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PRIVATE & CONFIDENTIAL

Sarah Feist
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Barry CF63 4RT

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17th February 2021

Dear Sarah

Town and Country Planning Act 1990 (as amended) (the "Act")

Planning Permission 15/00031/OUT

Location: Barry Biomass Energy Facility, Barry Docks, Barry CF63 4JE

I write further to your letter dated 12 January 2021, my initial response dated 15 January and our exchange of emails on 19 and 29 January respectively.

We have now obtained advice from Leading Counsel. There has also been further dialogue between the solicitors acting for Biomass UK No. 2 Ltd ("**ProjectCo**") and the Council's legal officer, James Docherty.

In your email dated 19 January, you wrote:

"Whilst noting your comments, **the development** that has been undertaken does not accord with the details approved under application 15/00031/OUT and **is not therefore considered to benefit from planning permission**. As confirmed in my letter, it is considered that the submission of a S73A application would be the most appropriate way forward to enable the current discrepancies to be regularised. **In the absence of planning permission, the development remains unauthorised** and in such circumstances, it would be expedient to take enforcement action, particularly if it is your intention for the facility to become operational." (emphasis added)

I explained in my previous letter that the project has been developed substantially in accordance with planning permission 15/00031/OUT and reserved matters approval 2016/00187/RES. I clarified that the "discrepancies" to which you had been referring were in fact nine small ancillary structures rather than the development as a whole. Notwithstanding the references in your original letter to regularising "the entire

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development" and your continued references to the development as a whole cited above, I understand that James Docherty has since helpfully clarified that "*the requirement for s.73a application would be solely in relation to those matters still outstanding at that time*".

For completeness, I enclose with this letter:

1. a copy of planning permission 15/00031/OUT dated 31 July 2015 (the "**Outline Planning Permission**");
2. a copy of the approved site layout plan E1627-2105 Rev A listed in condition 5 of the Outline Planning Permission (the "**Approved Layout Plan**");
3. a copy of reserved matters approval 2016/00187/RES (the "**Reserved Matters Approval**");
4. drawing OS01 Rev A, which is an as-built drawing onto which blue edging has been overlaid to identify the 9 structures under scrutiny (the "**Structures Plan**"). The Structures Plan was issued to Ian Robinson on 9 December 2020 to assist discussions and precipitated your letter on 12 January;
5. a table that was provided by James Docherty on 9 February. The table helpfully identifies each of the nine structures on the Structure Plan and sets out the Council's position in respect of each. Biomass UK No. 2 Limited's response against each item is recorded in an additional column inserted on the right-hand side of the table (the "**Structures Table**").

As I have previously stated, the Outline Planning Permission authorises "a wood fired renewable energy plant at David Davies Road, Woodham Road, Barry" (the "**Development**"). The Outline Planning Permission was not challenged within the applicable 6 week period and is now beyond the scope of any such challenge. The Council granted the Outline Planning Permission for the Development subject to 31 conditions. Condition 5 is as follows:

5. This consent shall relate to the plans registered on 5 February 2015 other than where amended by plans reference E1627- 2101 Rev A, E1627- 2102 Rev A, E1627- 2103 Rev A, E1627- 2104 Rev A, **E1627- 2105 Rev A**, dated 16 April 2015 and E1627- 2116 Rev B, E1627- 2117 Rev B, E1627- 2118 Rev B, E1627- 2119 Rev B, E1627- 2120 Rev B received on 22 July 2015 as well as the updated Air Quality Assessment submitted on 12 June 2015 and the Waste Planning Assessment received on 17 June 2015.

Reason:

To ensure a satisfactory form of development and for the avoidance of doubt as to the approved plans.

The Approved Layout Plan is clearly identified (see highlight). The reason for imposing the condition was to ensure a satisfactory form of development.

Following the grant of the Reserved Matters Approval and discharge of pre-commencement conditions (ref. 2015/00031/5/CD), the Development was lawfully implemented in 2016. As a matter of fact, the Development is therefore authorised by a lawfully subsisting and implemented planning permission. The

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Outline Planning Permission is not invalid. And the Development, which is not yet operational, is not unauthorised.

It is plain from a comparison of the Approved Layout Plan and the Structures Plan that the Development has been carried out substantially in accordance with the Approved Layout Plan as required by condition 5 of the Planning Permission.

You have suggested that ProjectCo makes an application pursuant to section 73A of the Act to regularise the whole development. However, the Council cannot compel such an application to be made and for the reasons set out above, there is no need for an application to regularise the whole development and none will be made by ProjectCo.

The "discrepancies" between the Approval Layout Plan and the Structures Plan that have been the subject of recent discussions are limited to the nine small ancillary structures shown on the Structures Plan. The position of ProjectCo in relation to each structure is itemised in the Structures Table. What this exercise clearly shows is that:

1. only six of the nine structures merit any further consideration. Two are shown on the Approved Layout Plan (structures 4 and 6) and are therefore authorised in principle by the Planning Permission. A third (structure 9) has been erected on the site by Western Power Distribution using its statutory powers as a district network operator and the fact that it is not shown on the Approved Layout Plan is irrelevant;
2. of the six remaining structures, four are non-essential to the operation of the Development (structures 1, 2, 3 and 5). All are non-material within the context of the Planning Permission and Development as a whole and/or benefit from permitted development rights;
3. structures 7 and 8 (which relate to fire prevention) are necessary for the safe operation of the Development and to comply with the environmental permit and insurance requirements. They are needed because the mains water supply at the location of the Development is insufficient to support a hydrant system. However, within the context of the Development and the Outline Planning Permission as a whole both are arguably non-material.

Non-material amendments can be made under section 96A of the Act. There is relatively little guidance and case law on the issue but what there is makes clear that there is no statutory definition of "non-material" because it will be dependent on the context of the overall scheme and is a matter of fact and degree for the authority. A local authority is required to have regard to the effect of the change together with any previous changes made under section 96A and it is not expected that any likely significant environmental effects will arise from the changes when compared to the unamended permission.

When deciding whether the six structures under scrutiny are non-material, the key issue is not whether the changes are perceptible or noticeable in some way, but whether they are material. Non-material amendments are always noticeable because they change the permission to something different to what it was before, and difference is noticeable. But the fact that the differences can be perceived does not make them material under statute. The guidance and case law summarised above all emphasise that materiality in this context is concerned with the effects or impacts of the change. These effects or impacts are to be

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judged having regard to the original permission and the context of the overall scheme, so that what is material in one context may not be material in another.

In this case, the starting position is the Outline Planning Permission. As can be seen from a comparison of the Approved Layout Plan and the Structures Plan (as built), the overall design of the Development has not changed. The six structures under scrutiny do not have any significant environmental impacts and nor do they invalidate the assessments previously undertaken and considered by the Council. Indeed, an updated environmental statement of the as-built Development will shortly be submitted to the Welsh Government confirming that there are no significant environmental effects arising from the Development that have not already been satisfactorily mitigated by the Outline Planning Permission. ProjectCo expects to soon be in receipt of confirmation of this from the Welsh Government.

When the above context for non-material amendments is applied to the assessment of the six structures under scrutiny, it is plain that the differences between the Approved Layout Plan and the as-built scheme shown on the Structures Plan are *de minimis*. They do not change in any materially impactful way the form of the Development controlled by planning condition 5 of the Outline Permission. All of the issues are capable of being addressed through non-material amendment applications or alternatively, the application of permitted development rights or a retrospective section 73A application limited to the individual structure in contention. This is the strategy that was originally agreed with officers in February 2020 and ProjectCo sees no reason to depart from it now.

In the circumstances, ProjectCo considers that there is no need for a section 73A application and nor would it be expedient for the Council to take enforcement action in respect of the Development as a whole. ProjectCo would therefore vigorously defend any such enforcement action and seek to recover its costs of so doing in the event that the Council nonetheless decided to commence such action.

We would welcome a further discussion with officers to agree the approach that will be taken in respect of each of the six structures on the Structure Plan and timeframes for implementing the agreed approach.

Yours sincerely,



Richard Frearson
Managing Director
Power Consulting (Midlands) Ltd

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APPENDIX 1- TABLE OF STRUCTURES RECEIVED FROM JAMES DOCHERTY ON 9 FEBRUARY WITH BIOMASS UK NO.2 LTD RESPONSE

No.	Structure	NMA	PD Rights	Other/Notes	Biomass UK No. 2 Limited response. (Dimensions in cm)
1	Lean to FRB	Possibly due to being sufficiently minor	No. Part of single building operation and therefore not an extension	Officers doubt whether this would be approved by Council's Planning Committee	7434 L x 2217 W x 4000 H (area 16.4 sqm) Agreed that this is non-material within the context of the Development and the Outline Planning Permission. No significant planning or environmental effects are caused by the structure's presence. This structure and the plant within it (hydraulic rams) <u>is</u> not fundamental to the operation of the Development. It is not certain that an NMA application would be called-in to committee or refused. Disagree with the Council's analysis of PD Rights. It is irrelevant when the structure was erected.
2	Lean to Compressor House	Possibly due to lack of prominence from outside the site, but large structure so this is arguable	No. Part of single building operation and therefore not an extension	Officers doubt whether this would be approved by Council's Planning Committee	12508 L x 7350 W x 4231 H or 9754 H if aux coolers included (area 27.5 sqm) Agreed that this is non-material within the context of the Development and the Outline Planning Permission. No significant planning or environmental effects are caused by the structure's presence. The structure houses air compresses that can no longer fit in the main building <u>as a result of</u> detailed design. The Council appears to judge the structure as being acceptable in principle with concern over the extent of the physical appearance due to size. The Council should be confident and comfortable processing a non-material amendment application. The structure and its design, while noticeable when examined, is overall in keeping and consistent with the Development as a whole. The size of the physical change is limited when seen in the context of the scheme itself and the placement of the scheme within its surroundings. It is not certain that an NMA application would be called-in to committee or refused. Disagree with the Council's analysis of PD Rights. It is irrelevant when the structure was erected.
3	Urea Silo	Possibly. Does not significantly affect the appearance of the premises.	Part 8 – Class B. Constructed after rest of site and under 15m as required in GPDO	Officers doubt whether this would be approved by Council's Planning Committee	4544 L x 4544 W x 11131 H (area 20.3 sqm) Agreed that this is non-material within the context of the Development and the Outline Planning Permission. No significant planning or environmental effects are caused by the structure's presence. The silo contains <u>rolled</u> urea (solid) that can then be mixed on site to produce a urea solution that is used in the combustion process. The plant could be operated without the <u>silo</u> but this would then necessitate deliveries of pre-mixed urea to be regularly delivered to the site by tankers. Retention of the silo reduces amenity impacts and increases operational efficiency. It is not certain that an NMA application would be called-in to committee or refused. PD Rights apply.
4	Incline Conveyor	No. Materially affects the appearance of the building.	No. Part of single building operation and therefore not an extension	s.73a application (for the development as a whole)	Disagree with Council's analysis. The incline conveyor is shown on the Approved Layout Plan and forms part of the Development authorised by the Outline Planning Permission. See highlights on below extract from the plan. No further action is required. The only difference between the as built conveyor and that shown on the Approved Layout Plan, is that the as-built version connects to Structure 5 whereas on the Approved Layout Plan it connects straight to the main process building.


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No.	Structure	NMA	PD Rights	Other/Notes	Biomass UK No. 2 Limited response. (Dimensions in cm)
					<p>Although not individually labelled as "conveyor" on the Approved Layout Plan, it falls under the umbrella terms "Feedstock system" on the key.</p> <p>The fact that the conveyor is not shown on the approved elevation plans is irrelevant and does not detract from the fact that the conveyor is shown on the Approved Layout Plan. The conveyor is <u>plant</u> not a building. The elevation plans show the outline of the silhouette of the consented buildings. In determining the planning application for the Development, officers would have understood that feedstock would have been delivered to the "feedstock reception building" before being transferred by the "feedstock feed system" to the "main process building" (all labelled on the Approved Layout Plan). The planning application in 2015 primarily concerned a change to the approved technology and adoption of the Outotec gasification system. The changes when compared to the 2010 planning permission were technology focussed and it is inconceivable that the Council would not have understood that a conveyor would have been needed to transfer feedstock to the gasifier. The Planning Statement submitted in support of the application included a photograph showing an example of an Outotec plant which included an external conveyor identical to that erected at the Development.</p> <p>Extract from Approved Layout Plan clearly showing Structure 4:</p>  <p>Extract from Planning Statement submitted with application for the Planning Permission:</p> <p>2. TECHNOLOGY APPROVAL</p> <p>2.1 It is proposed to replace the system detailed in the 2010 Permission: manufactured by Prestige Thermal Equipment (which produced a 5 MW average net output) with an alternative system made by the globally established manufacturer Outotec (www.outotec.com). The Outotec technology is more efficient and will result in the average net output increasing to 10MW for the same amount of fuel input.</p>  <p><i>Photo 1 - Example of operational Outotec gasification plant in USA</i></p>
5	Screening Tower & Dust Extractor	No. Materially affects the appearance of the building.	No. Part of single building operation and therefore not an extension	s.73a application (for the development as a whole)	2100 L x 487 W x 1370 H (102.3 sqm) Disagree with Council's analysis.

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No.	Structure	NMA	PD Rights	Other/Notes	Biomass UK No. 2 Limited response. (Dimensions in cm)
					<p>No significant planning or environmental effects are caused by the structure's presence. The structure screens oversize and metal products from the fuel stream. The structure is not essential or integral to the operation of the plant. Fuel could be screened <u>off-site</u> but it is less economic to do so.</p> <p>The Council appears to have a concern over the extent of the physical appearance due to size. The Council should be confident and comfortable processing a non-material amendment application. The structure and its design, while noticeable when examined, is overall in keeping and consistent with the Development as a whole. The size of the physical change is limited when seen in the context of the scheme itself and the placement of the scheme within its surroundings.</p> <p>It is not certain that an NMA application would be called-in to committee or refused.</p> <p>Disagree with the Council's analysis of PD Rights. It is irrelevant when the structure was erected.</p> <p>Given that the structure is not integral to the Development, if a s.73A was used the redline could be limited to the structure alone and need not relate to the development as a whole and could be submitted to the Council.</p>
6	Diesel Generator Diesel Tank	Likely to be Yes. No material effect on development	No. Part of single building operation and therefore not an extension	Officers doubt whether this would be approved by Council's Planning Committee	<p>Not unauthorised but agreed that change in location is non-material.</p> <p>The Approved Layout Plan includes a room labelled "Emr. GENSET" which stands for Emergency Generation Set. This shows that Development has always been designed to include emergency equipment that would provide essential back-up to bring the plant to a safe condition in the event of a mains electricity black out. See highlighted extract below. During the detailed design phase of the development, the generator and tank have instead been located a few metres away from the building in which they were originally to be housed. The generator and tank are intrinsic to one another.</p> <p>No significant planning or environmental effects are caused by the structure's presence.</p> <p>It is not certain that an NMA application would be called-in to committee or refused.</p> <p>Disagree with the Council's analysis of PD Rights. It is irrelevant when the structure was erected.</p> 
7	Fire Kiosk	Possibly due to being sufficiently minor and general lack of prominence	Possibly, Part 8 - Class B	Officers doubt whether this would be approved by Council's Planning Committee	<p>600 L x 220 W x 290 H (area 13.2 sqm)</p> <p>Agreed that this is non-material within the context of the Development and the Outline Planning Permission.</p> <p>No significant planning or environmental effects are caused by the structure's presence.</p> <p>This structure houses valve sets necessary to distribute fire water to the deluge system.</p>

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No.	Structure	NMA	PD Rights	Other/Notes	Biomass UK No. 2 Limited response. (Dimensions in cm)
					It is not certain that an NMA application would be called-in to committee or refused. PD Rights apply.
8	Fire Water Tank Fire Pump House	No. Too large and visible to not have a material effect.	Possibly, Part 8 Class A. If it can be confirmed as being more than 5m from the curtilage of the site	Potentially could be regularised 'on its own' if not essential/integral to functioning of the plant. Same concerns as above re: committee decision	Tank: 1000 L x 1000 W x 1020 H (area 100 sqm) Pumphouse: 1000 L x 600 W x 400 H (area 6 sqm) For further discussion with the Council. No significant planning or environmental effects are caused by the structure's presence. The structure houses fire water as specified by the fire prevention plan that forms part of the environmental permit and pumping equipment. The Council appears to judge the structure as being acceptable in principle with concern over the extent of the physical appearance due to size. The Council should be confident and comfortable processing a non-material amendment application. The structure and its design, while noticeable when examined, is overall in keeping and consistent with the Development as a whole. The size of the physical change is limited when seen in the context of the scheme itself and the placement of the scheme within its surroundings. It is not certain that an NMA application would be called-in to committee or refused. PD Rights apply. Alternatively, a <u>free-standing</u> s.73A application could be submitted to the Council for this structure alone. This was the strategy previously agreed with the Council in February 2020.
9	Reactor Transformer Unit		Yes. Part 17 Class G		Agreed position with the Council. The structure was erected by WPN under its powers as a statutory undertaker and no further consideration is required.

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