

**Section 78 Town and Country Planning Act 1990**

**Department of the Environment Circular 8/93**

**Appeal by RES Developments Limited against the refusal of West Devon  
Borough Council to grant planning permission for a wind farm at Den Brook**

**Planning Inspectorate Reference APP/Q/1153/A/06/2017162/NWF**

**APPLICATION FOR AN AWARD OF COSTS ON BEHALF OF THE APPELLANT**

**Marcus Trinick  
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October 2009**

**APPLICATION FOR AN AWARD OF COSTS ON BEHALF OF THE APPELLANT**

1. On behalf of the Appellant I apply for an award of costs against West Devon Borough Council (the Council). The scope of the application comprises the costs incurred by the Appellant from the date of the pre-inquiry meeting on Monday 1<sup>st</sup> June 2009 and the close of the inquiry, in relation to the bringing of evidence on policy and on landscape and visual issues.
2. The Appellant acknowledges that it would have been necessary to bring landscape and visual evidence through Mr Goodrum to address that given by Ms Reynolds for DBJRG, but additional costs were incurred by RES because of the approach of the Council, namely:
  - (a) The costs of preparation and attendance by Mr Stewart on policy issues, to meet the evidence of Mrs Hart.
  - (b) The time taken by me in preparation for the cross examination of, and in cross examination of Mrs Hart and Mr Holland.
  - (c) The costs of preparation and attendance by Mr Goodrum in relation to the evidence of Mr Holland.
3. Since the appeal was made in 2006 the application for an award of costs falls to be considered in terms of the advice in Departmental Circular 8/93.
4. In accordance with the advice in paragraph 1 of Annex 5 to C.8/93, and to paragraph 6 of Annex 1 to the document, this application is made to you as the decision maker before the close of the inquiry. For the benefit of members of the public, I record that this application will be considered by you quite separately from the merits of the appeal. Paragraph 2 of Annex 1 advises that a decision on a costs application does not follow directly from the result of the appeal.
5. The Appendix to the Circular advises that Councils may be at risk of an award of costs against them in a number of circumstances. None of the examples given

precisely meet the facts of this case, but I note that the examples given in the Circular are by way of example only.

6. I record paragraph 1 of Annex 1 in terms of general principles. Again for the record, and in terms of paragraph 6 of Annex 1, it is the contention of the Appellant that the Council has behaved unreasonably and that the Council's unreasonable behaviour has caused unnecessary cost.
7. I will now set out the facts which form the basis of the application before returning to the advice in the Circular.
8. The 22 March 2007 appeal decision of Mr Lavender was challenged in the High Court and was ultimately quashed on 23 July 2008. After much correspondence a new inquiry was arranged and that event is now about to close. Prior to the arrangement of the inquiry the principal and other statutory parties were required to submit Statements of Case. The Council submitted a Statement of Case on the 2<sup>nd</sup> December 2008.
9. In its December 2008 Statement of Case the Council confirmed that it would lead evidence on noise issues alone. It specifically confirmed that it would not lead evidence against the proposed development on planning policy or landscape and visual issues.
10. At the 1<sup>st</sup> June 2009 pre-inquiry meeting, the Council indicated that it would in fact be calling landscape and visual and policy evidence and such in the event was the case through Mrs Hart and Mr Holland.
11. You will remember that I cross examined Mrs Hart on the approach of the Council to the second inquiry. The following points of relevance to this application emerged from this passage of evidence:
  - (a) The decision to bring to the inquiry planning policy and landscape and visual evidence was made on the basis that a new Inspector had been appointed and that all issues were before him for determination (this point is of course acknowledged and agreed by the Appellant).

- (b) Since the first inquiry a number of planning policy documents material to your considerations had been published, specifically the Energy Review 2007 (CD32b), the draft Renewable Energy Strategy 2008 (CD32c & 32d) and the draft EU Directive. In addition there were relevant factual events in terms of the progress of Devon towards the achievement of 2010 renewable energy targets set out in the Structure Plan (CD8).
- (c) Since the decision of Mr Lavender in March 2007 there had been a local election, and the Planning Committee of the Council contained various new members.
- (d) Despite the events I have recorded, the proposed development has only been before the Council on a single occasion, in 2006 prior to the first inquiry. Officers have not presented any reports to the Committee following Mr Lavender's appeal decision, and indeed the events leading to this inquiry have not even been reported to members.
12. I also record ~~XX~~ of Mrs Hart and Mr Holland in terms of their complete failure to engage at any point in their evidence in chief with the previous appeal decision. Reading the evidence of these witnesses one might conclude that there had been no previous inquiry. I refer in this context to the submissions which have now been made about the materiality of Mr Lavender's decision, and I incorporate those submissions in this application.
13. I submit that the decision of the officers of the Council to call landscape and visual and policy evidence to this inquiry was unreasonable for the following reasons:
- (a) In ~~XX~~ of the Council's witnesses it became clear that there had been no material change in planning circumstances which required Mr Lavender's decision to be revisited in terms of planning policy and landscape and visual matters. Specifically, there had been no material change to the landscape and visual base line, no material change in terms of the impacts of the proposed development and no material change adverse to the scheme in terms of local policies or regional policies.

(b) It is quite extraordinary, and inappropriate and unreasonable, for officers of a local authority to decide for themselves to bring evidence to an inquiry without an appropriate resolution of the members of the Council. In my view it is quite unbelievable that West Devon Borough Council were not asked as a corporate body to re-examine its approach to the proposed development following not only the decision of Mr Lavender, but also the decision in the Court of Appeal. This matter should have been presented to members. It is simply not good enough to say that it was appropriate to bring landscape and visual and planning policy evidence because there was to be a new Inspector and all issues were before him. That line of reasoning might justify the approach of a member of the public, but certainly not a statutory authority with public responsibilities and a duty to behave reasonably.

(c) The approach of the officers of the Council failed the Council's members in another respect. Account should have been taken of the need to meet renewable energy targets set out in the Structure Plan (CD8) and progress towards meeting those targets should of course have been reported to members within a report asking for the views of members on their approach to the second inquiry.

In summary, the Appellant finds the behaviour of the Council and its officers quite unreasonable and it notes that in comparison Devon County Council did decide, following the first appeal decision, not to offer any policy or landscape and visual evidence to your inquiry.

14. I now return to the Circular, noting that the Circular does not anticipate every relevant circumstance, but only gives examples of unreasonable behaviour which may lead to an award of costs. In my view the Council has, on the facts outlined, behaved unreasonably in the following terms:

(a) Paragraph 3(5) of Annex 2 provides that it would be unreasonable for an appellant to cause a party to call a professional witness to attend

unnecessarily, in the terms advised in that paragraph. In my view this advice applies as much to a local planning authority as it does to an Appellant.

(b) By reference to paragraph 16 of Annex 3, the Council should have had regard to the previous appeal decision, and especially to the conclusions of Mr Lavender on landscape and visual and policy issues. They had no such regard and this disregard is unreasonable.

(c) Apart from the advice in the Circular, the Council has behaved unreasonably on the facts which I have described.

15. I submit that the Council has behaved unreasonably in the terms set out in this application and I apply for an award of costs within the scope described in paragraph 1.

Marcus Trinick

Eversheds LLP

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