



Costs Report to the Secretary of State for Communities and Local Government

by Edward A Simpson JP BA(Hons) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Date: 3 February 2011

Town and Country Planning Act 1990

Local Government Act 1972

Appeal by Viridor Waste Management Ltd

Bristol City Council

Inquiry opened on 30 November 2010

Former Sevalco Site (North), Severn Road, Avonmouth, Bristol BS11 0YU

File Ref(s): APP/Z0116/A/10/2132394

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- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Viridor Waste Management Ltd. for a full award of costs against Bristol City Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for construction and operation of a Resource Recovery Centre, including a Materials Recycling Facility, an Energy from Waste and Bottom Ash Facility, associated office, Visitor Centre, with new access road and weighbridge facilities, associated landscaping and surface water attenuation features.

Summary of Recommendation: That a full award of costs be allowed

The Submissions for Viridor Waste Management Ltd (VWML).

1. An award of costs is provided for by DCLG Circular 03/2009.
2. Costs will normally be awarded where the following conditions have been met:
 - (a) a party has made a timely application for an award of costs
 - (b) the party against whom the award is sought has acted unreasonably and
 - (c) the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process – the whole of the expense because it should not have been necessary for the matter to be determined by the Secretary of State.¹
3. The most common examples include failure by the planning authority to substantiate a stated reason for refusal.² VWML have given advance notice of our intention to apply and the application is supported by a written submission – in accordance with good practice.³ In awards against planning authorities the key test is whether evidence is produced on appeal which provides a respectable basis for the authority's stance.⁴
4. Planning authorities are not bound to accept the recommendations of their officers but if officers' professional advice is not followed authorities will need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the decision in all respects. If they fail to do so, costs may be awarded against the authority⁵.

Grounds

5. The Council failed to understand the nature and scale of waste management in the sub-region and failed to understand the extent of landfill necessary despite the matter being fully explained in the Joint Waste Core Strategy (JWCS) and explicitly explained by Environmental Resource Management (ERM) as reported in the Report to Committee.

¹ Circ.3/09 – para.A12

² Circ.3/09 – para.A23

³ Circ.3/09 – para.A31

⁴ Circ.3/09 – para.B16

⁵ Circ.3/09 – para.B20

6. The Council has adopted a stance which is contrary to the position put forward on its behalf in evidence to the JWCS in seeking to argue that the indicative recovery capacity figure could not be exceeded without adverse sustainability consequences.
7. The Council has failed to appreciate the imperative to divert waste from landfill which can be achieved by greater recovery capacity despite this being explained to members by ERM and despite evidence to that very effect being given on the Council's behalf at the Examination in Public (EiP). The Council failed to carry out the very judgment set out in the JWCS where greater than the indicative capacity is brought forward in a Zone⁶. It gave evidence to this inquiry that was entirely inconsistent with evidence given on its behalf to the EiP.
8. It gave highways evidence unrelated to the reason for refusal and gave that evidence without support from the highway authority or the Highways Agency.
9. In all the circumstances it failed to support the reason for refusal with evidence that gave a respectable basis for the Council's stance and so acted unreasonably.

The Response by Bristol City Council (BCC)

10. Para A7 of Circular 03/2009
" In planning appeals, and other proceedings to which this guidance applies, the parties involved normally meet their own expenses."
11. Para A11 of Circular 03/2009
" An award of costs does not necessarily follow the outcome of the appeal, as in litigation in the Courts. This is a well-established principle of the costs regime and remains so. An unsuccessful appellant is not expected to reimburse the planning authority for the costs incurred in defending the appeal. Equally, the costs of a successful appellant are not borne by the planning authority as a matter of course."
12. The application is based upon an allegation of a substantive nature (para B1) and by reference to
 - B16 - whether evidence is produced on appeal which provides a respectable basis for the authority's stance, in the light of R v SSE ex parte North Norfolk DC [1994]2 PLR 78.
 - B20 – suggestion that BCC has failed to show reasonable planning grounds and produce relevant evidence on appeal to support its decision which was contrary to the case officer's recommendation in all respects.
 - B23 – suggestion that BCC has also failed to give thorough consideration to relevant advice or representations from statutory consultees such as the Environment Agency or English Heritage, or from a county council as highway authority, before determining a planning application. The appellant refers to the Highways Agency's (HA) position but also to the advice from ERM.
13. In response to that allegation it is BCC's case that it has provided clear justification for its single reason for refusal, and the appellant's own evidence supports it.

⁶ Joint Waste Core Strategy para.6.8.9

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14. This costs application is actually based on whether the appeal is successful or not, i.e. merit, not on whether it was an unreasonable reason for refusal.
 15. The Highways Agency did not object but the concerns raised by the Council and set out in Mr Cockburn's evidence relate to a much wider related concern than the immediate impact upon the highway. This was at the very centre of the reason for refusal. In addition, it was clearly important to raise the matter of the large Severnside sleeping giant which has come back to life since the application was first considered. The evidence presented was clear and precise. There was no complaint as to the way that evidence had been presented to the inquiry.
 16. ERM is not a statutory consultee and unfortunately gave inaccurate and confusing advice as to the relevance of other similar developments permitted in the area. In addition, it is plainly not the case that the Council's or rather the West of England Partnership's evidence to the EiP with regard to the soundness of the JWCS is at odds with BCC's evidence at this inquiry. On the contrary, what is apparent is that the appellant's position at this inquiry is at odds with the representations it made to the EiP.
 17. The Officers' advice in the report to the committee indicated that it was for the committee to decide and the committee was entirely within its powers to refuse the application for the reason given.
 18. Issues raised by interested persons go well beyond BCC's reason for refusal. It would be unjust for BCC to have to bear the cost of the appellant's response to those concerns.
 19. It is an application for full costs which is clearly not justified.

Reply by VWML

20. The inquiry was only being held because of the reason for refusal. The appellant had had to call evidence to respond to the concerns raised in relation to other matters by interested parties which had already been addressed by the statutory consultees and in the report to committee and which had been assessed by BCC as not raising matters that would justify a refusal of planning permission.

Conclusions

21. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only 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.
22. The reason for refusal addresses 2 principal but related matters: over-concentration of waste recovery in a single zone (zone A), and the undermining of the sustainability benefits of a wide distribution of waste recovery facilities resulting in excessive traffic movements contrary to sustainability objectives. At the inquiry BCC also raised concerns about cumulative highway capacity impacts in Avonmouth.

Over-concentration of waste recovery facilities undermining sustainability

23. The committee report noted that while the emerging Joint Waste Core Strategy provided for a recovery capacity of 800ktpa, this also assumed a requirement for an additional 5.5Mm³ of non-hazardous landfill. The committee report also noted that an alternative to exporting this to surrounding counties (there being no landfill capacity in the West of England sub-region (WoE)), would be to provide additional recovery capacity. The Committee could have been in no doubt as to the potential for diverting waste from landfill by the Report's statement that *'based on a strategy of maximising the diversion of waste from landfill, that there are sufficient arisings within the sub-region to support both the Severn Road and the Severnside proposals'*. The Report also drew attention to the impact of that approach in driving waste up the waste hierarchy.
24. The residual waste generated in WoE will need to be transported to recovery facilities. Excessive traffic movements are therefore waste-miles rather than numbers of trips. The Committee appears only to have considered sustainability from the point of view of the potential reduction in waste-miles from a dispersed pattern of recovery facilities, and not the more significant sustainability impact of greenhouse gas emissions from landfill, or the impact in waste-miles of disposing of that land-filled waste potentially to sites outside WoE.
25. As was clear from the evidence to the inquiry, the level of arisings in WoE is such that granting permission for the appeal proposal, together with extant permissions for resource recovery facilities in Avonmouth granted by BCC, would not preclude, in capacity terms, the provision of facilities in Zones B – E at the rates suggest in the JWCS. The committee were also reminded that the tonnage figures contained in the various JWCS 'zones' were indicative, and that they were not to prescribe the amount of residual waste capacity.
26. Para.B20 of Circ.3/09 indicates that while planning authorities are not bound to accept the recommendations of their officers, if officers' professional advice is not followed authorities will need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the decision in all respects.
27. The inquiry did not raise any new evidence that was not already before the Committee when it made its decision. Indeed, the evidence tended to reinforce the correctness of the officers' recommendation as a means of driving waste recovery away from landfill, higher up the waste hierarchy and with more sustainable outcomes, which both accord with national policy while at the same time continuing to allow for a spatial distribution of resource recovery facilities in other Zones within the WoE in accordance with the emerging JWCS.
28. I conclude that the Committee Members decision not to accept their officers' recommendation amounted to unreasonable behaviour.

Cumulative highway impacts in Avonmouth

29. The officer advice with respect to highway issues was clear. *'BCC Highways Development Control team has assessed the submitted data and the proposed development and welcomes the various proposed highway improvements....The Highways Agency have also concluded that there are no objections to the proposed development, subject to the imposition of conditions'*. The Committee Report went on to conclude *'the development proposals would not discernibly or materially worsen the existing operation of the highway network*

and that all highway improvements meet the required highway standards....the development proposal is assessed as acceptable in traffic and transport terms'.

30. The case as presented at the inquiry was that somehow the highway and traffic impacts of existing planning permissions in Avonmouth that have yet to be fully implemented had not been addressed. At the inquiry it was stated that *'There are now, however, clear concerns that have arisen since the ES as to the effect of the latest revival or rather re-awakening of the sleeping giant presented by the very large Severnside permission granted in the 1950's.'*
31. To suggest that BCC was somehow unaware of the Severnside development is not supported by its own documentation. The emerging Bristol Core Strategy, published for consultation in November 2009, and at about the same time as the ES was published notes, as one of the strengths of the Avonmouth area, that *'Much of Severnside is covered by historic planning permissions for employment uses. Substantial areas remain undeveloped, but the permissions are still extant and capable of further implementation.'* Policy BCS4 identifies Avonmouth as *'a priority area for industrial and warehousing development and renewal'* and *'There may be opportunities for the development of energy from waste facilities'*. It goes on to indicate that *'Proposals will be expected to contribute to both the strategic and local infrastructure necessary to service the development.'* It makes no suggestion that development proposals are to be limited because of the potential highway and traffic impacts of extant planning consents.
32. Given the acceptance by BCC, as set out in the statement of common ground, that the additional traffic generated by the appeal scheme *'will not create an adverse impact on the operation or safety of the adjacent highway'*, to raise arguments against the appeal proposal on the grounds of the potential impact of other extant permissions that have been known about for some time is clearly unreasonable.

Need to respond to interested persons' concerns

33. The interested persons did not raise any matters that were not otherwise addressed by the relevant statutory consultees with responsibility for those matters, and who had been satisfied that any concerns they might have had had been either addressed by the appellant or could be addressed by the imposition of appropriate conditions or the entering into of an agreement.
34. While these were not matters of concern to BCC, they needed to be addressed by the appellant as part of the evidence to be put before the Secretary of State and witnesses needed to be called. Had permission been granted by BCC the inquiry would not have gone ahead and the witnesses would not have needed to be called.

Overall Conclusion

35. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has been demonstrated and I therefore conclude that a full award of costs is justified.

Recommendation

36. I recommend that the application for a full award of costs be allowed.

E A Simpson

Inspector