

**202566 - INSTALLATION OF COMBINED HEAT AND POWER UNIT AND GREEN STORAGE CONTAINER. RETROSPECTIVE. AT MUCH FAWLEY FARM, FAWLEY CHAPEL ROAD, FAWLEY, HEREFORD, HR1 4SP**

**For: Mr Green per Mr James Whilding, Addlepool Business Centre, Woodbury Road, Clyst St George, Exeter, Devon EX3 0NR**

**ADDITIONAL REPRESENTATIONS**

Additional representations have been received from Helen Hamilton (Marches Planning) as below:

**10<sup>th</sup> November 2021**

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**Link to representation:**

<https://myaccount.herefordshire.gov.uk/documents?id=8964d813-4640-11ec-ae38-0050569f00ad>

I have read your officer report (OR) and the email exchanges with Thrings in relation to the lawfulness of the AD plant at Much Fawley.

I was advised that the OR would explain why the Council disagreed with Christian Zwart's opinion (attached) that the project as a whole is unlawful. It has not done so. In fact, the legal advice is not even mentioned.

You are under the mistaken understanding that the fact that the plant began operating more than 10 years ago corrected any unlawfulness and that this was evidence of substantial completion of development. This is wrong.

I won't repeat the case law - that is in the opinion - but the basic principles arise from the Pilkington line of cases and Panton & Farmer.

The development was not built in accordance with the plans and was built in a way that meant the plans and conditions could not be complied with. The development then continued to expand over a wider area substantially enlarging the planning unit. In December 2020, a new digestate tank was installed to the north east of the site, despite planning permission having twice been refused for this development. Since then, the applicant has erected a new bund to the north of this tank, expanding the boundary of the site - and so the planning unit - even further.

Consequently, substantial completion - ie the date from which immunity from planning enforcement runs - was not achieved until this year.

Please will you confirm that the legal opinion is set out in the OR in a way that enables members of the committee to understand the issues and arrive at their own judgement.

I have other comments to make about the OR which I will address in a separate representation.

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## Further email on the 10<sup>th</sup> November

### Link to representation:

<https://myaccount.herefordshire.gov.uk/documents?id=e5b666bc-4639-11ec-ae38-0050569f00ad>

Further to my earlier email I have now reviewed your officer report in more detail and would be grateful if you would address the matters detailed below before the committee meeting. In particular, I would be grateful if you would correct the erroneous claim that the concrete walls were required by the Environment Agency. They were not, as the attached evidence shows.

1) At paragraph 1.15 the report advises that the public inquiry into this case will commence on 7th December. It has not explained that the consequence of granting this application would be that the inquiry will be cancelled and the enforcement notices nullified.

Members should be made aware that the Planning Inspectorate has decided that this case is so complex that the inquiry needs to sit for four days to hear evidence. (The Applicant and the Council had asked for a one-day inquiry)

That evidence will relate, among other things, to the question of whether the Anaerobic Digester project as a whole is lawful, the acceptability of the concrete walls in the AONB and the feasibility of the landscape proposals.

The Officer Report has also failed to report the legal opinion of planning barrister Christian Zwaart that the AD is unauthorised and capable of planning enforcement, contrary to the views expressed in the report.

Members should be made aware that they do not have to agree with the judgement of officers as to the lawfulness of either the concrete walls or the AD as a whole, but they have not been provided with the evidence they require to form their own opinion.

The committee could also decide to defer determination of the application so that this difficult case can be considered by a planning inspector through the public inquiry.

I was advised that the Officer Report would explain why officers have chosen to bring this case to committee less than three weeks before the commencement of an inquiry that would determine an application for the same development. Given this planning application was received in August 2020, it is impossible to understand why it was deemed sensible to bring the case to committee now, especially given the inconvenience and wasted cost for all parties. I would be grateful if you would set out officers' reasoning for this decision in an update to the committee.

2) At 4.2 the report cites the Environment Agency's response, which recommends that the Environmental Permit application and the planning application are twin-tracked. Please explain why the Council has not acceded to this recommendation.

3) At 4.4.2, the report provides the landscape officer's recommendations for the screening of the concrete walls. It has not cited the evidence provided on behalf of our clients that the landscaping scheme could not be implemented because of the wide and deep concrete footings to the walls as shown on the Environmental Permit plans and because the ground levels around the site have been raised by several metres with hardcore. Please would you put this evidence before the members of the committee.

4) At 4.5, you have repeated the ecology officer's response but not my comments on it. You will be aware that contrary to the officer's assertion, most of the Wye SAC's qualifying features and ancient woodland are highly sensitive to any deterioration in air quality. The SAC habitat most vulnerable to SO<sub>2</sub> is *Ranunculus fluitans* (water crowfoot), not jelly lichens

as the ecology officer asserted. The River Wye has lost up to 95% of this important habitat in very recent years and the LPA, as a competent authority under the Habitats Regulations, is under a duty to take steps to restore this habitat.

Natural England's conservation objectives for the River Wye require a reduction in air pollutants, including ammonia and nitrogen deposition. The Air Pollution Information System (APIS) shows there is a significant exceedance of the critical loads and levels of these pollutants to this part of the SAC.

5) At 4.6.1, the report says "*the site is permitted by the Environment Agency and ultimately it is the Agency that regulates emissions to air, land and water.*" However, it fails to explain that these emissions are a material consideration in any planning decision.

6) At 5.3 the report cites a letter of objection that the development "*is no longer compliant with how it was originally permitted.*" It has not referred to the legal opinion that it was never compliant with the permission.

Nor has the report explained the concept of "salami-slicing", in which components of a wider project - such as this AD plant - are treated as separate items in order to avoid scrutiny under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and the Conservation of Habitats and Species Regulations 2017. This was explained in the legal opinion and is highly relevant to this application: committee members need to decide whether this application is an attempt at salami-slicing.

7) At 6.3 you advise that a number of changes and additions "*were required under the permit, most notably the addition of a 3m high silage pit wall...*" This is wrong and significantly misleading. I attach a copy of the approved Environmental Permit plan, which shows that the bund was only required to be 0.5m high (Emission Point Q), and a Freedom of Information response from the Environment Agency advising that the EA has NOT asked for any development other than is shown on this plan.

You refer to an "*underground gas holder.*" The gas holder is above ground (although it was probably deflated when you visited the site). It was installed when the AD was built, even though it was not part of the planning application and was not shown on the application plans. A gas holder was shown on a landscaping plan approved in 2011, however it was installed in a different location to this plan. The gas holder is in the location shown on the permit plan. (Emission Point I).

8) At 6.5 the report states "*Officers have not been provided with any evidence that the original permission was not installed and appointed as approved prior to the EA permit application approval.*" We have submitted ample evidence of this, not least the fact that, from the start, the development covered a much larger area than disclosed and so should have been screened under the EIA Regulations; the applicant installed silage pits outside the red line boundary, the tanks and process buildings were not in accordance with the plans; most of the structures were not olive green as required by condition, the hardstanding and drainage precluded the implementation of the landscaping plan and the AD used a slurry pit-outside the red line - for digestate storage (also in breach of the environmental permit).

9) At 6.9 the report says "*the need for the second back up CHP has arisen from changes in the requirements from the EA.*" The EA's FOI response contradicts this. The EA says it has not required any works or equipment beyond what is shown on the permit plan.

10) The report describes the CHP as "*a standalone development.*" By definition it cannot be standalone. Without the AD, there is no requirement for the CHP and without the CHP, there is no requirement for the concrete walls or the proposed extension of them.

11) At 6.14 and 6.16, the report advises that the "*principle of the AD plant is not for consideration.*" This statement contradicts the legal opinion and is a matter of planning

judgement for committee members. If the case proceeds to the inquiry, it will be a question for the Planning Inspector to address.

12) At 6.30, the report says *“it is unclear if the concrete wall was constructed as a noise barrier.”* The applicant has confirmed that it was. See attached extract from a letter he wrote to a neighbour. (The whole letter can be provided if necessary).

13) At 6.33 the report has misquoted NPPF paragraph 174, which refers to *“recognising the intrinsic character and beauty of the countryside.”* This paragraph is about conserving and enhancing the natural environment and makes no reference to rural communities as the report suggests. The report has omitted to cite the NPPF paragraphs most relevant to this application - 176 and 177.

*176 Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within all these designated areas should be limited, while development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.*

*177 When considering applications for development within National Parks, the Broads and Areas of Outstanding Natural Beauty, permission should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:*

- *a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;*
- *b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and*
- *c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.*

14) At 6.35 the report advises that *“the concrete wall is not part of this application”* (and incorrectly claims that the wall was part of the EA permit). The wall is only immune from planning enforcement if it can be determined that it is separate from the AD project and that substantial completion has been achieved. As you are aware, the AD site continues to evolve with the installation of the digestate storage tank last December and the erection of a bund to the north of the site this year.

If this permission is granted, it would require a further extension to the walls, which would mean that the walls themselves are not complete and are not, therefore, immune from planning enforcement even if they could be isolated from the AD project.

Since the CHP is not acceptable without an extension to the walls, further development of the walls is required and must form part of this planning application.

The Applicant has not provided any plans or elevation drawings of the existing and proposed walls.

15) At 6.43, the report advises *“Planning permissions cannot be reversed”*. This is not strictly correct: planning permissions can be revoked, but planning authorities rarely do this because they may have to pay compensation. However, that is not an issue here where a

legal opinion has demonstrated that the development is unlawful and the planning permission invalid.

In a very similar case Vale of Glamorgan Council issued an enforcement notice against a much larger biomass development than this one because it was not built in accordance with the plans:

[https://www.valeofglamorgan.gov.uk/en/our\\_council/press\\_and\\_communications/latest\\_news/2021/August/Council-takes-enforcement-action-over-Barry-Biomass-Plant.aspx](https://www.valeofglamorgan.gov.uk/en/our_council/press_and_communications/latest_news/2021/August/Council-takes-enforcement-action-over-Barry-Biomass-Plant.aspx)

Herefordshire Council could and should do the same so that the whole AD project at Much Fawley can be subjected to Environmental Impact Assessment to determine whether the many harmful impacts of this development can be mitigated.

Finally, can officers please explain what is meant by a “*green storage container*” in the application description.

Please confirm that these matters will be addressed in an update to the committee report and that the representations and evidence I have provided in relation to the HRA, heritage and landscape impacts will be put before the committee.

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**The following emails were received from Karen Hartwell Baker on Saturday 13<sup>th</sup> November 2021:**

Dear Rebecca

As you are aware from the numerous historic complaints, this site has caused much distress to neighbours from odour, noise and damage to the riverbanks due to altered drainage and run off. Complaints which could have been dealt with had the site been effectively managed, machinery maintained, planning and EA requirements adhered to.

By separate emails, due to the file size, I will forward 3 documents which you have seen but the Committee members will probably not have seen:

- An EA report regarding noise and odour
- Counsel advice regarding the site
- Helen Hamilton’s presentation in March to the Council Officers regarding the breaches and disregard for EA and Planning, historic and current.

The CHP was running for almost 4 years whilst the original engine was being repaired.... During this time reports of noise, and close neighbours being unable to sleep at night with windows open were made, they were ignored. Why was planning only applied for retrospectively?

Likewise, planning for the green digestate storage tank was only sought after it had been built. It stands outside the permitted area of the site.

The CHP cannot be considered on a stand alone basis as the applicant asserts that the concrete walls were built as soundproofing.

If these walls were built as soundproofing, they would have encompassed the CHP and planning should have been sought. It is more probable that the walls were erected for a silage pit as there was a breach of EA permit with the current storage.

I understand there is no enforcement against the concrete walls. Is it normally permissible to alter footpath levels and erect high concrete walls in an AONB without planning?

According to the officer report there is no issue with ground water. Could you explain why the site area is permanently puddled and it flooded at Christmas necessitating pumping the excess polluted water over the field into the Wye?

This case is being taken to committee when an inquiry is scheduled to take place in 2 weeks time. If the planning inspectorate considered it necessary to take four days over this case, how are committee members meant to be able to decide at a Planning Committee meeting?

According to the current operators the AD is running at less than 1% capacity, just to keep it alive whilst a decision is taken in regard to leasing the site to commercial operators. It is therefore not representative of what it has been like in terms of nuisance when running at full capacity.

Should the site be leased to a commercial operator, it will no longer have justification for its original planning permission as an on-farm operation.

Documents submitted via email:

- Environment Agency Report of site visit on the 26<sup>th</sup> May 2021
- Council Opinion from Christiaan Zwart acquired by Marches Planning
- Anaerobic Digester & Plant at Much Fawley & Seabourns Farm presentation by Marches Planning 11<sup>th</sup> March 2021

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### **Email from Natural England to Mrs Helen Hamilton on the 11<sup>th</sup> November 2021**

Links to correspondence full:

<https://myaccount.herefordshire.gov.uk/documents?id=a3a2ee0b-4642-11ec-ae38-0050569f00ad>

<https://myaccount.herefordshire.gov.uk/documents?id=d91fd477-42f3-11ec-aa16-0050569f00ad>

Dear Ms Hamilton,

Thank you for your email.

I can confirm that Natural England only considered this specific application which was to install another CHP unit to be used as a back-up for the existing one. Our advice is not related to the wider AD project which you have raised concerns around. We did not consider whether the existing relevant permissions were correct and whether the AD plant was installed and run as per the original consents. Our consideration was purely based on the use of another CHP whilst the other was not being used. The planning documents stated that only one would be run at any one time and this was to be secured through condition if planning consent was granted. Our response was based on this statement which is highlighted within the HRA.

Natural England has not commented on the potential impacts on AONB but in general we would recommend the relevant AONB board is contacted for their views when a proposal falls within a protected landscape.

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### **Comments received from Brockhampton and Much Fawley Parish Council**

The Parish Council wish to support local businesses and to reflect the concerns of the applicant and the local residents adjacent to the proposed site. On balance the Parish Council of Brockhampton with Much Fawley oppose this retrospective application and

request Herefordshire Council withholds planning permission, subject to a full review of the planning and permitting compliance requirements to address the concerns raised.

This retrospective application is for the placement of a Standby CHP Generator installed in a shipping container that appears to be closer to neighbours' homes than the CHP plant approved as part of, or subsequent to, the original application for an AD Plant. Only one CHP plant can generate electricity at any time.

Following installation of the standby, plant that is the subject of this application, it seems that the standby plant has become the primary means of producing electricity and heat for the AD unit and the original system is used as the standby unit now.

The plant that is the subject of this application has raised significant concerns from the residents adjacent to the site, as the noise and emissions from this unit appear to produce a higher level of nuisance than the original equipment and location.

There appears to be some confusion over the proposed mitigation measures to address the issues raised by residents close to the site. Any mitigation measures that might be offered or required must be completed and inspected by the appropriate officer.

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### **Comments received from Sarah Lewis from Historic England**

I can confirm that we rely on the LPA to judge whether consultation in accordance with national guidance is necessary and on the basis that the application relates only to the CHP unit and storage container we would not expect to have been consulted in this instance.

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### **Letter of support from the owners of Tremelza received on the 16<sup>th</sup> November 2021**

Thank you for your time earlier. As discussed on the phone, my property is marked on the preceding planning document as being one of the properties at most risk of the noise impact from the plant.

As discussed I wanted to make my neutrality in this matter clear and that I or my partner are not under legal representation by any of the parties involved currently; who I understand have only detailed they are representing "the community" for the record. As such I wanted to make it clear that this does not include the owners of Tremelza (site mark B).

My views on the site have not been sought by any official body with regard to this whole matter and have only been requested by that of neighbours currently which as a new resident, I am somewhat uncomfortable with given the long history of the plant and strained community relationships.

I will be more than happy to discuss this at an official level given privacy and opportunity to do so.

As such I wanted to make it clear that I have no objection to the installation of sound suppression measures around the site as I was under the impression this was the primary complaint. To which a solution has been identified and can be carried out to reduce the impact of the site on the community and is a potentially curative measure to much of the hostility against the plant. I am more than happy to discuss concerns/issues and our viewpoint with planning office. Mr & Mrs Green (the current owners) and any future leaseholder of the plant to ensure that noise is reduced and production of renewable energy is sustained whilst minimising impact on the local residents.

Just to make it clear I have some wider concerns surrounding the planning review and engagement process. I have been made aware of a number of planning meetings taking place at primary complainants' homes with local councillors in attendance, to which I was

invited but declined as only complainants were represented. This did not give appropriate scope for fair debate on the matter as the owners or future leaseholders we're not present which presents a clear opportunity for bias in decision making. As such I declined to attend these gatherings. Had I been consulted by an official body with representatives of all parties this may have been different. I also wanted to highlight my concerns with regard to council planning officials attending the site and Mr & Mrs Greens farm without prior consent/appointment whilst also not wearing appropriate clothing hi viz jackets and inspecting farm buildings again without prior arrangement which presents privacy , health & safety concerns as well of that of neighbourhood security. I felt I should highlight this to you so you can investigate appropriately

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## **OFFICER COMMENTS**

The legal opinion by Christiaan Zwart's which was acquired by Marches Planning addresses the lawfulness of the whole AD development and need for an EIA. The legal opinion states that the development began in 2012. However the applicant has provided evidence that the AD Plant has been operational since 8 March 2011 when it was first commissioned under the Renewables Obligation regime where Renewable Obligation Certificates are issued to operators of accredited renewable generating stations for the eligible electricity they generate.

I note the comments contained within the representations relating to evidence submitted in respect of works not being undertaken in accordance with approved details. It is acknowledged that since it began operating, changes and amendments have occurred across the site. Officers have carefully considered these varying elements of the development and all the information available to them and concluded that they are immune from enforcement action.

This application deals only with a second CHP unit and storage container. If approved it does not prevent further enforcement action being taken on the wider development if it becomes necessary.

The Officer report has addressed the need for an Environmental Impact Assessment under the 2017 Town and Country Planning Regulations at paragraphs 6.6 – 6.8 of the Officer appraisal.

Whilst Officers appreciate the frustration from locals in relation to the time it's taken to get the application to planning committee, given the sensitive nature of the site and that of the representations received Officers have ensured that all matters which have been raised within representations and which are considered material to that of the proposal have been carefully considered. Where necessary amended plans and further evidence in relation to breaches of planning control have been requested by the applicant and investigated by Officers to ensure that when bringing the application in front of members of the planning committee all material planning considerations which have been identified have been addressed.

Officers can confirm that the Environmental Permit variation application was submitted to the EA on the 4<sup>th</sup> April 2021 and is currently being considered by the National Permitting Service. The variation incorporates the backup CHP unit under consideration under application 202566.

Whilst Officers acknowledge concerns in relation to the proposed landscaping scheme in relation to ground conditions, the Landscape Officer is satisfied with the proposed planting zone and has confirmed that it is not unusual for hedgerow plants to be grown alongside walls. Conditions 5 attached to the recommendation will ensure that that a planting zone of 2-2.5m is provided and that the landscaping is maintained for 10 years in accordance with details outlined within the submitted landscape maintenance and management plan. It is for

the landowner's interest to ensure that the ground conditions do not prevent the survival of the trees.

The site is permitted by the Environment Agency which regulate emissions to air from the site. However air emission are a material consideration in any planning decision and as such the Council Environmental Health Officer which deals specifically with air quality and emission was consulted as part of the application and their comments can be found at paragraph 4.7 of the Officer report.

The concrete wall is not part of this application. From all of the evidence provided by the applicant and Mrs Hamilton, the wall was installed as a secondary containment which was a conditional requirement of the permit. The wall was completed in April 2017.

## **CHANGE TO RECOMMENDATION**

No change to recommendation other than that of the correction to condition 5 which was misprinted within the planning report and should read as follows:

5. The landscaping scheme as shown on approved Landscape Plan 050-210 rev B shall be completed no later than the first planting season following the date of the decision. A planting zone of minimum 2-2.5m shall be provided, with trees planted at minimum 2.5m from the base of the concrete wall. The landscaping shall be maintained for a period of 10 years in accordance with the details outlined within the Landscape Maintenance and Management Plan by Steele Landscape Design dated November 2021. During this time, any trees, shrubs or other plants which are removed, die or which are seriously damaged shall be replaced during the next planting season with others of similar sizes and species unless the Local Planning Authority gives written consent to any variation.

In addition no later than the 1st April in each of the 5 calendar years following the first planting of the hedgerow and trees as shown on plan 050-210 rev B, the operator of the AD plant shall submit to the Local Planning Authority a written statement detailing:

- a) The number, location and species of plants, shrubs and trees which have been planted, in the preceding 12 months;
- b) The number, location and species of plants, shrubs and trees which have died, become diseased or seriously damaged in the preceding 12 month; and
- c) Proposals for the replanting and maintenance of any such failures with plants of similar size and species within the following 6 months.

Reason: In order to maintain the visual amenities of the area and to confirm with policy LD1 of the Herefordshire local Plan – Core Strategy and the National Planning Policy Framework