

THE VALE OF GLAMORGAN COUNCIL

CABINET: 22<sup>ND</sup> NOVEMBER 2021

REFERENCE FROM ENVIRONMENT AND REGENERATION SCRUTINY  
COMMITTEE: 19<sup>TH</sup> OCTOBER 2021

“492 BARRY BIOMASS INDEPENDENT REVIEW REPORT (REF) –

The Monitoring Officer / Head of Legal and Democratic Services presented the reference from Cabinet on 27<sup>th</sup> September, 2021. The Committee also welcomed, Annabel Graham Paul, barrister from Francis Taylor Buildings, Inner Temple Chambers.

The report related to a resolution of Council on 26<sup>th</sup> February, 2020 concerning the Barry Biomass Plant which called for “an Independent Review of the Vale of Glamorgan Council’s determination of all planning applications related to the Barry Incinerator”.

An independent barrister specialising in Planning and Environmental Law, Annabel Graham Paul was appointed by the Monitoring Officer / Head of Legal and Democratic Services on behalf of the Council to undertake the independent review.

Attached at Appendix 1 was the Independent Review Report with the findings summarised in paragraphs 2.2 – 2.6 of the Cabinet report, together with additional information provided at paragraph 2.7 in respect of linked matters arising post February 2020.

The Independent Reviewer’s observations were also set out at paragraphs 2.7.9 and 2.7.10 in respect of Welsh Government’s interim decision dated 29<sup>th</sup> July, 2021 (Appendix 2).

Mr. Dennis Clarke, registered public speaker, was then afforded 3 minutes to address the Committee. Mr. Clarke began by stating that both Friends of the Earth and Barry Docks Incinerator Action Group wished to be associated with his comments being made to the Committee.

Mr. Clarke’s submission was that what had taken place was neither independent nor a review. The Council had acted for itself when instructing a barrister and Mr. Clarke commented that clients often suffered from subjectivity which meant that objectivity was often missing. Mr. Clarke’s point was illustrated as the report appeared to continually deny that the Biomass project was an Environment Impact Assessment (EIA) Schedule 1 development. The report also repeated the Welsh Government Minister’s decision in paragraph 74 of their letter dated 29<sup>th</sup> July, 2021 (Appendix B), which stated that the Minister had concluded that the development comprised in the 2015 outline planning permission was a Schedule 1 development and should have

been subject to an EIA. Mr. Clarke commented that the report had taken a word from paragraph 85, that word was interim, but the word referred to the ongoing implications of the conclusion. This was not a proviso in relation to paragraph 74 or indeed most of the letter. This supported the truism that the client would always want to prove its argument.

Mr. Clarke submitted that the exercise followed was not independent. In referring to Paragraph 2.7.6 of the report, Mr. Clarke stated that the summary of Welsh Government's comments was inaccurate as Welsh Government had not indicated that an EIA was not needed. Welsh Government had referred to a statutory EIA which advised the Council that it must consider the environmental implications. Paragraph 2.5 of the Cabinet report contained a blanket exoneration of all that occurred in the Vale, but it omitted comments from paragraph 32 of the barrister's report which stated that the evidence reviewed was a 'patch-work' of the decision-making process and there is no way of ascertaining what may or may not have been said during verbal conversations. The barrister was therefore only able to review the evidence that they had been given. There was no access to officers to explain things, which prevented the barrister from undertaking a full review of the decision-making process. This was therefore not the review that Full Council had requested. Mr. Clarke stated that as the review was called for by Full Council then the Scrutiny Committee should consider making a recommendation for Full Council to debate this outcome.

Councillor Bailey stated that he supported Mr. Clarke's suggestion for the report to be referred to Council and he made a formal recommendation to that effect. Councillor Bailey stated that as Council had made the request for a review it was appropriate for this matter to be discussed at Council. This was seconded by Councillor Wiliam, citing democratic transparency as an important factor.

In response to Mr. Clarke's comments, the Monitoring Officer / Head of Legal and Democratic Services referred to the Welsh Government's Minister's determination that the outline planning application was for a Schedule 1 development and so an EIA should have been required. With regard to the evidence looked at, the barrister, Annabel Graham Paul who conducted the review, had considered over 10,000 pages of documentation, and every effort was made to ensure that everything available was put in front of the barrister including, for example, any telephone attendance note or any sort of note.

Councillor Bailey sought clarification of whether officers had acted on inaccurate advice from Welsh Government. The Monitoring Officer / Head of Legal and Democratic Services responded that in 2008 there was a difference in view and the review was looking back to 2008. The review considered that there was a range of different stances from different bodies.

Councillor Wiliam queried whether the barrister, in conducting the review, had taken into account the need for sincere cooperation and what that meant in remedying the defect that an EIA was always required. In reply, the Monitoring Officer / Head of Legal and Democratic Services stated that it was important to consider that the instructions to the barrister, were to undertake a review of the determination and thought process of officers at the time and what they had considered. Annabel

Graham Paul had not been instructed to provide an advice paper on whether an EIA was required.

In being invited to respond, Annabel Graham Paul commented that in terms of background and Welsh Government's stance stating that the development was Schedule 1 and so required an EIA, it was important to recognise that the Welsh Government letter of the 29<sup>th</sup> July, 2021, postdated her review and was not available at the time the review was conducted in June. The review did cover how the Council had considered the plant to be either a Schedule 1 or Schedule 2 development. This was shown in paragraphs 10 onwards (Appendix 1 to the report). Annabel Graham Paul added that she was always aware that there was a live issue as to whether the development was Schedule 1, which was a technical point around whether the plant operated as an incinerator or not. This came down to the science of how the gasification process worked, and so would require technical scientific advice that a Planning Officer would not necessarily know. Annabel Graham Paul clarified that after she had considered the evidence, this indicated that it was the officer's view that this was not a Schedule 1 development but a Schedule 2 – paragraph 11b development. Planning Officers had sought the view of Welsh Government at the time in 2015, and the Council had indicated to Welsh Government that the plant was not Schedule 1. This was because the technological process did not incinerate the wood waste but boiled off synthetic gas. Welsh Government had responded to the Council's reasoning the following day, and they had noted that their determination was similar to their own previous screening decision in 2008. This provided credence to the Planning Officer's view that this was not incineration. Annabel Graham Paul stated that she had therefore made the conclusion that the reasoning of the Planning officers appeared sound and was supported at the time by Welsh Government. Now some 6 years on, Welsh Government had taken a different view, this however did not mean that the Planning Officers had acted negligently, but rather they had acted upon the advice received at the time. The review had therefore looked at the decision-making process, and it had been concluded that the process undertaken by the Vale of Glamorgan Council was well informed and based on advice from Welsh Government, so appeared rational.

Annabel Graham Paul added that the issue of an EIA was being corrected by the developers and Welsh Government had determined that it was inappropriate to issue a discontinuance notice, as in their view, there were not any likely significant environmental effects. This meant that the Council could be satisfied that there were no environmental impacts that had not already been assessed.

With regard to the duty of sincere co-operation, Annabel Graham Paul advised that this had not been covered in her report as it was deemed unnecessary as the instructions provided related to the Council process and procedure. Annabel Graham Paul stated that she was satisfied that officers had carried out things as properly as they could have at the time.

Councillor Wiliam disagreed with the view that there were no significant environment impacts, and he stated that the European Commission had issued advice that gasification was incineration, and no technological knowledge was required. He therefore wondered whether the Council had considered this advice which he stated pre-dated the decision relating to screening. Councillor Wiliam enquired whether

any officers had been interviewed as part of the review. Annabel Graham Paul advised that she had access to the Planning files but had not had access to interviews as per her instructions. She advised that the Council needed to consider proportionality and the cost to the public purse, and so, there were limits on time and resource. This was a decision for the Council.

Councillor William stated that in his opinion more resources should have been allocated to the review. He added that he did not accept the findings of the review and supported the call for this to be debated at Council. Councillor William also queried whether it was now accepted that this was a Schedule 1 development, and so that information may have impacted on the consideration of the screening process. In reply, Annabel Graham Paul commented that that Welsh Government had indicated that this was Schedule 1 development, even though the letter of the 29<sup>th</sup> July, 2021 referred to this on an interim basis. This however did not mean that Planning Officers had acted inappropriately, and the remit of the review was to look at whether the process was properly considered.

Councillor Robertson queried who would be undertaking the EIA. He also asked whether the Vale of Glamorgan Council would be consulted. The Head of Regeneration and Planning joined the meeting and advised that Welsh Government had considered both U.K. and E.U. legislation and determined that an EIA could be submitted by the applicant. Once submitted this would be assessed by Welsh Government who would then consult with bodies such as Natural Resources Wales. The Vale of Glamorgan via the Shared Regulatory Service would likely be included as part of that consultation. Following that, Welsh Government would produce a report of its findings which could include conditions to mitigate environmental impacts.

Councillor Sivagnanam queried whether the Council had any powers to stop the plant from becoming operational. The Head of Regeneration and Planning advised that the Council had issued enforcement action against the plant, which was currently going through the appeal process. The outcome of this would be determined by Welsh Government. In addition, the Monitoring Officer / Head of Legal and Democratic Services referred Members' attention to paragraph 92 of the Welsh Government letter, which indicated that the Minister had decided not to suspend operations while an EIA was undertaken.

Councillor Bailey stated that he understood all that had been said and reiterated his previous comments for this matter to be referred to Council in order for there to be a debate and also to allow Council to consider whether the report had met the scope of the review.

There was unanimous consensus from the Committee Members for Cabinet to be requested for the review report to be referred to Council, so that there could be full debate on this matter.

Subsequently, it was

**RECOMMENDED – T H A T Cabinet be requested to refer the Barry Biomass Independent Review Report to Council for its consideration.**

### Reason for recommendation

For democratic transparency, as the initial request for a review originated following a resolution made at the Council meeting held on 26<sup>th</sup> February, 2020 (Minute No - 704), and the view that there should be a debate on this matter at Council.”