



Costs Decision

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/21/3271410 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 recontouring of the landfill site without complying with conditions attached to planning permission Ref MK/806/95, dated 6 February 2002.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

The submissions for FCC Environment

2. The application for costs was made in writing. The following submissions are made, in summary.
3. The application states that the Council's reason for refusal was unsubstantiated and that vague or generalised assertions were made about likely impacts on amenity which were unsupported by objective evidence. It refers to the lack of technical objections to the proposal.
4. It also refers to a response received by the Council from the Environment Agency (EA) which stated that it would not be possible to complete the site within the permitted period and expressed concerns about leaving the site unrestored or alternatively filling it with soils. The EA's comments were misrepresented to the committee and disregarded in reaching a decision. It was not made clear that the EA could not identify any alternative way to restore the site and that there were no options to restore it within its existing operational life.
5. In the appeal, the Council's case relied on theoretical alternatives which were not supported by evidence. The Council did not have regard to the benefits of the scheme or to the environmental implications if permission was not granted for it.
6. The Council has not defended its reason for refusal in full and has presented a different case as part of the appeal, which it has sought to advance without reference to objective evidence. It has expanded its case on appeal which has resulted in the applicant having to adduce technical evidence. Its case on appeal referred to highway safety impacts despite this not forming part of the

reason for refusal. It has also introduced the phasing of the development as part of its case and questioned the use of S73 of the Town and Country Planning Act 1990 as the appropriate procedure.

The response by Milton Keynes Council

7. The issues covered by the reason for refusal in terms of impacts on living conditions are odour, fly infestation and disturbance caused by HGV activity. These matters are explained in the Council's Rule 6 statement. It is the Council's case that every effort should be made to devise a scheme that limits or minimises impacts and their duration so far as possible while achieving a satisfactory restoration and aftercare regime at the soonest practicable opportunity.
8. It was open to the Development Control Committee to give weight to the public representations and to conclude that the harm outweighed the benefits of the proposal. There was nothing in the material before the Committee that compelled it to conclude that the appeal scheme was the only means of restoring the site. The consultation responses indicated overwhelmingly that there was a problem that was not answered by compliance with the permitting regime. The odour and fly infestation referred to by residents are subjective matters unlike other issues that require objective assessment before judgements can be made. Notwithstanding this, the odour concerns are fully supported by expert evidence.
9. The author of the letter from the EA to the Planning Inspectorate in connection with the appeal states that she agreed there would be other ways to restore the site but that she struggled to identify any and more importantly that there were no suitable options that could be achieved by 2022. This does not provide a robust basis on which to approve the application.
10. National policy requires consideration of community impacts. These include impacts from odour and vermin. Given the considerable weight which the committee placed on the harm to amenity it was not bound to grant permission irrespective of this harm. The applicant's Planning Statement did not claim that there was no other alternative to the proposed restoration scheme.
11. Decision makers are entitled to take into account alternatives. The committee was concerned to realise a scheme that could deliver the benefits of a restored site with less delay and harm. Evidence was adduced on appeal to advance this issue.

Reasons

12. 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.
13. The EA has explained¹ that, during the Council's processing of the application, it contacted the planning officer to set out its concerns should permission be refused. These were that it would not be possible to restore the site within the permitted period, that leaving the site unrestored would not be an option and that filling with soils would result in issues with stability and differential settlement which would likely result in damage to the lining, capping or gas

¹ In its letter to the Planning Inspectorate dated 13 May 2021

- and leachate infrastructure and emissions to air, land or water. The latter point was reported to the committee in an update paper.
14. The minutes of the Development Control Committee of 3 September 2020 record that *"the Environment Agency had submitted further comments in the days preceding the meeting, to provide more clarity. These related to concerns about the currently proposed methodology for restoration, given the current condition of the site, which would be more complicated and not supported. Further clarification had subsequently been sought from officers, and the Environment Agency had confirmed that alternative and satisfactory restoration methods were both possible and plausible at the site."*
 15. However, the EA states that this does not accurately reflect the conversation between the Council's planning officer and the EA's officer, who struggled to identify any other ways to restore the site and, more importantly that there weren't any suitable options that could be achieved by the existing deadline of 2022.
 16. The EA's position as the lead regulator was clearly of fundamental importance to the Council in making its decision. It appears from the minutes that members of the Committee were told that there would be alternative ways to restore the site when in fact the EA struggled to identify any. The minutes do not record any discussion about the environmental implications of refusal of permission. This is a fundamental question that was not properly considered by the Council in making its decision.
 17. In the absence of such consideration, the basis for the Council's decision is undermined. In the appeal, the Council accepted that the site could not be restored within the permitted period and that leaving the site unrestored is not an option. It maintained its position that soil could be used to restore the site but did not question the applicant's evidence that this would take longer than the 15 years applied for. The basis of the Council's case at appeal was that there are alternative ways to restore the site that would potentially take less time than the 15 year period applied for. There is no reference to these considerations in the officer's report, the Committee minutes or the decision. If alternative options for restoration had been explored by the Council and considered appropriate, then the Council could have granted permission subject to revised conditions. It is apparent that the exploration of alternative options took place at the appeal stage, representing a development of the Council's case and indicating that its decision to refuse permission was unsubstantiated.
 18. Furthermore, the Council accepted that the requirements of conditions 2 and 3 of the existing permission² cannot realistically be complied with. On this basis the Council should have granted permission subject to revised conditions. The refusal of permission was for these reasons unreasonable.
 19. The weight to be given to impacts on residents' living conditions was a matter for the Council and evidence was adduced to support the Council's decision on this issue. However, neither the officer's report nor the minutes include any evidence of a balancing exercise having been undertaken to consider the impacts on living conditions together with the implications for completion of restoration.

² MK/806/95: Condition 2 requires cessation of waste importation by 6 February 2022; condition 3 controls the site restoration sequence.

20. The consideration of alternative options at the Inquiry was relevant in order to test the robustness of the assumptions made in the proposed scheme. The consideration of alternative options at the Inquiry went some way towards justifying the basis for the Council's decision, but this does not alter the position that the basis for the Council's decision is unsubstantiated.
21. In addition to these considerations, the second part of the reason for refusal refers to postponement of restoration resulting in a loss of opportunity for the community to benefit from open space recreation as originally agreed. No account seems to have been taken of the implications of refusal of permission on the ability to secure public access or the benefit offered by the proposed scheme in securing such access.
22. The Council did not present any evidence on highway safety and its evidence merely referred to concerns that had been expressed by interested parties. Similarly, the Council did not object on grounds of noise or landscape impact. The question of whether S73³ was the appropriate procedure did not form part of the Council's reason for refusal but formed part of the case made by Newton Longville Parish Council as the Rule 6 party. The Council also referred to this in its Rule 6 statement. As this had been raised by the Rule 6 party it would have required submissions irrespective of the Council's statement. This was a procedural matter and as such was distinct from the Council's substantive case at appeal.
23. The Council suggested the inclusion of an additional condition to monitor settlement rates, but this was not agreed by the applicant. It was entirely reasonable to consider this matter as part of the discussion on conditions at the Inquiry.
24. However, for the reasons given above, the Council's decision was unreasonable, and this resulted in the applicant pursuing the appeal. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified.

Costs Order

25. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Milton Keynes Council shall pay to FCC Environment, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
26. The applicant is now invited to submit to Milton Keynes Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Nick Palmer

INSPECTOR

³ S73 of the Town and Country Planning Act 1990