Planning and Environmental Appeals Division

Scottish Government
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Ms K Lyons - Principal Solicitor
Highland Council
Sent By E-mail

Our ref: PPA-270-2017-2
Planning Authority ref: 08/00455/FULRC

15 October 2019

Dear Ms Lyons

PLANNING PERMISSION APPEAL: ERECTION OF WASTE TO ENERGY COMBINED HEAT AND POWER PLANT ON LAND AT CROMARTY FIRTH INDUSTRIAL ESTATE, INVERGORDON, IV18 OLT

Please find attached a copy of the decision on this appeal.

The reporter's decision is final. However you may wish to know that individuals unhappy with the decision made by the reporter may have the right to appeal to the Court of Session, Parliament House, Parliament Square, Edinburgh, EH1 1RQ. An appeal **must** be made within six weeks of the date of the appeal decision. Please note though, that an appeal to the Court of Session can only be made on a point of law and it may be useful to seek professional advice before taking this course of action. For more information on challenging decisions made by DPEA please see https://beta.gov.scot/publications/challenging-planning-decisions-guidance/.

I trust this information is clear. Please do not hesitate to contact me if you require any further information or a paper copy of any of the above documentation.

Yours sincerely

Colin Bell

COLIN BELL
Case Officer
Planning and Environmental Appeals Division

Planning and Environmental Appeals Division

Appeal Decision Notice

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Decision by Paul Cackette and David Buylla, Reporters appointed by the Scottish Ministers

- Planning appeal reference: PPA-270-2017-2
- Site address: land at Cromarty Firth Industrial Estate, Invergordon, IV18 0LT
- Appeal by Combined Heat and Power (Highlands) Limited against the decision by the Highland Council
- Application for planning permission 08/00455FULRC dated 9 May 2008 refused by notice dated 24 August 2009
- The development proposed: erection of waste to energy combined heat and power plant

Date of appeal decision: 15 October 2019

Decision

We dismiss the appeal under section 48(8) of the Town and Country Planning (Scotland) Act 1997. This has the effect that planning permission is refused.

Preliminary matters

On 16 May 2017, the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 came into force. The 2017 EIA regulations revoked the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011. However, because this proposal (and its accompanying environmental statement) were submitted before 16 May 2017, in accordance with exemptions provided for in the 2017 EIA regulations, it is governed by the 2011 EIA regulations.

This appeal has been before Ministers since November 2009. Two previous decision notices have been issued. However, both were quashed by the Court of Session following appeals by an objector. The second appeal was taken to, but ultimately not heard by or adjudicated on by, the Supreme Court which issued its formal order on 21 December 2016, the effect of which sustained the quashing of that second decision. The matter was referred back for re-determination and we were appointed for that purpose on 12 July and 23 August 2017.

The environmental information which supports the proposal was originally prepared in 2008. Following the quashing of the first appeal decision, this was updated in 2011. Following the quashing of the second appeal decision, the appellant indicated that further environmental information would be submitted. However, this has not happened.

Reasoning

1. The basis for this decision is that:

a) the appellant has failed to provide within a reasonable period sufficient information in respects of essential aspects of the appeal (including environmental information) or a basis on which such sufficient information is proposed or intended to be supplied; and

b) the appellant's failure to provide the necessary information has resulted in undue delay in the progress of the appeal.

2. After our appointment as above and in order to provide an opportunity to do so, we issued a procedure notice on 7 November 2017 requesting further information from the parties to this appeal under the terms of The Town and Country Planning (Appeals) (Scotland) Regulations 2013. The notice covered three matters.

3. The first related to advice provided by the Scottish Environmental Protection Agency (SEPA) in May 2017 that the design of the plant within the submitted proposal no longer represents best available technology and may therefore not be consentable under the Pollution Prevention and Control (Scotland) Regulations (the PPC). We wished to receive the appellant's response to this advice, conscious that the appellant's ability to modify its proposals to satisfy PPC requirements could be constrained by the prohibition imposed by section 32A of the Town and Country Planning (Scotland) Act 1997 on the variation of an application after an appeal under section 47 has been made.

4. The second related to the adequacy of the environmental information – specifically to the considerable period of time that has elapsed since the original environmental statement of 2008 and even since its update in 2011. The appellant had indicated in May 2017 its intention to provide updated information (including environmental information) covering the topics of: planning policy; traffic and transport; air quality; consentability; and foul drainage. We also sought the parties' view on any implications of the recently introduced 2017 EIA regulations.

5. The procedure notice also sought the appeal parties' views on how we could ensure adequate publicity for the proposals (including any updated environmental information), given the possibility that new development may have taken place in the locality in the years since the last publicity was undertaken. This may have introduced new neighbours to the scheme who would legitimately expect to have the opportunity to respond to the proposals. It may also have affected the scope of the consultation process we would have to carry out following the receipt of updated information.

6. Although we received timeous responses to the procedure notice from the other four parties to whom it was sent (The Highland Council, Ross Estates Company (an objector) Scottish Natural Heritage and SEPA), we received no response from the appellant to the procedure notice by the deadline of 21 November 2017. Over subsequent months the DPEA case officer sought to obtain such response by letters / emails / telephone conversations of 8 February 2018, 27 February 2018, 29 March 2018, 18 April 2018, and 3 May 2018. As no substantive response was received, on 4 April 2019 we issued formal

notice of our intention to dismiss the appeal under section 48(8) of the Town and Country Planning (Scotland) Act 1997.

7. The appellant responded before the deadline set out in that notice (25 April 2019), but only to request a further three months to address all outstanding matters. We agreed to that extension. However, no further contact from the appellant has been received. The steps required of the appellant under the procedure notice for the expedition of the appeal have not been taken within the relevant time period.

8. Not least because of the extension request of 25 April (in response to the formal notice of 4 April 2019 intimating the possibility of dismissal), we are accordingly satisfied that the appellant throughout the period from November 2017 to date was aware of the requirements incumbent on it in order to pursue its appeal.

9. Section 48(8) states:

If at any time before or during the determination of an appeal under section 47 it appears to the Secretary of State that the appellant is responsible for undue delay in the progress of the appeal, he may—

(a) give the appellant notice that the appeal will be dismissed unless the appellant takes, within the period specified in the notice, such steps as are specified in the notice for the expedition of the appeal, and

(b) if the appellant fails to take those steps within that period, dismiss the appeal accordingly.

10. Regulation 3 of the 2011 EIA regulations prohibits us granting planning permission pursuant to an EIA application unless we have first taken environmental information into consideration and having stated in our decision that we have done so. Due to its age, we do not regard the environmental information that is before us as adequate. In the absence of an indication of how the inadequacies of that information was proposed or intended to be addressed, we are unable to satisfy ourselves or to conclude that the requirements of regulation 3 have been or can be met nor is there any reasonable prospect that this can be done in the foreseeable future nor has any explanation been provided for the ongoing delay.

11. Equally, we have received no indications of how the matters of the PPC licence and the adequacy of neighbour notification in light of the time that has elapsed is proposed or intended to be addressed. There is no reasonable prospect that these issues can be addressed in the foreseeable future and no explanation been provided for the ongoing delay.

12. Despite numerous requests, the appellant has failed to provide adequate environmental information or to address other issues that we consider to be critical to the determination of this appeal. These actings (or failings) by the appellant have in our view caused undue delay in the progress of this appeal.

13. Having been given the notice on 4 April 2019 required by section 48(8)(a) concerning possible dismissal, the appellant has failed to comply with the notice we issued under section 48(8) despite being given an additional three months to comply with it.

14. Having regard to all of the above, we hereby dismiss this appeal.

Paul Cackette *David Buylla*
Chief Reporter Principal Reporter