The Planning Inspectorate

# Costs Decision

Inquiry held on 3 September 2013
Site visit made on 4 October 2013

**by Brian Cook BA(Hons) DipTP MRTPI**

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

**Decision date: 25 November 2013**

**Costs application in relation to Appeal Ref: APP/F0114/A/13/2195706**
**Stowey Quarry, Stowey Road, Stowey, Bishop Sutton, Somerset**

- 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 Bath & North East Somerset Council for a full award of costs against Mr Larry Edmunds.
- The inquiry was in connection with an appeal against the refusal of planning permission for restoration of Stowey Quarry by landfilling of Stable Non Reactive Hazardous Waste (SNRHW) and inert wastes.

## Decision

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

## The submissions for Bath & North East Somerset Council

2. The essence of this application is that the planning application submitted to and refused by the Council and subsequently appealed had no reasonable prospect of success.

3. Faced with a clear objection from the Environment Agency (EA) on the basis of the available evidence the appellant had three options. First, the additional work requested could have been done. Second, the appellant could have shown by way of evidence presented at appeal why the EA was wrong. Third, the application could have been withdrawn. The appellant chose not to do the first, failed to do the second because the case put by the EA was unanswerable on the evidence available to the appellant and did not do the third.

4. Instead, the appellant sought to address the concerns of the EA through the submission very late in the day of the hydrological risk assessment (HRA). When this failed to satisfy the EA the appellant chose to seek to amend the application to remove the waste type that was generating the poor quality leachate that was of concern to the EA. This amendment was not formally sought until the opening of the Inquiry.

5. Since the appellant was at all times aware that the EA and therefore the Council were concerned only with the inclusion of stable non reactive hazardous waste (SNRHW) in the application and thus the effect on hydrology the impact of the amendment sought and allowed would have been known. The Council was therefore put to the expense of preparing for the Inquiry on a false premise.

6. This is a very clear example of the unreasonable behaviour referred to in paragraphs B13 and B14 of Circular 3/2009. A full award of costs is therefore sought.

**The response on behalf of Mr Larry Edmunds**

7. This is a matter where there is a very particular set of factual circumstances.

8. This is, in fact, a situation where a planning permission was granted by the Council for the development which attracted no objection from the EA. There was no suggestion therefore that the submitted information was inadequate.

9. On that planning permission being quashed the description of the proposal was amended to include asbestos; SNRHW was always clearly part of the description. Nevertheless, the EA then requested further information in order to assess the effect of the SNRHW component.

10. The appellant then commissioned additional work in response to the Council's requests and was advised by his consultants that this would be acceptable. That it was not accepted by the EA does not amount to unreasonable behaviour on the part of the appellant.

11. The Council was requested to defer consideration of the application to allow further meetings to take place between all parties in an attempt to resolve the matter. This it did not do and refused the application.

12. Nevertheless the appellant again commissioned the further work requested (the HRA) and was again advised by his consultants that this would be acceptable. On receiving confirmation from the EA that this was not in fact the case, the appellant took prompt action to seek to amend the application at appeal.

13. The Council does not object to the amended application so it was wrong to determine the matter prematurely and it was reasonable of the appellant to pursue the matter.

**Reasons**

14. 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 another party to incur or waste expense unnecessarily.

15. There is no evidence that the EA was consulted during the preparation of the Environmental Statement that supported the planning application. It was the presence of SNRHW among the range of waste types to be disposed of that ultimately caused concern to the EA. The inclusion of that waste in those to be disposed of was clearly stated in the initial planning application documents. The stance of the EA on that planning application is therefore difficult to understand at this distance. I therefore have some sympathy with the appellant's disappointment that the planning permission was quashed due to the procedural failures of the Council and that the EA then came to a different view.

16. Nevertheless, the application was ultimately refused by the Council on the basis of a holding objection by the EA. Having submitted the HRA to the EA the appellant continued to negotiate with the EA and the Council and eventually reached an understanding with the EA on 6 August 2013. By this stage all

parties had prepared and submitted their evidence for the Inquiry which opened on 3 September.

17. I do not necessarily accept the contention that the appellant acted on the advice he received from his consultants in August 2013. Mr Harper's proof related to the Council's reasons for refusal and the holding objection of the EA. In my letter dated 14 August (sent via the Planning Inspectorate) I set out my understanding of Mr Harper's proof but raised the possibility that I may have misunderstood his position. In an email dated 22 August (so after the appellant purported to have sought to amend the basis of the proposal before the Inquiry) Mr Harper corrected my impression. I shall not set out in full what he said as the parties have that. However, his view is very clear. He states his opinion that the site '…is potentially capable of being engineered to accept a lesser specification SNRHW, not that applied for.' He therefore accepted that the application scheme could not be supported but maintained his position that SNRHW could remain part of the scheme.

18. If that was his professional view it was appropriate for him to state it. However, the appellant did not accept that advice and instead sought to withdraw all SNRHW from the application in order to overcome the EA objection. Whether that was the appellant's own decision or was made on the advice of Oaktree Environmental Limited I do not know.

19. Paragraph B43 of the Circular is very clear about the way appellants should proceed where, as in this case, the nature of the scheme is changed in response to the reasons for refusal. The appellant did not follow this course of action. Instead an amendment to the application considered by the Council was put forward on the first morning of the Inquiry. While notice of this was given in a letter dated 6 August from the appellant to the Planning Inspectorate, I did not interpret this letter as a formal request to amend the application before the Inquiry as was made clear in my note to the parties of 23 August sent via the Planning Inspectorate.

20. Until the formal request to amend the application was made all parties would have needed to approach the Inquiry on the basis that some form of SNRHW would be part of the appeal scheme and prepare accordingly.

21. However, by seeking the change that I agreed to the appellant was accepting that the appeal plainly had no reasonable prospect of success on the basis of the application submitted to the Council. This is given in paragraph B13 of the Circular as an example of unreasonable behaviour by appellants likely to lead to a substantive award of costs.

22. It is not correct to say that the Council does not object to the amended application. I set out in my appeal decision Mr Forsdick's explanation of the Council's position and the reason for that. Whatever the merits of its approach the expense of preparing for an Inquiry which did not in fact proceed on the basis established by the appellant's statement of case was therefore unnecessarily incurred and wasted. This did not become apparent until the first morning of the Inquiry.

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

**Costs Order**

24. 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 Mr Larry Edmunds shall pay to Bath & North East Somerset Council, the costs of the appeal proceedings described in the heading of this decision.

25. The applicant is now invited to submit to Mr Larry Edmunds, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

*Brian Cook*

Inspector