

Costs Decision

Hearing Held on 24 April 2024

Site visit made on 25 April 2024

by SRG Baird BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 July 2024

Costs application in relation to Appeal Ref: APP/D0840/W/23/3334658 Land known as Penhale Moor, south-east of Bosprowal Farm and south of Penhale Road.

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Aura Power Development Limited for a full award of costs against Cornwall Council
 - The hearing was in connection with an appeal against the refusal of planning permission for the application Ref PA22/06139, dated 29 June 2022, refused by notice dated 14 August 2023.
 - The development proposed is the installation and operation of a ground mounted photovoltaic solar farm, inclusive of solar arrays, transformers, substation, landscaping, fencing, internal access tracks, access, CCTV and other associated works, for the purpose of generating and exporting renewable energy to the electricity grid network.
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Decision

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

Preliminary Matter

2. The application for costs relates to the behaviour of the Council and the merits of the appeal. Following the close of the Hearing, A Written Ministerial Statement (WMS) Solar and Protecting our Food Security and Best and Most Versatile (BMV) Land was made on 15 May 2024. The decision on the merits of the appellant's substantive application does not include any consideration of the implications of the 2024 WMS for the proposal.

The submissions for Aura Power Developments Limited

3. Submissions for the appellant were made in writing.

The response by Cornwall Council

4. The response by the Council was made in writing.

Reasons

5. Planning Practice Guidance (PPG) 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.
6. One of the aims of the costs regime, is to encourage local planning authorities (lpa) to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning

- merits of the case, and not to add to development costs through unavoidable delay.
7. Contrary to the recommendation of the Planning Officer, the application was refused for one reason, namely that the site selection process did not make a *"...compelling nor convincing case for the development of Best and Most Versatile (BMV) agricultural land..."* and that the use of the remainder of the land, Grade 3b on the Agricultural Land Classification, has not been, *"...exceptionally justified..."* The reference to exceptionally justified relates to Policy RE1 (2) (c) of the Council's Climate Emergency Development Plan Document (DPD) February 2023, which forms part of the development plan.
 8. When determining a planning application, Members are not bound to follow the professional advice of their officers and are entitled to come to a contrary conclusion. However, an example of unreasonable behaviour is a failure to produce evidence to substantiate the reason for refusal and promote vague, generalised or inaccurate assertions about the proposal's impact, which are unsupported by any objective analysis.
 9. In relation to the site selection process not making a *"...compelling nor convincing case..."* the Ipa's Statement of Case (SoC) refers to an absence of an alternative sites assessment (ASA). The Ipa asserts that this omission is contrary to national and local policy and prays in aid an appeal decision and a subsequent High Court judgement, Lullington, South Derbyshire¹. In that case, the appeal decision was largely founded on a WMS Planning update March 2015. The Lullington appeal proceeded on the basis that the WMS was extant and unlike here, neither its applicability nor the weight to be attached to it was explored. However, in the case before me, the Council agrees², that, *"...that no weight can be given to (and reliance placed upon) the Written Ministerial Statement on solar energy (from March 2015) and the Planning Practice Guidance on renewable and low carbon energy from 2015, where these deal with issues around site selection and the use of agricultural land (including BMV land). This is as both were published some time ago and prior to various updates of the National Planning Policy Framework, the publication of the suite of Energy National Policy Statements, and the 2019 updates to the Climate Change Act, which made reaching net zero by 2050 a legally binding requirement."*
 10. A fair reading of that judgement does not provide any authority that an applicant is required to provide an ASA. Moreover, there is no explicit reference either in the 2015 WMS, PPG or more up-to-date national policy/advice that renewable energy projects are required to submit an ASA. Indeed, the Bramley judgement³ ruled that PPG does not mandate the consideration of alternative sites and still less does it require a sequential test to be adopted. Subsequent national policy/advice has not changed this position and it is an approach that is reflected in subsequent appeal decisions, an example of which is noted in the SoCG⁴. As far as I can see, the only local "policy" reference to an ASA, albeit it does not use those specific words, is set

¹ APP/F1040/W/22/3313316 & Lullington Solar Park Limited v Secretary of State for Levelling Up, Housing and Communities and South Derbyshire District Council [2024] EWHC 295 (Admin).

² Statement of Common Ground (SoCG).

³ APP/H1705/W/22/3304561 & Bramley Solar Farm Residents Group v Secretary of State for Levelling Up, Housing and Communities, Bramley Solar Limited & Basingstoke and Deane Borough Council & Others [2023] EWHC 2842 [Admin].

⁴ APP/G2713/W.23/3315877.

out at Section 5.6 of a document from March 2016 entitled Cornwall Renewable Energy Planning Advice. Here, the document notes that BMV land should be avoided and for “...*grade 3b land consideration should be given to reasonable alternative locations on land of lesser agricultural and environmental value.*” However, the lpa accepted that this document was advisory, not adopted and more proscriptive than the Framework and PPG. Accordingly, this advisory document is not a justification for requiring an ASA.

11. In referring to alternative sites, the Council’s SoC, paragraph 5.12, refers to, “*The main urban conurbation of Camborne, Pool and Redruth lies close by to the north-east of the site. There are plentiful buildings on the retail and industrial parks which have large areas of roofing which are entirely suitable for Solar PV.*” There is nothing in the SoC or produced during the Hearing to substantiate this vague and generalised assertion. In this context, for the lpa to seek to justify the refusal of the application on the lack of a robust assessment of alternatives sites amounts to unreasonable behaviour.
12. Regarding the reason for refusal, reference to DPD Policy RE1 (3) that the use of Grade 3b land has not been, “...*exceptionally justified.*” This reference is inconsistent with up-to-date national policy/guidance. This inconsistency was brought into stark focus by the Council’s agreement in the SoCG that no weight or reliance can be placed on the 2015 WMS and PPG guidance where these deal with issues around site selection and the use of agricultural land, including BMV land. As evidenced by the Examining Inspector’s report on the Climate Emergency DPD, paragraph 148, the justification for the approach taken by Policy RE1 and particularly criterion 5 is based on the 2015 WMS. As such, acknowledging that the WMS and PPG are inconsistent with up-to-date national policy but continuing in the SoC to ascribe full weight to DPD Policy RE1 is unreasonable.
13. On agricultural land quality, the Council’s SoC fails to engage with the appellant’s evidence on agricultural land. The nub of the Council’s case is that given the site’s location and climate it is capable of double cropping, and this lifts the land in to the BMV category. Not only does this demonstrate a lack of understanding of how the agricultural land classification system works, but it is also done without any objective evidential basis. There was no objective evidence to dispute the appellant’s evidence that the site has “*never*” been used for double cropping. The only foundation for the Council’s submission is set out at paragraph 5.14 of the SoC. Here it refers to sale particulars for land to the north of the appeal site. That land was described as Grade 3 productive agricultural land located in this renowned “...*early and double cropping farming district*”. The Council asserts that as the appeal site is adjacent, it has the same capability and therefore lifts it into the BMV category. This is not objective evidence.
14. Turning finally to the execution of the planning balance, the contribution to net zero targets locally and nationally, is given significant weight. The presence of BMV, the unsubstantiated elevation of the remainder of the site, Grade 3b, to BMV and the contribution of the agri-food sector to the Cornish economy is given great weight. These attributions of weight indicate that the notional scale is evenly balanced. SoC paragraph 5.23, where the Council records that there has been no demonstration of alternative locations, despite there being no requirement within national policy/advice to engage in an ASA, tips the balance against the scheme. Whilst the planning balance refers to an

ecological uplift, which is ascribed neutral weight, there is no assessment of the very significant uplift in Biodiversity Net Gain as a potential benefit and no consideration of the potential economic benefits of the scheme. Accordingly, the Council failed to undertake an appropriate balancing exercise and as such acted unreasonably.

Conclusion.

15. Drawing all of the above together, the Council has failed to produce evidence to substantiate the reason for refusal. The Council has unreasonably delayed development, which should clearly have been permitted, having regard to the development plan, national policy and other material considerations. The Council's approach represents unreasonable behaviour resulting in the need for an appeal resulting in the appellant incurring unnecessary and wasted expense. As such, a FULL AWARD of costs is justified.

Costs Order

16. 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 Cornwall Council shall pay to Aura Power Development Limited, 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.
17. The applicant is now invited to submit to Cornwall 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.

George Baird

Inspector