



Costs Decisions

Inquiry Held between 6 July 2021 and 29 October 2021

Site visit made on 20 July 2021

by Nick Palmer BA (Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10th December 2021

Costs application in relation to Appeal Ref: APP/Y0435/W/21/3273179 Bletchley Landfill Site, Guernsey Road, Bletchley, Milton Keynes MK3 5FP

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by FCC Environment for a partial or full award of costs against Milton Keynes Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for construction and operation of a surface water attenuation lagoon, forming part of the surface water management scheme for Bletchley Landfill Site.
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 - The application is made by Milton Keynes Council for a partial or full award of costs against FCC Environment.
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Decisions

1. The application by FCC Environment for an award of costs is refused.
2. The application by Milton Keynes Council for an award of costs is refused.

Procedural Matter

3. Both applications were made in writing. I have considered each application on its individual merits but because the parties have each made similar submissions on both applications, and to avoid unnecessary duplication, I shall deal with them together in this document.

The submissions for FCC Environment

4. The application is made on the basis that the reason for refusal was not substantiated, and that vague or generalised assertions were made with respect to impacts on biodiversity. The application further states that the Council did not allow the applicant to respond to the Countryside Officer's comments and proceeded to refuse the application. There was also a delay in providing the first comments made by the Countryside Officer to the applicant. The Council expanded its case on appeal and failed to agree factual matters in

the Statement of Common Ground. The points made in support of the application, in summary, are as follows.

5. Firstly, the Council failed to appreciate relevant planning policies and evidence relating to protected and priority species and the need for surveys to be carried out. The applicant had provided sufficient technical information both in terms of the need for the proposed lagoon and the effects on biodiversity to enable the Council to find that there would be no adverse impact on biodiversity and that the proposal was in accordance with development plan policies.
6. Whereas the reason for refusal referred only to harm to priority species, at appeal the Council also referred to harm to protected species. It also referred to purported adverse impacts on bats, although subsequently accepted that this could be covered by a condition requiring further survey work.
7. The Council did not take into account or agree the necessity for the lagoon in the location proposed. Consequently, the applicant had to adduce technical evidence on drainage matters.
8. Further information was provided to the Council in response to the Countryside Officer's comments. The applicant was not given an opportunity to respond to the last set of comments, when the Council refused permission. The Council could have either granted permission subject to conditions requiring further surveys to be carried out, or delayed determination to allow those surveys to be carried out.
9. In an e-mail sent by the planning officer to the applicant¹ it was indicated that the application was to be recommended for refusal on the grounds of ecological impact. The reason for refusal alleges substantively unacceptable impact on ecology. It is unsurprising in these circumstances that the appellant took the decision to proceed with the appeal. If the applicant had re-submitted a planning application, it is evident that the Council had an objection in principle to the development.

The submissions for Milton Keynes Council

10. The Council has withdrawn its objection to the appeal scheme by virtue of the further survey work that was carried out by the applicant. Had the applicant not adduced the further survey evidence the sufficiency of the evidence would have had to be addressed at the Inquiry.
11. This approach must hold good for protected and priority species, given Natural England's (NE) advice on the need for proper surveys, and Circular 6/2005 which states that the presence or otherwise of protected species must be established before planning permission is granted.
12. The Preliminary Ecological Assessments (PEA) clearly signposted the likelihood of the presence of both priority and protected species. The Council accepted from the outset of the appeal that the wording of the reason for refusal was erroneous and should have referred to protected species as was evident from the officer's delegated report.

¹ CD 4-13

13. The rationale for policy guidance is clear that until one can be reasonably confident about the sufficiency of the information, it is not possible to apply the mitigation hierarchy which would then engage considerations of need.
14. There was extensive communication between the applicant and the Council's Countryside Officer during the planning application stages. The first request for the PEA was wholly reasonable given that no survey work accompanied the planning application. By the time it was submitted it was beyond the Great Crested Newt (GCN) survey season, and the second request made no difference to this. There was no possibility that the further survey work could have been submitted by the extended determination date.
15. The Council's costs application is made on the basis that the Council was reasonable in requiring the further survey, notwithstanding the results of that survey.
16. There is no policy, regulatory or statutory requirement that requires a local planning authority to delay the determination of an application simply because the applicant has failed to provide the information necessary to deal with the application.
17. The Council granted four extensions of time. It follows that, if the request for the further survey work was justified, having regard to the issues raised in the PEAs, the proper course of action would have been for the applicant to have withdrawn the application and resubmit it with the necessary survey data, or, after refusal to have resubmitted the application rather than to appeal.

Reasons

18. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
19. The planning application was submitted to the Council on 12 March 2020. It was accompanied by a Biodiversity Net Gain Assessment. A PEA had been prepared in August 2019 but was not submitted with the application. This had recommended further survey work to be undertaken before submission of a planning application.
20. The Countryside Officer stated in his response of 6 April 2020 that a PEA was required. This was not passed to the applicant until 16 July 2020, some 3 months later. The PEA was submitted to the Council on 21 July.
21. The Countryside Officer then responded on 22 July to say that a site-specific PEA and further investigation/information regarding GCN were required. The officer stated that the latter should assess either whether the proposal would be covered by an extant licence; or whether a survey would be carried out; or the District Licence Scheme would be applied for.
22. A second PEA was prepared in November 2020. The Countryside Officer's response was that further survey information was required. Further information regarding GCN was included but the Countryside Officer's concerns on this species had not been completely overcome. Further surveys were also requested for badgers, bats, invertebrates, reptiles, hedgehogs and birds. This was communicated to the applicant, but the application was refused shortly afterwards on 21 December 2020.

23. The applicant's proof of evidence included a vegetation survey, GCN eDNA survey, and breeding bird survey and the Council's concerns have been overcome. The Council has agreed that a bat survey could be subject to a condition.
24. Standing advice from NE is that a PEA can indicate if more detailed surveys are necessary, which was the case here. The standing advice further states that planning applications should not be decided until the necessary surveys have been received. This also states that conditions requiring surveys should not usually be attached. The Guidelines for Preliminary Ecological Appraisal (2017) advise that further surveys should only be secured by conditions in exceptional circumstances and sets out examples of such circumstances.²
25. There have been differences of professional opinion regarding the adequacy of the information that was submitted during the course of the planning application, but the parties reached agreement following submission of the appeal and before the opening of the Inquiry.
26. Whether or not the Council took into account the necessity for the lagoon and for its siting, it was necessary to establish whether there would be significant harm to biodiversity before applying the mitigation hierarchy.³ The PEAs both indicated the need for further survey work to be undertaken to establish the effect on protected and priority species and this survey work was necessary in order to ascertain whether there would be significant harm to biodiversity. The first PEA indicated the need for further survey work in respect of GCN, notwithstanding that there was already a significant amount of information available pertaining to this species. For these reasons the Council's requests for further information were reasonable.
27. The Council's reason for refusal refers to impact on priority species. The Council made clear at the appeal that its evidence related to protected species as well as priority species. This would have been clear from the discussions between the parties that took place before the Council made its decision.
28. There was a delay of over 3 months in the Council passing the Countryside Officer's initial comments on to the applicant which indicates a lack of cooperation. However, following this delay the parties engaged in progressing the required information. The initial delay in passing on the Countryside Officer's comments delayed the process overall but did not directly cause the appeal to be submitted.
29. Following the Countryside Officer's response to the second PEA, the Council advised the applicant that the application was likely to be refused and gave the applicant an opportunity to withdraw it. It would not have been possible to undertake the further survey work requested by the Countryside Officer within the agreed extended period for determination. Further extensions of time over a period of up to 6 months would have been necessary to undertake the necessary work. The Council took the view that the application should be refused rather than to continue to offer to extend the period for determination. Given the length of time that had elapsed since the application was submitted and the time that was required to carry out the necessary survey work, this was not unreasonable.

² Paragraph 3.11 and Box 4

³ National Planning Policy Framework para. 180 (a)

30. The e-mail from the planning officer of 14 December 2020 says that the application would be recommended for refusal on grounds of ecological impact. The reason for refusal refers to an unacceptable level of harm to habitats and that insufficient detail had been provided to evidence how mitigation measures would be implemented. It is understandable that the applicant took the view that the reference to unacceptable harm indicated an objection in principle. Nonetheless the Council's decision was made in the context of ongoing discussions and submissions and when a significant period remained until the next survey season for GCN.
31. Although the applicant could have re-submitted a planning application when the survey information was available, the submission of an appeal was a reasonable course of action. For these reasons there was no unreasonable behaviour on the part of either party that resulted in the appeal. Indeed, the process overall was one of co-operation; it was unfortunate that the process of providing the further information required by the Council was constrained by the GCN survey season.
32. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated in respect of either application.

Nick Palmer

INSPECTOR