



Appeal Decision

Site visit made on 10 May 2005

by **A D Robinson BA(Hons) DipTP MRTPI**

an Inspector appointed by the First Secretary of State



100039176

The Planning Inspectorate
4/09 Kite Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
☎ 0117 372 6372
e-mail: enquiries@planning-inspectorate.gsi.gov.uk

Date

29 SEP 2005

Appeal Ref: APP/W4515/A/04/1167561

Holystone Limited, Wesley Way, Benton Square Industrial Estate, Newcastle upon Tyne NE12 9TA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Holystone Limited against the decision of North Tyneside Metropolitan Borough Council.
- The application Ref 04/01904/FUL, dated 4 June 2004, was refused by notice dated 13 August 2004.
- The application sought planning permission for an extension to waste recycling facility building to (i) accommodate a trommel and conveyor for the recovery of soils; and (ii) to enable existing working practices to be reorganised thereby removing the need for a new external storage/loading bunker without complying with a condition attached to a planning permission Ref 02/2932/FUL, dated 28 March 2003.
- The condition in dispute is No.12 which states that: 'there shall be no intentional handling, processing or storage of domestic waste or other non-inert materials'.
- The reason given for the condition is: 'to safeguard the occupiers of adjacent premises, local residents and users of public highways nearby from any discomfort or loss of amenity from odours or flies which could arise from the handling of such waste'.

Summary of Decision: The appeal is allowed and planning permission is granted subject to conditions in the terms set out below in the Formal Decision.

Procedural Matters

1. It is clear from the appellant's representations and also from what I saw on my site visit that the extension to the recycling building, which was the subject of the March 2003 planning permission, is being used for the handling of non-inert waste, including some household waste. Accordingly, I am treating the appeal as one made under Section 73A(2)(C) of the Town and Country Planning Act 1990, as amended, for development carried out without complying with a condition subject to which the March 2003 planning permission was granted.

The Main Issue

2. I take the view that the main issues in this appeal are:
 - (i) Whether there is an enforceable limitation which prevents the site being used for the handling and processing of non-inert waste; and
 - (ii) Whether the disputed condition is reasonable and is needed to protect the amenity of those living and working nearby in respect of odours and flies.

Planning Policy Framework

3. Local policy is provided by the North Tyneside Unitary Development Plan (UDP), adopted in March 2002. Since the proposal was refused, the Council has printed the UDP in its final form. I note that the printed version contains a number of changes to the numbering of policies, including changes to the numbers of some of the policies cited by the Council in its committee report and in its decision notice. The content of the policies remain unchanged. In dealing with this appeal, I have referred to the policy numbers as set out in the final printed version of the UDP.
4. Policy E3 indicates that the Council will seek to minimise the impact of pollution on the environment, including existing land uses, and on proposed development. It goes on to say that the Council will support and encourage measures, including monitoring of pollution, to reduce existing pollution to the lowest practicable levels. Policy E30 indicates that the Council will encourage and support the minimisation of waste production and the re-use and recovery of waste materials.
5. Policy E30/4 indicates that waste management facilities such as transfer stations, baling plants and scrap processing facilities will be permitted in environmentally acceptable locations which have an adequate means of access and are screened. It goes on to say that the location of such facilities either in conjunction with other waste management facilities or within industrial estates will be encouraged. The policy also states that where an existing facility has had an adverse impact upon its neighbourhood by reason of visual impact or other nuisance, the intensification of that use will not be permitted unless proposals can demonstrate that they will result in a significant reduction in that nuisance.
6. Also within the UDP are a number of Development Control Policy Statements (DCPS). As the Council points out, these are not, as would seem from their title, Supplementary Planning Guidance but are adopted policies. DCPS 27 is concerned with waste transfer stations. It sets out the considerations that will be taken into account in determining proposals for such facilities. These include the proximity of the site to residential properties or other sensitive uses which may be affected by, amongst other things, noise and smells. They also include the nature of the materials to be handled. It also identifies the conditions that may be imposed on any planning permission for this type of facility. These include restrictions on the type and nature of materials.
7. National policy is provided by Planning Policy Statement (PPS) 10 which is concerned with waste management and PPS 23 which is concerned with planning and pollution control. At the time that the Council was processing the application to remove the disputed condition, national policy was provided by Planning Policy Guidance (PPG) 10 in respect of the role of planning in waste management and PPG 23 in respect of the relationship of the planning and pollution control regimes. As far as the appeal is concerned, there are no material differences between the broad thrust of national policy as set out in the PPGs and the more recently issued PPSs.
8. As far as PPS 10 is concerned, paragraph 27 indicates that the planning and pollution control regimes are separate but complementary. Whereas pollution control is concerned with the control of processes to prevent pollution and to guard against impacts to the environment and human health, the planning system controls the development and use of land in the public interest. The paragraph goes on to say that the planning system should

focus on whether development is an acceptable use of land and the impacts of the development on other development and uses of land. Paragraph 32 deals with planning conditions. It indicates that it should not be necessary to use planning conditions to control the pollution aspects of a waste management facility where the facility is regulated by the relevant pollution control authority.

9. In respect of PPS 23, paragraph 2 advises that any consideration of the quality of land, air or water impacts arising from development is capable of being a material planning consideration, insofar as it arises or may arise from or may affect any land use. Amongst other things, it also advises that the planning system has a role in ensuring that other uses and developments are not, as far as possible, affected by major existing or potential causes of pollution and that controls operated under the planning and pollution control regimes should complement rather duplicate each other.
10. National policy in respect of the use of conditions in planning permissions is also provided by Circular 11/95. This sets out a number of tests in respect of the validity of planning conditions. These include the condition being necessary, relevant to planning, relevant to the development being permitted, enforceable, precise and reasonable in all aspects. In discussing the test of being relevant to planning, paragraph 22 points out that some matters are subject to control under separate legislation, yet are also of concern to the planning system. It indicates that a condition which duplicates the effect of other controls will normally be unnecessary.

Inspector's Reasoning

The Site and its Surroundings

11. The appeal site is located within an industrial estate at Benton Square, a small settlement of mixed residential and industrial character on the northern edge of the Tyneside conurbation. Access to the industrial estate is gained from Whitley Road and, further away from the site, from Great Lime Road. For much of their lengths, both these roads are essentially residential in character being flanked by residential properties and with numerous residential side streets leading off them.
12. The site occupies a triangular shaped expanse of land in the north-eastern corner of the industrial estate and is served by a spur off one of the estate roads, Wesley Way. The north-western boundary of the site adjoins the Tyne and Wear Metro line. Beyond this lies a tract of open farmland. To the north-east and east, an expanse of open land separates the site from a primary school and residential properties in Windsor Place.
13. To the south-west and south-east the site is adjoined by other premises on the industrial estate. To the south-west is a depot owned by the appellant which contains an office block and a large yard used for the storage of skips and vehicles. To the south-east is a depot used by a firm of transport contractors. The depot separates the site from residential properties in Devonshire Drive. On my visit, the parties estimated that the nearest properties in Devonshire Drive are about 137 metres (150 yards) from the site.
14. The site is in use for waste transfer and recycling operations. Much of the activity within the site takes place in a large steel framed building occupying the centre of the site. The building is subdivided into three bays, each served by two roller shutter doors. Waste is brought into the western end of the building. The waste is then sorted with materials that

are capable of being re-used or recycled being separated from the waste. Some processing takes place with lighter materials, such as paper, being shredded and heavier materials, such as soils, being graded. The waste is removed from the eastern end of the building in bulk containers for disposal. The bay at the eastern end of the building also contains a shredder, trommel and conveyor. The yard around the building contains a number of piles of soil and other recovered materials. The yard also contains a weighbridge and site office.

15. On my visit I was told that the site currently handles in the order of about 100,000 tonnes of waste per annum. I was also told that the main sources of wastes were from demolition and construction projects and also from commercial premises, that is, shops and offices. A small quantity of household waste is also handled within the site. It was pointed out that this largely arose from the collection of waste from shops and offices. No estimate was provided of the quantity of household waste handled. None of this was disputed by the Council.

Site History

16. A planning application (NT/0076/96/DM) was submitted in January 1996 for the use of the site for a 'waste transfer and recycling station for inert waste and top soil storage area'. Planning permission was granted in July 1996 with a condition restricting the storage of materials within the site to top soil only. No condition was imposed restricting the type of wastes that could be received or handled at the site.
17. Also pertinent are the applications submitted for the extensions of the building within the site. In May 1997 planning permission was granted for a side extension to the building used as a waste transfer station and recycling plant to facilitate the segregation of waste but with no increase in waste input (97/00109/FUL). No condition was attached in respect of the type of waste to be dealt with in the extension. In March 2003 planning permission was granted for a further extension of the building to accommodate a trommel and conveyor for the recovery of soils and to enable working practices to be reorganised to remove the need for an external loading/unloading bunker (02/02932/FUL). This permission contains the disputed condition. It also contains conditions which specifically seek to limit the impact of waste management operations on those living and working nearby, including condition 7 requiring the adoption of odour suppression measures.
18. In addition to these planning permissions, the operations on the site are also controlled by the Environment Agency through a waste management licence issued in September 1996 (TW 469 NT). The licence provides for household, commercial and industrial wastes to be dealt with on the site. The conditions attached to the licence require the site to be operated in accordance with a working plan which deals with, amongst other things, odours and fly infestation.

Whether there is an Enforceable Limitation Preventing the Site from taking Non-Inert Waste

19. Section 70 of the Town and Country Planning Act 1990 deals with the determination of planning applications. It indicates that local planning authorities may grant planning permission, either conditionally or subject to such conditions as they think fit. The Act does not provide local planning authorities with the power to impose on a planning permission any limitations capable of enforcement, such as a limitation provided by the description of development.

20. The Courts have confirmed that the use of land is only restricted by conditions imposed by a planning permission and not by any other limitation. In the case of "I'm Your Man Ltd v SSETR" (September 1998), the Courts held that without a time limiting condition, a planning permission granted for sales, exhibitions and leisure activities for a temporary period of seven years was, notwithstanding the unambiguous nature of the description of the development, actually a permanent permission. In effect, the use granted planning permission was for sales, exhibitions and leisure activities. The temporary period of seven years included in the description was held by the Courts to be an attempt to impose a limitation on the planning permission granted.
21. The judgement reinforces my view that the description of development cannot always be relied upon to control future changes of use. In the case of a planning permission limited by the description of development, the use of land can be changed without any breach of planning control so long as the change does not amount to a material change of use. In the case of a planning permission subject to a condition, a change of use in breach of condition can be enforced whether or not the change is material. I will deal with the question of whether the use of the site for the processing of non-inert as well as inert waste amounts to a material change of use.
22. The Council contend that the judgement in "I'm Your Man Ltd v SSETR" is limited in its scope and applies only to temporary planning permissions. There is nothing in the reporting of the case which has been provided to me to indicate that the judgement only applies to temporary planning permissions. To my mind, it has a much wider application.
23. In the current case, the Council has relied upon the description used in the January 1996 planning application as restricting the use of the site to the handling of inert waste only. Although this application was for a waste transfer and recycling station for inert waste, the reference to inert waste is merely part of the description of the development. I do not consider that by itself, it represents an enforceable limitation. When determining the application, the Council could have attached a condition to restrict the nature or type of waste to be handled on the site. It chose not to do so. The only condition restricting materials is one concerned with the storage of top soil. This does not relate to the processing of other materials. I share the appellant's view, therefore, that there are no enforceable limitations or conditions which restrict the use of the site to the processing of inert waste only.
24. The analysis does not end here. It is also necessary to go on to assess whether any change of use from the development permitted to any other use represents a material change or use constituting development. In making such an assessment, regard needs to be had to the Town and Country Planning (Use Classes) Order 1987.
25. I accept that many waste related activities, such as the tipping or incineration of waste, are sui generis. However, it seems to me that the sort of operation carried out on the site is more akin to an industrial process. The waste is sorted so that recyclable materials are separated from the remainder of the waste and the recyclable materials are then processed by shredding and the like. This degree of sorting and processing represents, in my assessment, an industrial process coming within Class B2 of the Use Classes Order, which encompasses general industrial uses.

26. Support for this view comes from the Courts in the judgement in Bennett Fergusson Coal Limited v FSS (July 2003) where it was held that waste recycling comes within the B2 use class. I note that the Council has not sought to argue that waste recycling does not come within the B2 use class.
27. It seems to me that the B2 use class applies to the sorting and processing of both non-inert and inert waste. It is the nature of the operation that is critical, not the type of waste. I understand that both inert and non-inert wastes have been brought onto the site since the start of recycling operations in 1996. However, even if this was not the case and the site had been used for many years for the processing of only inert waste with non-inert waste being brought in only recently, I concur with the appellant's assessment that no change of use will have taken place. Article 3(i) of the Use Classes Order provides that where land is used for a purpose within any class specified in the Schedule to the Order, the use of that land for any other purpose within the same class does not constitute development and thus, planning permission is not required.
28. I conclude, therefore, that there are no enforceable limitations to prevent the site being used for the handling and recycling of non-inert waste.

Whether the Disputed Condition is Reasonable and Necessary

29. In addition to the absence of an enforceable limitation on the type of waste to be processed on the site, I also note that the planning permission granted in May 1997 for the second bay to the recycling building contains no condition restricting the type of waste. To my mind, it is unreasonable to seek to restrict the lawful use of the site and the rest of the building by way of a condition controlling the type of waste that may be dealt with in the third bay of the building. In effect, the condition is an attempt to alter existing planning permissions.
30. The third bay, where the shredder and trommel are operated and where waste is loaded into bulk containers for removal from the site, cannot be separated from what happens in the rest of the building. The waste transfer and recycling operation involves an almost seamless process using all parts of the building. In operational terms, it does not seem to me that the various parts of the building can be separated one from another. It is unreasonable, in my view, to introduce a restriction on the type of waste that can be handled in the third bay when this would have major implications on how operations are carried out in the other two bays and which are not subject to any restriction as to the waste that can be handled within them. The unreasonableness of the disputed condition makes it contrary to the advice contained in Circular 11/95.
31. In respect of need for the disputed condition, several questions ought to be posed. The first is whether the continued use of the site to handle non-inert waste would have an unacceptable impact upon those living and working nearby. The second is whether there are controls in place which would minimise the impact of dealing with non-inert waste.
32. The answer to the first question is in large part answered by a perusal of the Environment Agency's site inspection records over a fifteen month period. These have been submitted by both the appellant and the Council. During this period both inert and non-inert waste was handled at the site in considerable quantities. This waste included some household waste. At least some of the inspections seem to have been made in response to complaints, but not all of the complaints were about odours. On no occasion did the Agency's staff detect any odours.

33. Whilst I accept that odours can be short lived and thus difficult to detect, it seems to me that the site inspection records point to the effectiveness of the measures already taken to deal with odours. I see no reason why this situation should change if the site continues to take non-inert waste.
34. As for the second question, I accept that either the waste regulation system or planning controls can be used to control the impact of waste related development. What is important is that duplication should be avoided, although I recognise that some overlap may be inevitable. In this case, I note that prior to the planning permission being granted for the third bay of the building, none of the planning permissions granted on the site contain a condition relating to the control of odours. None of planning permissions, including the one for the third bay, have a condition in respect of the control of fly infestation. To my mind, the absence of planning controls over odours and flies is an implicit acknowledgement by the Council of the central role played by the licence in dealing with these impacts. There is much merit for such a view. Unlike planning conditions, which are fixed at one point in time, licensing conditions can be varied throughout the life of a development. In addition, waste regulation provides for more speedy enforcement than is the case with the planning system.
35. The licence contains conditions both in respect of the control of odours, including action to be taken to prevent the spread of odours outside the site boundary and preventing the acceptance of waste where odours are detected, and the prevention of infestation of flies and the like. These conditions have been included in the licence to deal with both inert and non-inert wastes. The failure of the Environment Agency's staff to detect odours, even where specific complaints about odours have been made, suggests that the measures to suppress odours, through the use of fixed deodorising sprays at various points in the site, have been successful. Likewise, the absence of detection of any fly infestation by the Agency's staff points to the success of measures, such as regular cleaning of the unloading bays and spraying suspect loads with an insecticide, in controlling this problem.
36. I note that the planning permission for the third bay in addition to controlling the type of wastes that can be handled also contains an odour control condition. No suggestion has been made by the appellant that the condition is unreasonable, onerous or duplicates other controls. This may, in part, be recognition that there is no hard and fast line between planning and licensing controls. The condition may be warranted in that the particular processes within the third bay, such as the use of the trommel and shredder or the loading of waste, have the potential to generate odours. If this is so, then the imposition of a planning condition dealing with odours in this part of the building may well be appropriate.
37. However, what the planning condition dealing with odours arising in the third bay does is to render as wholly unnecessary any attempt to control the type of waste coming into the third bay. Any odour controls that may be put in place should be capable of dealing with a range of wastes, given the absence of any enforceable restriction on the site as a whole as to the type of waste that may be accepted at the transfer and recycling station.
38. I conclude, therefore, that the disputed condition is both unreasonable, in that it seeks to alter existing planning permissions, and is not needed, in that there are other licensing and planning controls available to deal with odours and flies. Given the existence of these controls, I do not consider that the amenity of those living and working nearby would be affected by continuing waste recycling operations without the disputed condition being in

place. As such, I do not consider that there would be a conflict with the identified development plan policies

Other Matters

39. I have taken into account all other matters raised in the written representations, but none is sufficient to outweigh the considerations that have led to my conclusions on the main issues in this appeal.

Conclusions

40. For the reasons given above, I conclude that the appeal should succeed and I shall exercise my powers accordingly.

Formal Decision

41. I allow this appeal and grant planning permission for extension to waste recycling facility building to (i) accommodate a trommel and conveyor for the recovery of soils; and (ii) to enable existing working practices to be reorganised thereby removing the need for a new external storage/loading bunker at Holystone Limited, Wesley Way, Benton Square Industrial Estate, Newcastle upon Tyne in accordance with the application Ref 04/01904/FUL dated 4 June 2004, without compliance with condition number 12 previously imposed on planning permission Ref 02/2932/FUL dated 28 March 2003 but subject to the other conditions imposed therein, so far as the same are still subsisting and capable of taking effect.

Alan D Robinson

Inspector