

**IN THE MATTER OF  
THE TOWN AND COUNTRY PLANNING ACT 1990**

**AND IN THE MATTER OF  
NORTHACRE ENERGY FROM WASTE FACILITY,  
STEPHENSON ROAD,  
NORTHACRE INDUSTRIAL ESTATE,  
WESTBURY.**

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**OPINION**

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1. I am asked to advise Wiltshire Council in respect of an appeal against non-determination of an Energy from Waste Facility at Northacre Industrial Estate. Strategic Planning Committee will consider the Council's position in respect of the appeal at its meeting on 27<sup>th</sup> July. The background is that the application now under appeal was resolved to be approved in June 2021, but the decision was delayed until March 2022 awaiting the decision of the Secretary of State whether or not to call it in. The matter was then put back to committee in April 2022 to consider any new material considerations arising. The report to that committee identified new material considerations, but indicated that none would lead to a different decision. The committee resolved to defer the decision to July 2022 to allow for further information to be forthcoming. In the meantime, the applicants have implemented a legal 'fallback' scheme on the site, obtained an Environmental Permit and appealed the current application for non-determination, with a warning as to costs. I have seen the draft committee report for the July meeting, which reviews each potential 'new' material consideration and concludes that there is no justification for making a different determination to that in June 2021; it therefore recommends informing PINS that the Council would have granted permission if it were still the decision-maker.
2. I am asked to advise on five specific matters, which I set out below.

(i) *SPC's position to date and the issues raised in the discussion to support a deferral pending the outcome of the Secretary of State's consultation:*

3. So far, I consider that the Council has acted reasonably. It was entitled to delay issuing the decision until the Secretary of State had considered the issue of call-in. Given the passage of time, it was entitled to consider whether new matters as at March 2022 would alter its decision made in June 2021. It was entitled, as at April 2022 to call for more information/consideration if it did not feel it had sufficient at that stage.
4. As at July, the Council may now consider the updated analysis of the officers' report, and conclude that the June 2021 resolution should be endorsed and permission would have been granted, if the application had not been appealed. In those circumstances, it should inform PINS and the Appellant as soon as the resolution has been made that it will not contest the appeal.

(ii) *Should the Committee decide to support a refusal whether there appear to be any defensible grounds for maintaining that position on the current facts:*

5. On the basis of what I have seen, the answer is 'no'. The principal matters were determined in favour of the application in June 2021. New matters arose between then and March 2022, when the Secretary of State notified that he would not be calling the application in. Those matters were considered in April 2022 with a recommendation that they did not alter the original decision. Deferral to July 2022 has led to a fuller consideration of those matters, and the addition of two more changed circumstances (the implementation of the fallback and the grant of the EP). The recommendation, again is that these do not alter the original decision – indeed the fallback and the EP arguably strengthen the applicant/appellant's case.
6. Without altered circumstances justifying a different decision from that taken in June 2021, the Council would be at risks of a costs award if it refused the permission now. Officers' analysis is that there are no altered circumstances that do justify that change of position.

(iii) *Should SPC confirm that had it still been the deciding authority it would have granted permission, subject to conditions:*

7. On the basis of the foregoing, the answer is ‘yes’. No new considerations have arisen since the original resolution and there are no justifiable reasons for refusal.

(iv) *Whether there is any basis for resisting an application for an adverse costs award due to the non-determination on the basis that the facts of the case are so unusual to be almost unique:*

8. It appears from the applicant/appellant’s letter dated 29<sup>th</sup> June 2022 that, if the Council resolves that it would not have refused permission, the developers would not seek an application for costs. It refers to the Council being ‘insulated from a claim of costs’.

9. In any event, it is my opinion that an early determination that permission would have been granted will reduce both the risk of a costs award, and (by not contesting the appeal) also reduce the quantum of any such award, were it made.

10. The Council was reasonable in delaying the issuing of the decision until the Secretary of State decided whether or not to call in the application. Given the length of time between the resolution and that decision, the Council was entitled (indeed, arguably, obliged) to ask itself whether any new material considerations had arisen. A number had, and these were duly reported to committee. That the recommendation reached was that they did not alter the original decision did not mean there was anything unreasonable in considering them. Equally, members were entitled to seek more information and more detailed consideration, which pushed the decision from April to July. That additional consideration having taken place – along with new factors having arisen since April – the Council is entitled to re-affirm its original decision that permission should be granted.

11. None of the above, in my opinion, is unreasonable conduct so as to justify an award of costs.

(v) *Comment on the draft cabinet report and whether Counsel considers any changes should be made:*

12. I have read the committee report for 27<sup>th</sup> July. It appears comprehensive and balanced in its reasoning and conclusions; I have no reason to doubt the judgements reached.

13. Consequently, I have no amendments to propose.

CHRISTOPHER BOYLE QC,

12<sup>th</sup> July 2022

Landmark Chambers,

180 Fleet Street,

London,

EC4A 2HG.