relied on the Agency’s view and under health risks (section Q) the County Council relied 12 times on the PPC permit.

The summary reasons for the grant of planning permission relied explicitly on the PPC permit:

“The proposal is for a technologically advanced facility, which has the benefit of a PPC permit to ensure air quality is maintained and health risks are negligible. Residential and local amenity will be protected by conditions covering noise, odour, and related matters. Consequently there is no conflict between the proposed development and Regional Planning Guidance 9 Policy E7; Structure Plan Policy S1(i), Waste Local Plan Policies WLP19(d), WLP 35(c), and Lewes District Local Plan Policy ST30.”

The County Council's conclusion that there was compliance with these policies relied upon the PPC permit.

The PPC permit was granted unlawfully and was subsequently quashed by the High Court. The County Council erred in law and had regard to an immaterial consideration by relying on the permit which was (a) unlawfully issued and (b) subsequently quashed and so never had legal effect.

- (ii) the County Council erred in relying upon the Environment Agency's PPC decision document to answer representations made on the Environmental Statement as the Agency had not considered the representations made on the Environmental Statement (in addition to the PPC permit being unlawful);

The Agency agreed during the PPC judicial review that they had not considered the representations made on the Environmental Statement. The decision document could not therefore have been an answer to representations made on the planning application. The effect was that those representations (principally on air quality, odour and health risks) were not considered by either regulator (nor addressed, as the answer offered was not made in response to those points).

- (iii) the County Council failed to have regard to a material consideration, that the reasoned justification for WLP9 regarded a Newhaven incinerator as serving only the west of the joint Councils' area, when the incinerator proposed would deal with waste across the whole area.

The Waste Local Plan had, in its draft stages envisaged two Energy from Waste Plants. One of those, at Mounfield Mine, was not part of the Waste Contract and was dropped. The reasoned justification to WLP9 said 'A facility at North Quay, Newhaven would serve the western part of the Plan Area. ... Proposals for further waste recovery capacity, including energy from waste, will undoubtedly come forward in the east of the Plan area. Any such proposal will be considered on its merits using the Plan's generic policies, including Policy WLP 19' (para 6.29, 6.30). By the time the planning permission was determined the Regional Spatial Strategy and the Waste Strategy 2007 had increased targets for reuse, recycling and composting.

The incinerator capacity proposed was a maximum of 242,000 tonnes per annum but with a likely throughput (allowing for maintenance) of 210,000 tonnes per annum. Paragraph 8.54 of the committee report said that at the lower WLP recycling rate of 40% about 270,000 tonnes of municipal waste would still require treatment in 2015/16. At the RPG 50% rate all but 219,000 tonnes of waste would be recycled. The recycling rate is required to increase to 55% in 2020 and 60% in 2025. That raises concerns that recycling targets will not be met because of the need to use the incinerator. Essentially waste will be dealt with lower down the waste hierarchy because there are expensive facilities to do so.

Whether or not that is the case, the great majority, if not all, of the non-recycled municipal waste produced in the Councils' area would be burnt at Newhaven. The Newhaven facility has therefore changed from the proposal in the Waste Local Plan to serve half the Councils' area into a project to serve the whole of the Councils' area. The planning application is therefore not for a scheme envisaged by the reasoned justification to WLP9 and by the Plan as a whole. The planning application is contrary in that further respect to the development plan. The report failed to address this departure from the plan and the need to reassess the locational judgment about the siting of an incinerator.

- (iv) the County Council erred in law and had regard to an immaterial consideration in relying upon the purported planning obligation, as South Downs Waste Services Limited ("South Downs Limited") did not have an interest in the land and (to the extent the County Council rely upon this) the County Council also did not have an interest in land and could not bind itself;

The site on which the incinerator is proposed to be built is owned by BNP Paribus Securities Services Trust Company Limited and BNP Paribus Services Custody Bank Limited. Part of the site is subject to a leasehold interest, extending to 2019 and with protection under the Landlord and Tenant Act 1954, in favour of Aram Resources Limited. They have sublet part of the site to Newhaven Roadstone Limited until 2019. The remainder is occupied by Aggregate Industries UK Limited who are holding over on a 1954 Act lease.

According to a summary produced to the CPO inquiry, the County Council has an agreement for lease with the BNP companies which will expire on 29<sup>th</sup> December 2007, if vacant possession of the land has not been obtained, and may only be extended to 15<sup>th</sup> January 2008. It is said that there is then a further agreement for lease between the County Council and South Downs Limited

The County Council and South Downs Limited cannot prove that they have agreements for lease, without producing the agreements. We note that Veolia were required under CPR 31 to produce the agreements in the PPC judicial review proceedings and failed to do so.

Whilst an agreement for lease may be able to create an interest in land it cannot create an interest which is inconsistent with a third party's existing interest. Any such agreement will have a purely contractual effect and will not create an interest in land.

- (v) the County Council erred in law, or acted without regard to the enforceability of the agreement or irrationally as the planning obligation relied on an agreement for lease which will (according to the Council) expire on 29<sup>th</sup> December 2007, if vacant possession of the land has not been obtained, and may only be extended to 15<sup>th</sup> January 2008. At the time planning permission was granted vacant possession had not been obtained (and still has not been);

At the time the planning obligation was made, it was possible (and indeed highly probable) that the County Council and South Downs Limited would not acquire possession of the incinerator site subject to the claimed agreement for lease and the agreement for sub-lease. The lease agreement was said by the County Council to be of an extremely short duration and relied upon removing other leaseholders with long leases or 1954 Act protection. In short, the purported agreements could only become effective if agreement was reached with leaseholders who had refused to enter into an agreement so far. The County Council had so little confidence in a voluntary disposal by those leaseholders that it was about to embark on an expensive compulsory purchase order inquiry.

If the land was acquired under the CPO or by assignment of the existing leases or under a further agreement with BNP (following the expiry of the present agreement on 15<sup>th</sup> January 2008) then the interests in land would not be subject to the planning obligation. It is therefore probable that the land interests used for the development of an incinerator on the site will not be subject to the planning obligation.

The County Council considered, correctly, that a planning obligation was required rather than merely a contractual agreement with Veolia. The committee report refers throughout to a section 106 agreement. The Council's press release on 22<sup>nd</sup> October announcing the return of the application to committee said that the legal agreement "can only be signed once Veolia has secured a 'legal interest' in the land required to build the facility, a process that has yet to be completed."

If the purported agreements for a lease and a sub-lease could create an interest in the land, the County Council acted unlawfully in making the planning obligation because there was a real possibility (and indeed a high probability) that any incinerator would not be developed pursuant to those agreements, but would rely on other agreements or compulsory purchase. The planning obligation would not bind the land in such a case and so would be ineffective. The County Council acted unlawfully and irrationally in making a planning obligation with such a tenuous interest in the land which could not bind the development in all reasonable circumstances.

- (vi) the County Council misunderstood and failed to apply the sequential test for development at risk of flooding, contrary to PPS25, without having any reason for failing to apply policy or recognising that it had not done so (para 8.170-8.175);

The application site is in flood zone 3a. PPS25 requires a sequential test to be applied to direct development to land less prone to flooding (zone 1 being preferable). The planning application and Environmental Statement failed to apply a sequential test. The County Council committee report for 7<sup>th</sup> November says 'the sequential test is applied to direct the

most vulnerable development to areas of lowest flood risk' (para 8.170) and then fails to apply the test to the scheme. The report misstates the sequential test. The test is concerned to steer 'new development' to lower risk areas not to direct merely the most vulnerable development to such areas. Perhaps as a consequence of this error the report fails to apply the sequential test.

The alternative sites for an incinerator, or major waste development, are mostly in flood zone 1 (see Environmental Statement and 'Points of Clarification required of Peter Earl whilst on the witness stand' for a convenient summary but the information was publicly available when the Council decided to approve the Newhaven application) and so were sequentially preferable.

- (vii) the County Council's conclusion that the transport of waste by rail (as required by Policies WLP2(b) and WLP19(b)) was not practicable was based on no evidence and was irrational as the evidence before the committee was 'the applicant accepts that there is no practical reason why waste could not be transported by rail from the Hollingdean transfer station' and 'it is clear that trains could be used to haul waste from Brighton to the ERF site'. In addition the County Council failed to have regard to paragraph 6.30 of the Waste Local Plan which said that the location 'would be suitable for rail or water transfer of waste'.

Waste Local Plan policies WLP2(b) and WLP19(b) require the majority of waste to be transferred to and from the site by water or rail unless it is demonstrated that this is not practicable. The ability to access North Quay by water or rail was one of the reasons for its allocation in WLP9: see paragraph 6.29 and 6.30 of the plan.

Veolia and the County Council rely on the potential for rail and water transport as one of the reasons why North Quay is preferable to alternative sites: see the Environmental Statement para 2.25, 2.53, 2.61, 2.67; committee report para 8.43. The committee report records 'the applicant accepts that there is no practical reason why waste could not be transported by rail from the Hollingdean transfer station' but has rejected rail because it would be more expensive than road haulage (para 8.121). The report then claims there would be 'practical difficulties' which simply amount to works being needed at the site and at Hollingdean (if waste was to be carried from there) (para 8.121). The report accepts 'it is clear that trains could be used to haul waste from Brighton to the ERF site' (para 8.123). The report concludes on the rail issue:

"On balance, I consider, that whilst there are sound environmental reasons for preferring rail freight, in principle, the overall benefits in the case of this application are limited, because of the relatively small quantities of material involved, and the practical difficulty of connecting the Hollingdean transfer station site to the rail network, which would be crucial to a rail-haul operation. However, it is clear that siting of the development at

North Quay is well located for rail-haul and the applicant should be encouraged to keep the option open.”

The statutory summary of reasons then contradicts itself by saying that there is no conflict with WLP2(b) and WLP19(b) yet says that the absence of proposals for alternative transport modes is a disadvantage of the proposals which does not fully accord with certain other policies which are not relevant on this point.

The County Council did not make a finding that rail access was ‘not practicable’ and had no evidence on which it could lawfully have formed such a view. In such circumstances it wrongly asserts that the proposal accords with WLP2(b) and WLP19(b). If there is a recognition that the lack of rail transport is harmful in policy terms (as recorded later in the reasons) this is not applied to the correct policies, nor are the implications followed through. One implication is that one of the justifications for preferring this site falls away. It cannot be an advantage of a particular planning application that rail (or water) transport is possible at the site when the scheme does not include such transportation.

***What the Defendant is asked to do:***

Agree to the quashing of the planning permission on the bringing of judicial review proceedings. If you do not agree to this course of action, please explain why not.

***Further information required:***

Please provide a copy of:

- (i) the agreement for lease dated 26<sup>th</sup> October 2007 between RBSI Custody Bank Limited and RBSI Trust Company Limited;
- (ii) the agreement for lease dated 9<sup>th</sup> November 2007 between the County Council and South Downs Waste Services Limited;
- (iii) all documents considered when the County Council was considering the adequacy of South Downs Limited’s interest in land when it decided to enter into the planning obligation.

***Interested Parties:***

We have identified the following as potential interested parties, to whom we have sent a copy of this letter. If you are aware of any other potential interested parties, please let us know.

- (i) Veolia ES South Downs Limited  
154a, Pentonville Road  
London N1 9PE
- (ii) South Downs Waste Services Limited  
154a, Pentonville Road  
London N1 9PE

***Other applications made:***

None.

***Legal Advisers dealing with this claim:***

John Dunkley of EarthRights solicitors and Richard Harwood of 39 Essex Street Chambers

***Address for reply and service of Court Documents:***

EarthRights solicitors, The CAB Building, Barnards Yard, Saffron Walden, Essex CB11 4EB

**Period for reply**

Please reply substantively within 14 days of the date of this letter.

Yours faithfully,

**John Dunkley**  
**EARTHRIGHTS SOLICITORS**  
[jd@earthrights.org.uk](mailto:jd@earthrights.org.uk)

cc: Director of Law and Performance Management, East Sussex CC (Att: Mr Philip Baker)  
Veolia ES South Downs Limited  
South Downs Waste Services Limited  
The Inspector of the CPO Inquiry  
Lewes District Council  
Friends of the Earth