
Appeal Reference:	2021/A0131
Appeal against:	The refusal of full planning permission for a copy from appeal decision] for [centralised anaerobic digestion (CAD) plant to include a bunded tank farm, (6 no. digester tanks, 2 no. buffer tanks, 1 no. storage tank and associated pump rooms), biogas holder, biogas conditioning system, temperature control system, waste water treatment plant (WWTP), motor circuit control room building, hot/cold water recovery system, feedstock reception and digestate treatment building, product storage building, odour control system and associated tanks, emergency gas flare, back-up boiler, administration/office building, car parking, 3 no. weighbridges, fire water tank and pumphouse, pipelines to existing combined heat and power (CHP) plant engines, switchgear, earth bunding, 3 no. accesses to existing Giant's Park service road infrastructure and ancillary plant/site works
Location:	Lands to the north-west of existing Belfast City Council Waste Transfer Station at 2a Dargan Road, Belfast
Claim by:	Dargan Road Biogas Ltd
Claim against:	Belfast City Council for a full award of costs
Decision by:	Commissioner Julie de-Courcey, dated 6 th March 2023

Decision

1. A full award of costs is made.

Reasons

2. In accordance with the Commission's publication "*Costs Award Guidance*" costs will normally only be awarded where all four of the following conditions are met:
 - The claim relates to a relevant type of appeal;
 - The claim is timely;
 - The party against whom the award is sought has acted unreasonably; and
 - The unreasonable behaviour has caused the party claiming costs to incur unnecessary or wasted expense.

Eligibility

3. The planning application to which the appeal relates was determined under the Planning Act (Northern Ireland) 2011 [the Act]. An appeal was made in accordance with Section 58 thereof against the refusal of full planning permission. Therefore, the Commission has the power to make an order as to the costs of parties in accordance with Section 205 of the Act.

Timeliness

4. Paragraph 20 of the Commission's aforementioned publication states that where a hearing takes place, any costs claim should be made as soon as reasonably practicable after the behaviour that triggered that claim. If, for example, it is being argued that another party was responsible for causing an unnecessary appeal, the costs claim should accompany the claiming party's statement of case. As the claim for costs was submitted with the appellant's statement of case, it was made in a timely manner.

Unreasonable Behaviour

5. The claimant drew attention to paragraph 14 of the Commission's "*Costs Award Guidance*" that sets out examples of behaviours that may be found to be unreasonable and is relying on the first namely causing an unnecessary appeal as it considers the respondent "*unable to produce any credible evidence to substantiate its reasons for refusing planning permission*".
6. The claimant's point about additional speaking rights not being afforded to them at Belfast City Council's (BCC) Planning Committee's (PC) meeting of 24 August 2021 is a matter that needs to be raised directly with it if considered contrary to procedure or if the corporate protocol in that respect is deemed to be unfair. That issue aside, my reading of the costs claim is not disputing the PC's authority to depart from its Planning Officers' recommendations, the challenge is to the rationale and robustness of its reasons for doing so.
7. The claimant referred to the planning application being presented to the PC on four occasions and subject of one Pre-Determination Hearing. The length of time taken to issue a decision on the application subject of this appeal is not part of their case alleging unreasonable behaviour. Part of a quotation from the PC Minutes that the claimant included in support of that position included mention of the length of time the application has been in the planning system; that must be read in the round. My understanding of the purpose of the chronology, that comprises almost half of their costs claim, is that it is provided to illustrate and supplement their contention that the PC caused an unnecessary appeal as set out in paragraph 5 above.
8. The respondent commented on the respective roles of the Planning Officers and PC and the latter's entitlement to make a decision contrary to the recommendation of its officers. That is not part of the claimant's allegation of unreasonable behaviour; their evidence focuses on what they see as the PC's lack of any credible evidence to substantiate its reasons for refusing planning permission.

9. The first reason for refusal of the application subject of the appeal giving rise to this claim for costs cited non-compliance with, amongst other things, Policies PED 8 Development Incompatible with Economic Development Uses and PED 9 (a) General Criteria for Economic Development of Planning Policy Statement 4: "*Planning and Economic Development*" (PPS 4). Its Preamble says that it does not provide policy for waste disposal or waste management facilities, which are dealt with in other PPSs. However, it adds that the policy approach and associated guidance contained within PPS 4 may (*my emphasis*) be useful in assessing proposals for other *sui generis* employment uses. Uncertainty in interpreting and applying this discretionary provision could have been prevented had direction been given as to when it might be considered of utility; none was provided. Albeit that those policies largely replicate associated provisions of Policy WM1 - Environmental Impact of a Waste Management Facility of Planning Policy Statement 11: "*Planning and Waste Management*" (PPS 11), the respondent's reference to PPS 4 was not, of itself, unreasonable or misplaced.
10. None of the policy relied on it he first reason for refusal relate to planned or proposed development in the way that criterion (ii) of Policy RE 1 Renewable Energy Development of Planning Policy Statement 18: "*Renewable Energy*" provides for those subject of valid but undetermined applications let alone those at earlier stages in the process namely a Proposal of Application Notice (PAN) and Pre-Application Discussion (PAD). Notwithstanding that, the respondent did not act unreasonably in considering the proposal's impact on the proposed development by Giant's Park Belfast Limited (GBPL) as a material consideration for the purposes of application of Sections 6 (4) and 45 (1) of the Planning Act (Northern Ireland) 2011. Whether the weight attached to that consideration was commensurate with the evidence is an issue considered in the appeal decision.
11. Annex 1 – Additional Note from Environmental Health BCC was appended to the final report presented to the PC on 24 August 2021. This informed its Planning Officers' advice that "*there are no technical reasons why the proposed CAD facility would be incompatible with either the film studios or GBPL proposals*". The respondent had no issue with the totality of the accompanying environmental information that showed, amongst other things, that the proposal would not be likely to give rise to significant effects in respect of: noise and vibration; air quality and dust; visual impact and landscape character; traffic; and birds or vermin subject to mitigation measures being secured by the imposition of conditions on any forthcoming planning permission.
12. There being no technical or scientific-based reasons underpinning the refusal reason, it was difficult to discern the substance of the respondent's case for how the proposed development would be incompatible with the character of the surrounding area and adjacent uses, including the GBPL proposal, and prejudice their future operation. Much of the evidence in this respect seemingly related to its perceived benefits/disadvantages when compared to the GBPL proposal whereas the claimant was entitled to have their application considered on its own merits irrespective of GPBL being BCC's preferred development partner. In its statement of case the respondent expanded on why its PC perceived there to be incompatibility and in its rebuttal of the claimant's statement of case in respect of the planning appeal said that it's argument was "*more nuanced around the environmentally sensitive nature of those uses in a commercial context*". The respondent specifically

refers to the BCC statement of case in asserting that its first reason for refusal is reasonable. Albeit that its evidence has not been considered persuasive in allowing the appeal, it reads as a *post facto* justification for the PC's decision in the absence of scientific or technical evidence to support its approach.

13. The second reason for refusal of the planning application subject of the appeal to which this costs claim relates refers to the proposal's alleged incompatibility with Policy BHA 05 of the draft Belfast Metropolitan Area Plan (2015); the plan actually provides for Zoning BHA 05 Mixed Use Site North Foreshore. For the sake of consistency with the decision on the planning appeal, this 2014 version of the draft plan shall be referred to as BMAP.
14. BCC acknowledged that the statutory development plans for the area are the Belfast Urban Area Plan 2001 (BUAP) and the Belfast Harbour Local Plan 1990-2005 (BHLP). However, it considered that greater weight should be given to BMAP because of the advanced stage that it had reached in the development plan process. Of itself, that was not unreasonable but a matter of judgement.
15. When its Planning Officers' report was placed in front of the PC for the final time (24 August 2021), Members were reminded that:
 - There was a precedent of permitting uses on the overall site subject of the North Foreshore Giant's Park Comprehensive Masterplan (CMP) that did not accord with its provisions i.e. Belfast Harbour Film Studios (BHFS) had been built and planning permission granted for its phase 2 extension;
 - The CMP is conceptual and it is unclear from the document how definitive the spatial configuration of uses across the zoning is. In any event, greater weight should be afforded to the Zoning BHA 05 itself as the CMP is a subordinate policy document. Moreover it was published in 2009, does not reflect the planning permission granted for BHFS phase 1 and is arguably outdated;
 - When planning permission was granted for BHFS phase 1, the PC accepted the Case Officer report that advised that the proposal "*conformed in principle*" with Zoning BHA 05 in recognition of the broad zoning of the land for employment uses;
 - The PC did not grant permission on the basis that there was no longer a requirement for waste management facilities. There was no evidence that the granting of planning permission for BHFS meant that waste management facilities were no longer required on the wider lands comprised within Zoning BHA 05; and
 - BCC's decision to grant planning permission for BHFS on land assigned for Arc 21 waste management facilities in the CMP established the principle of it taking a flexible approach to uses prescribed by Zoning BHA 05.
16. As instructed at paragraph 1.1 of that final report to the PC, it has been read in conjunction with the cited items. However, it is reasonable to expect that the report would provide a clear, composite picture as to how all material considerations were weighed in informing the PC's decision on the proposal. However, there was no

indication of the weight that was given to the listed considerations in the preceding paragraph in distinguishing the approach taken in this case to that taken in determining the BHFS proposals in the context of the provisions of the CMP and BMAP Zoning BHA 05. The planning application for phase 2 of BHFS and that subject of the appeal to which this costs claim relates were under consideration at the same time. However, a more liberal interpretation of BMAP policy seems to have been applied the BHFS proposal. There was no indication of the weight given to the aforementioned considerations in this instance or on what basis the proposals were apparently distinguishable with regard to the application of BMAP policy.

17. The report said that planning permission was granted for BHFS contrary to the CMP due not only to recognition of the broad zoning of the overall lands for employment uses but also the contribution that the film studios would make to the local economy. No evidence was given as to the comparative value of the BHFS development to the proposal being determined. It was not apparent that evidence of this proposal's wider environmental, economic and social benefits (WEESB) were objectively assessed on their own merits in the final balancing exercise. Whilst the weight given to economic considerations may have tipped the balance in favour of BHFS, the applicant was nevertheless entitled to know what weight, if any, was given to: the divergent application of policy associated with BMAP Zoning BHA 05 in all three applications; and the WEESB associated with their proposal.
18. The respondent refers to relevant material considerations as including the Regional Development Strategy 2035, Strategic Planning Policy Statement for Northern Ireland (SPPS) Planning for Sustainable Development and various (unspecified) Planning Policy Statements. However, from the final report to the PC or the Minutes of that meeting, there is no indication what weight was given to them.
19. When the claimant's chronology of the PC's consideration of their proposal is considered in conjunction with the foregoing, is persuasive that the respondent did not: undertake reasonable, objective assessment of the grounds on which it considered the policies in its first reason for refusal to be engaged; and did not demonstrate that a balancing exercise had been undertaken to show how the evidence before it had been weighted and assessed. The respondent behaved unreasonably in terms of the process followed by the PC and the failure to provide persuasive evidence to support the stated refusal reasons before and at the time of reaching its decision.
20. The PC had several opportunities to assess and review the proposal with input from their professional and legal advisers. Where the PC departed from their advice, it should have observed its own "*Operating Protocol Belfast City Council Planning Committee*" whereby it is required to:
 - a. Fully explain the rationale for the decision, based on proper planning considerations;
 - b. Make a decision in accordance with the LDP and any other associated planning policy; and
 - c. Give clearly identified planning reasons for departing from the LDP and demonstrating how they justify that departure.

Minutes show that its decision was taken against advice from Planning Officers that moving to refuse was based on “*no technical objections*”, “*no technical reasons*” and was “*unreasonable*”. Whilst disparity and disagreement are inherent and reasonable characteristics of the planning process, in this instance, the respondent has been unable to produce credible evidence to substantiate its reasons for refusing permission. On this basis of this unreasonable behaviour it caused an unnecessary appeal and a full award of costs should be made to the claimant.

Unnecessary or Wasted expenses

21. In claiming for an award of costs, the claimant said the expenses incurred included:

- a. The appeal fee;
- b. Senior Counsel/Legal fees to provide advice, attend meetings, prepare written submission and attend and give evidence at the hearing;
- c. Planning consultant fees to provide advice, attend meetings, submit the appeal, prepare written submissions and attending and giving evidence at the hearing; and
- d. Environmental Statement consultant team to provide advice, attend meetings, prepare written submission and attending and giving evidence at the hearing.

Order

It is hereby ordered that Belfast City Council shall pay to Dargan Road Biogas Ltd the full costs of the appeal proceedings incurred in:

- a. The appeal fee;
- b. Senior Counsel/Legal fees to provide advice, attend meetings, prepare written submission and attend and give evidence at the hearing;
- c. Planning consultant fees to provide advice, attend meetings, submit the appeal, prepare written submissions and attending and giving evidence at the hearing; and
- d. Environmental Statement consultant team to provide advice, attend meetings, prepare written submission and attending and giving evidence at the hearing.

On receipt of this order Dargan Road Biogas Ltd may submit details of those costs to Belfast City Council with a view to reaching agreement on the amount. If the parties are unable to agree, the claimant may refer the matter to the Taxing Master of the High Court for a detailed assessment.

COMMISSIONER JULIE DE-COURCEY

Documents

Claimant: Costs claim dated 1st July 2022 by Clyde Shanks

Respondent: Response from Belfast City Council dated 8th August 2022