

Economic Development and Environment Policy & Scrutiny
Committee

**SCRUTINY REPORT
ON THE EXERCISE OF
PLANNING CONTROL ON THE USE OF
INERT WASTE FOR
RECREATIONAL DEVELOPMENT**

(Reference: EDE-SCR – 07)

Dated: May 2011



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Glossary of Terminology

| | |
|-----|---------------------------|
| EA | Environment Agency |
| ECC | Essex County Council |
| LPA | Local Planning Authority |
| PPS | Planning Policy Statement |
| WPA | Waste Planning Authority |

Preface

Originally I proposed this scrutiny review to the Economic Development and Environment Policy and Scrutiny Committee, because of the ongoing public concern that arises where large volumes of inert waste are imported to a local site for the construction of a golf course or other recreational facility. This report outlines how development using inert waste may be controlled through the planning regulation and waste permitting frameworks, and some of the recent changes that have been introduced. It is also notable that in March 2009 Essex County Council published Guidance that seeks to address those areas of planning control where ambiguity could result in less effective development control being exercised by planning authorities where planning applications incorporate the use of inert waste for recreational development.

While the review has been useful in developing Members' understanding of planning control where inert waste is used, in many ways its importance lies in the fact that it has provided a baseline for the Task and Finish Group to undertake further investigation next year when the Council's Guidance and new waste permitting arrangements have been in place for a sufficient period to monitor their effectiveness in practice.



Chairman of the Task and Finish Group, Economic Development and Environment Policy & Scrutiny Committee

Executive Summary

The focus of this scrutiny review has been to investigate the regulation of recreational development using inert waste, and the changes that are being introduced to improve the effectiveness of the various regulatory bodies that may be involved.

In Essex action has been taken to clarify the roles of the respective planning authorities in the formal consideration of proposals that use inert waste in the creation of recreational facilities like golf courses.

The County Council 's Minerals and Waste Planning Team has published guidance to address those areas of planning control where ambiguity could result in a less effective approach by planning authorities. The guidance was published in March 2009 and already the Guidance has proven to be effective as a number of proposals have been re-directed to Essex County Council as the Waste Planning Authority for determination. Additionally the Guidance has attracted positive attention at a national level and underpins its relevancy to all planning authorities adopting a more measured approach to the consideration of planning applications that incorporate the use of inert waste for recreational (landraising) development.

In addition to the planning control that may be exercised by the Waste Planning Authority and Local Planning Authorities, the Environment Agency also has powers to control waste development. However, the scrutiny review has co-incided with changes in the Agency' s powers that only took effect in April 2010. Consequently it is too early to consider the effectiveness of the new regulations. The Agency also has more statutory powers than planning authorities to enforce the regulation of waste development and pollution control, and it may also charge fees based upon the amount of work that the Agency will have to undertake including some of the costs associated with monitoring sites.

Lorry movement associated with development is often a major source of local concern and irritation. However, there are limited means available to control those lorries and therefore the impact of vehicle movement needs to be considered when planning consent is sought.

Recommendations

1. That in the summer of 2012 the Cabinet Member for Communities and Planning be invited to inform the Economic Development and Environment Policy and Scrutiny Committee on the longer term effectiveness that the ' Development Involving County Matters. Guidance Notes, March 2009 ' may have had in Essex since its publication.
2. That as part of the monitoring of the outcomes of this review in the summer of 2012, the Environment Agency be invited to provide a progress report on the implementation of the new Environmental Permitting Regulations.
3. That the Cabinet Members for Highways and Transportation, and Communities and Planning continue to explore opportunities to reduce the impact of lorry movements associated with development upon the local highway network.

INTRODUCTION

In Essex, County Councillors have been concerned about problems they have perceived around some golf course developments over a number of years. It highlights a grey area in planning control that needs to be addressed. The Committee hoped that by undertaking a scrutiny review evidence could be gathered to identify to what extent the controls that are in place to manage recreational development are effective and that there is a need for a more co-ordinated approach to planning matters where both the County and District Councils may have an interest.

BACKGROUND

Since the introduction of the Landfill Tax, companies have had to pay tax on the inert waste that they dispose of at landfill sites that are controlled by a waste permit (regulated by the Environment Agency). Some developments however can be exempt from environmental permitting – e.g. recreational projects. If inert waste is being used to facilitate recreational development, such as a golf course development, it would normally be exempt from permitting and therefore would avoid landfill tax. While planning permission would still be required, there is generally less control on the material being imported to the site because no permit is in place, although exemptions can be revoked if harm to human health/the environment takes place. It is a countrywide issue.



The proper local planning authority to consider these types of application could be either a district or county council depending upon the detail of the development. The test of whether a golf course improvement project is a district or county matter depends fundamentally on whether the proposal constitutes a ‘waste disposal activity’ (change of use) or is an engineering operation (operational development). The County Council would be required to deal with the former as Waste Planning Authority (WPA) and the relevant District Council with the latter as Local Planning Authority (LPA). Most developers will approach district

councils in the first instance for golf course proposals where material is to be imported, albeit those authorities may have less experience in the consideration of the wider issues of waste planning control. The amount of materials and proposed contours for a development would give the experienced waste planner an indication about the scale of that development, and in turn determine which is the most appropriate planning authority for its determination and the level of consultation required. This is a grey area in planning terms as a judgement will have to be made on whether the predominant purpose of the development (or substantial element) involves either waste disposal (for its own sake) or engineering. Matters of fact and degree including scale, form, volume etc are all relevant considerations.

The reasons for undertaking a scrutiny review on the use of inert waste for recreational purposes arose from concern that there have been cases where district councils have determined applications for golf courses, which in fact were large scale projects that should have been handled by the County Council because of the volume of waste materials involved (being clearly above what was necessary to bring about an improvement); and cases where districts have failed to carry out proper consultation including with the County Council. As stated, the re-contouring of a golf course could be an engineering operation for a district to consider as an improvement project. Alternatively, the scale of the project may have much broader ramifications, and the County Council would need to form a judgement on whether or not the importation of materials required for the total contouring proposed is waste disposal (rather than engineering) and in turn if the development should be treated primarily as a waste planning application.

As a waste planning application, issues such as the diversion of inert waste materials from other sites (such as quarries that require such material for restoration) , environmental impact and waste planning policy would all have to be taken into account.



A number of golf course development proposals have been determined in Essex involving the importation of waste materials. Recent examples include Basildon Golf Course, Blakes Golf Course (Epping Forest), Netherhouse Farm (Epping Forest) Rose Farm (Tendring) and Lords Golf Course (Rochford) . The issue of waste importation to construct golf courses is not limited to Essex; there are many other developments that have been proposed countrywide. As a response to the issue, in 2009, the Department for Communities and Local Government issued a guidance note to Chief Planning Officers drawing attention to cases where planning approval has been given to large-scale landscaping developments using waste, which may be wrongly classed as waste recovery operations.

Task and Finish Group

At its meeting in September 2008 (Minute 28) the Committee considered a scoping document produced by Councillor Schofield to undertake a scrutiny review on the exercise of planning control on the use of inert waste for recreational development. The proposed review was added to the Committee' s work programme for future review with the following objective:

‘ To review the effectiveness of planning control upon the use of inert waste for recreational development such as golf courses. ’

In July 2009 (Minute 33) the Committee appointed a Task and Finish Group (‘ the Group ’) to look at the topic in more detail with the following objective. The Health Overview and Scrutiny Committee was also invited to nominate a representative to the Group as that Committee had received some concerns from the public in relation to the construction of two new golf courses.

The Group was made up of Councillor John Schofield as its Chairman, and Councillors John Dornan, Ray Howard, John Knapman, and Gerard McEwen. Councillor John Aldridge, the Committee ' s former Chairman also took part in the review as an ex officio member.

Approach to Evidence Gathering

In undertaking the review the Group took evidence from the following participants:

- Roy Leavitt, Head of Environmental Planning, (Sustainable Environment and Enterprise (ESH)
- Richard Greaves, Planning Manager, Minerals and Waste Planning (ESH)
- Andrew Cook, Development Manager, (ESH)
- Tim Sheppard, Senior Environment Officer, Environment Agency

An important influence upon the way that this review has been conducted in practice has arisen from the fact that its timing has co-incided with two important milestones that seek to address past problems that are the subject of this review:

- From a planning authority perspective, Essex County Council has produced Guidance that seeks to clarify what is a ‘ county matter’ as well as trying to address the question of who the relevant planning authority in situations where applications may involve development using waste ; and
- From a waste licensing perspective new changes have been introduced under the Environmental Permitting Regulations 2010.

Consequently the approach that has been taken by the Group is to outline the regulatory situation in this report with the intention of monitoring how effective the aforementioned changes have been in Essex over a period of two years from the publication of this report.

At its March meeting the Group received copies of correspondence from the Theydon Bois Action Group (TBAG) offering to share its experience upon the effectiveness of planning control at Blunts Farm where ‘ recreational development ’ using inert waste has been approved by the District Council. The TBAG website was a useful reference in providing a local perspective on the development of Blunts Farm. However, based upon its consideration of the

evidence submitted by witnesses around the regulation of recreational development, the Group decided to conclude its evidence gathering on this occasion and not to meet TBAG. Nevertheless this would not preclude consulting local groups as part of

EVIDENCE

What is 'waste'?

There is no planning definition of waste in the Town and Country Planning Act 1990. Furthermore the term is evolving as the recycling of 'waste' materials is developed so that some materials that were previously considered waste may now be considered as a raw material.

An EU Waste Framework Directive (2006/12/EC) defines waste as:

'Any substance or object the holder discards, intends to discard or is required to discard'.

Ultimately, whether a material is actually waste, is a matter for the Courts to determine.

The characteristics of inert waste are:

- 1.No physical, chemical or biological transformations;
- 2.Not likely to give rise to environmental pollution or harm to human health;
- and
3. Does not endanger surface water or groundwater.

County or District Planning Authority?

County councils have statutory responsibilities as waste planning authorities (WPAs), and district councils as local planning authorities (LPAs).

Waste related development is defined in the Town and Country Planning (Prescription of County Matters) (England) Regulations 2003. A county matter for waste related development is as follows:

1. The use of land, the carrying out of building, engineering or other operations, or the erection of plant and machinery used or proposed to be used, wholly or mainly for the purposes of recovering, treating, storing, processing, sorting, transferring or depositing of waste;
2. The use of land or the carrying out of operations for any purposes ancillary to any use or operations specified above, including the formation, laying out, construction or alteration of a vehicular access to any public highway.

A WPA must consult the relevant District Council upon those applications that it will determine. However, a District Council is not obliged to consult the WPA unless it recognises that the application has a 'waste' element or there are Waste Planning policies to be taken into account. In effect, LPAs are required to consult WPAs on any application which could materially affect conflict with or prejudice the implementation of a relevant county policy, including those contained in the waste local plan/ waste development document. Other matters for the Planning Authority to consider are the plant footprint, scale, visual impacts, and traffic movements and working hours.

Under Section 286 of the Town and Country Planning Act 1990 the validity of a planning consent issued by a LPA cannot be challenged on the ground that it should have been determined by another LPA. While conflicts on 'county matters' are rare, in *R v Berkshire CC, ex-parte Wokingham D C* 2/7/96 the Court of Appeal held that where a scheme contained a 'substantial element' which was a county matter, this determined the overall nature of the application and that the County Council was the appropriate planning authority.

In Essex, guidance has been produced by the Essex County Council for the Essex Planning Officers ' Association entitled ' Development Involving County Matters. Guidance Notes March 2009 ', which seeks to clarify what is a ' county matter ', and provide guidance to both District/ County and County planning officers to assist in resolving cases where it may not be clear who the relevant planning authority is.

Aside from being circulated to District Councils across Essex, the Group was advised that the Guide has received attention at a national level, for instance:

- It has been circulated to other English County Councils through the Planning Officer Society ' s Minerals and Waste Committee.
- The Government Department for Communities and Local Government has quoted directly from the Guide in a letter to Chief Planners.
- An article published in Waste Planning Journal.

Since the Guidance was produced Officers confirmed that they had received some positive feedback from Essex District Councils. It was also notable that a number of planning applications have been referred by the LPAs to the WPA for determination including Blakes Golf Course (Epping Forest), Netherhouse Farm (Epping Forest) Rose Farm (T endring) , Lords Golf Course (Rochford) , and Regiment Way (Chelmsford) . Other examples are Great Chesterford (landraising for Agricultural Improvement) . Furthermore the County Council ' s Enforcement Officer monitors weekly all District Council planning application lists for development, which could be considered to be a county matter.

Diversion of Inert Waste

As part of the strategic minerals and waste planning process, the volume of material required and available is taken in to account when setting policy and in determining planning applications. Inert waste is a valuable source of material essential for the restoration of former mineral extraction sites. The diversion of the waste material to sites that have no restoration need with the result that sites across Essex may not be restored in accordance with planning permission timetables or at all. Therefore,

this should be a consideration in any determination of a proposal to deposit waste. Furthermore, the Essex Waste Plan policies require that information as to the source of wastes is supplied with all proposals, not only to ensure their suitability for deposit on any site, but also to ensure that importation of waste into Essex from other regions (in particular London) is strictly controlled.

Essex County Council is in the process of updating its Waste Local Plan, and new policies on managing inert waste in Essex will be introduced in due course.

Sanctions

The Group questioned what sanctions, if any, the WPA has in the event that a LPA determines a planning application that is more of a waste matter. In practice, the WPA is limited in what it can do: if it is aware of a proposal, it may ask to see that proposal. If the LPA has issued planning permission, the WPA has no sanction. If the LPA is the owner of land and wants to develop a recreational amenity on that land, then it may determine the planning application.

Aside from the professional action that may be taken by planning officers, there may also be political judgements that the Council's political organisation may consider under appropriate circumstances.

Monitoring of Conditions attached to Planning Permissions

The Group considered that monitoring should be a key component in the control of the way that inert waste is used in any development. It was confirmed that all sites considered by the County Council are monitored by Planning Officers.

The Environment Agency is able to levy any charges upon operators for the carrying out of monitoring as part of permitting requirements. In addition Waste Planning Authorities can in some cases (landfill sites) impose a charge for site monitoring.

FINDINGS AND CONCLUSIONS

1. Planning Control: Summary and Recommendation

Taking into account what the Group learned about the relevant planning regulations in terms of the aims of the review, Members welcomed the production of the Guide produced for the Essex Planning Officers ' Association as a way towards addressing concerns around the proper determination of planning applications for large scale recreational proposals that use inert waste. It was also pleasing that it had received recognition at a national level.

Unfortunately no historical statistics have been collated on the number of planning applications that have been considered by all planning authorities across Essex where inert waste has been used for large scale recreational development. Therefore at this stage it is difficult to assess the impact of Guidance in practice ie to compare.

The Group was aware that in looking ahead in terms of what the scrutiny review could achieve, it was important the Guidance should have an ongoing impact in the way that these types of application are handled in planning terms. Therefore Members agreed that as part of monitoring the outcomes of the review District Councils should be consulted on how helpful the Guidance has proven in practice, and to seek evidence as to whether or not it has promoted consultation that may otherwise not have taken place as well as more effective development control.

Recommendation 1

That in the summer of 2012 the Cabinet Member for Communities and Planning be invited to inform the Economic Development and Environment Policy and Scrutiny Committee on the longer term effectiveness that the ' Development Involving County Matters. Guidance Notes, March 2009 ' may have had in Essex since its publication.

2. Waste Permitting: Overview

The Environment Agency is responsible for waste permitting, and has regulatory control over waste development including a requirement that large scale landscaping developments have to have an environmental permit that may include provisions to regulate waste development and pollution control.

It has more extensive powers than planning authorities including the ability to prosecute operators for criminal offences. It may also monitor sites more thoroughly on an ongoing basis where it has issued a site licence, and operators have to pay for the monitoring.

In April 2008 changes were introduced under the Environmental Permitting Regulations 2007 whereby Waste Management Licences were replaced by Environmental Permits. There are two types of permit: bespoke and standard rules. The applicant has to pay a fee based upon the amount of work that the Agency will have to undertake.

There are defined rules that determine the type of permit that will be required for a development, which cannot be issued before planning consent has been granted.

- Standard Permits are considered where generic risk assessments have been carried out and a set of rules created. If the operator can comply with the rules then a standard permit can be applied for. One of the requirements to apply for a standard permit is evidence of planning permission (or evidence that planning permission is not required). There is a reduced fee for a standard permit (£2,800 compared with £4,500 for a waste management license based on 2007/2008 charges).
- Bespoke Permits are considered for higher risk activities where the standard rules cannot be complied with (eg the site is within 500 metres of a Site of Special Scientific Interest, or involve more than 100,000 tonnes). They are written specifically for a particular application, take longer to process than standard permits and therefore tend to be more expensive.

It is likely that for golf course development proposals requiring more than 100,000 tonnes of waste a bespoke permit would be required. However, the CL:AIRE Code of Practice is a means of determining that soil from a construction site is not waste if used on the same site (ie it has not been discarded). This would not affect golf courses at present but a revision is imminent, which could mean that soil could be taken to sites other than where produced and not be classed as waste, subject to following the provisions of the Code. There could therefore be circumstances of golf course construction where an environmental permit is not required and the only control available would be through planning.

The Agency must also apply the Recovery versus Disposal Test as it is now a requisite part of determining any application which involves a permanent deposit of waste to land for example

- Construction activities
- Land reclamation activities
- If activity is deemed to be disposal rather than recovery then the new Standard Rules Permit cannot be given.

A waste recovery operation is one where the principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources. Disposal is defined as any waste management operation serving or carrying out the final treatment and disposal of waste.

Once a plan has been determined for a site, the Agency has the powers to enforce compliance. Furthermore there is now one national team that will make decisions in

Enforcement Powers

The Agency has various enforcement powers eg Section 33 of the Environmental Protection Act 1990 and Regulation 38 of the Environmental Permitting Regulations 2010. Its enforcement powers are pursued using the following approaches:

- Dedicated Environmental Crime Teams
- Waste Crime Innovation Programme
- Site Waste Management Plans mean that the Agency tries to tackle any problems at their source.
- Focus on higher risk cases
- Arrests using the Police

While the Agency only has limited resources at its disposal so that prioritisation has to take place, it does undertake the following activities:

| Types of Environment Agency Compliance Assessment Activities | |
|---|--|
| Compliance Assessment Activity: | Description: |
| Sampling/ Check Monitoring | Taking measurement of inputs, emissions or the receiving environment |
| Review of reports and data | Review of reports and data submitted by the permit holder, such as tonnages and environmental monitoring data. |
| Procedure Review | An operator may be required to submit procedures to the Agency for agreement prior to implementation. The Agency may also assess whether procedures referred to in permit applications and the EP OPRA profile are in place and comprehensive. |
| Site Inspection | Attendance at a site to check compliance with all or some of the permit conditions, or directly applied legislation (other than by check monitoring) using for example visual assessment. |

| Compliance Assessment Activity: | Description: |
|---------------------------------|---|
| Audit | In-depth evaluation of an operator' s ability to comply with all, or parts of, the permit, or directly applied legislation. For example, an audit might include specific reviews of the effectiveness of an operator' s procedures and management system. |

Planning or pollution control

The planning and pollution control regimes are separate but complementary.

- The development and use of land is a planning issue for the relevant planning authority.
- The prevention of pollution or harm is a pollution control issue for the relevant pollution control authority.
- The planning authority should assume that the pollution control regime will be properly applied and enforced.

While a planning application may need an impact assessment at the application stage, the day to day control of noise, dust, odour or other nuisance should be regulated by the Environment Agency. The Agency will also consider the process technology and potential pollution impacts.

Waste Permitting: Summary and recommendation

Given that the new regulations / transitional arrangements are in their infancy the Group acknowledged that it would be difficult to assess their impact as part of this particular scrutiny review. Nevertheless Members considered that the Environment Agency should be encouraged to exercise all those powers at its disposal to ensure that any development has minimal impact upon local environment/ communities.

As a part of any future monitoring of the review, the Group considered that a progress report on the implementation of the new Environmental Permitting Regulations should be sought from the Environment Agency.

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As a part of any future monitoring of the review, the Group considered that a progress report on the implementation of the new Environmental Permitting Regulations should be sought from the Environment Agency.

Recommendation 2

That as part of the monitoring of the outcomes of this review in the summer of 2012, the Environment Agency be invited to provide a progress report on the implementation of the new Environmental Permitting Regulations.

3. Highways: Overview

Lorry movements associated with development are often a source of local concern, and the Group questioned how lorry movement and routes may be controlled.

Although a Highways Authority may be a statutory consultee for a planning application, its comments have to be restricted to safety and capacity considerations rather than amenity matters that are more difficult to justify in planning terms. It has no ' Power of Direction ' .

Road hierarchy is taken into account, and classified roads are usually considered suitable for lorry movement. In some cases a haul road may have to be constructed as part of a planning permission so that development may go ahead. However, the imposition of planning conditions to restrict lorry routes would be difficult to enforce and cannot be attached to planning permissions. Lorry movements may only be restricted by the making of Traffic Regulation Orders such as weight restrictions in line with statutory regulations based upon highways rather than planning grounds.

In the main a Highways Authority must rely on either the Local Planning Authority, the Police or Trading Standards depending on the circumstances. There are no direct powers of enforcement available in relation to the planning process.

In response to the question of what works well or not so well for the Highways Authority in performing its role in respect of waste management, the Group learned that the larger operators generally have a good track record of agreeing and adhering to lorry routes. However, difficulties arise from those smaller less organised operations that rely heavily on independent contractors to bring in waste. It was also observed that the WPA has more experience in handling those applications that relate to waste operations, and the consideration of highway related matters.

The Group' s attention was drawn to the following approaches that may be considered as a way of reducing the impact of development upon the local highway network:

- Greater use of Condition Surveys and Bonds to protect the fabric of the highway against the abnormal use created by the types of operations under consideration. Therefore if a site operator defaults on addressing any repairs caused by his operation, then there is a legal agreement to redress a problem.
- The provision of more voluntary routeing agreements as part of the applications (even if they are included in a planning permission they are difficult to enforce against the site if different lorry operators use different routes).

The operational activity associated with the volume of lorry movement generated by development is often an underlying feature of local concern, and may include the queuing of parked delivery lorries before a site opens in the morning or overnight. Planning permissions will include conditions that specify operating hours, and the Group questioned if a more flexible approach to those hours could alleviate problems associated with the queuing of lorries. While the Highways Authority may prefer to avoid this phenomenon, it has no control on operating hours that are a planning control consideration. The introduction of Traffic Regulation Orders to restrict parking at site entrances would require Police enforcement and only move the problem of waiting vehicles to other locations.

Highways: Summary and recommendation

While the Group was mindful that lorry movements are often a source of considerable concern to local residents where development is taking place, it was also acknowledged that a Highways Authority is limited in the way that it may impose control upon such lorry movement through planning permission.

Nevertheless Members supported the use of Condition Surveys and Bonds, voluntary routeing agreements and planning conditions on operating hours as a means of reducing the impact of any development.

Although there are difficulties in controlling the routeing of lorry movements associated with development, the Group considered that ways of reducing the impact of lorry movement associated with development should continue to be explored.

Recommendation 3

That the Cabinet Members for Highways and Transportation, and Communities and Planning continue to explore opportunities to reduce the impact of lorry movements associated with development upon the local highway network.

Health Issues

Part of the original impetus for the review arose from the golf course development at Basildon that was permitted by the LPA, and some local residents cited health concerns as part their opposition to the development which they referred to the Health Overview and Scrutiny Committee. Councillor Knapman was appointed to the Group as a representative of HOSC.

The South West Essex Primary Care Trust commissioned professional consultants to provide an independent a Health Impact Assessment. The final Assessment entitled ‘ Health Impact Assessment of Basildon ’ (dated 8 January 2010) was published in full on the Trust ’ s website. The Assessment is particular to the Basildon case and concludes that the development does not constitute any meaningful health risk to local community health. Having considered this information, Members did not take any action on potential health issues within the context of this scrutiny review.

Background Papers

‘ Development Involving County Matters. Guidance Notes March 2009 ’ Essex County Council

‘ Defining Waste Recovery: Permanent Deposit of Waste on Land ’ Regulatory Guidance Series, No EPR13 Environment Agency

This report is issued by

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