

Our ref: 2866/201002579/
SE/JH

Ask for: Steffan Evans



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Date: 26 March 2012



Steffan.Evans@ombudsman-wales.org.uk

Dear,

You have previously corresponded with my investigator, Mr Evans, regarding your complaint. In view of the issues involved in this case, I have decided to respond to you personally. This letter forms the final report of my office's investigation into your complaint against Cardiff County Council ("the Council"). You will be aware from your telephone conversations with Mr Evans that we recently met with officers from the Council to discuss the issues arising in this case. Some changes have been made to the draft letter-report in light of those discussions. However, as nothing was raised that had not already been considered, the conclusions reached on your complaint remain unchanged.

Your complaint

Your complaint broadly relates to the Council's handling of Viridor Plc's successful planning application for a waste incinerator development (an energy from waste facility) at Trident Park, Cardiff.

You considered that the consultation exercise undertaken by the Council about the proposed development was inadequate. You believed that the Council should have notified the residents of the local area more extensively and you listed a number of potentially interested parties who in your view would have benefited from notification. Because of the potential impact of the proposed development, you also considered that the Council should have consulted more widely with the residents of the City.

You complained that the Council's failure to properly consult about the application amounted to maladministration which denied persons potentially affected by the development the opportunity to make representations and potentially object to the proposed development. You are of the view that had the consultation exercise been more widespread and comprehensive that the Council would have decided against granting approval for the proposed development.

Your main concern about the impact of the development appeared to be your belief that the facility would release dangerous and harmful emissions which would be detrimental to the health of the City's residents.

You complained that the process of determining the application was flawed and that the decision taken was a miscarriage of justice for the residents of Cardiff.

The Ombudsman's role

My role is to consider and investigate complaints of maladministration or service failure on the part of public bodies which causes hardship or injustice to members of the public. To uphold a complaint I must be satisfied that there has been an injustice or hardship to the complainant resulting from a failing identified by the investigation.

I normally take maladministration to mean that the body concerned has failed to act in accordance with policy or procedure or has otherwise acted unreasonably. If the body has failed to act in accordance with the law then that can also amount to maladministration.

I should explain that I cannot substitute my judgment for that of an authority under investigation, nor can I question the merits of an authority's properly made decision. A properly made decision is one that is taken without maladministration. I do not either, as Mr Evans has previously informed you, have the power to declare a planning consent null and void, as you suggested I should in this case.

My investigation

In addition to the documents you supplied, I have considered the Council's formal response to your complaint, including relevant background papers and copies of the correspondence between you and the Council. Whilst I will not refer to everything I have considered in this letter, I am satisfied that nothing of significance has been overlooked.

To assist me with the determination of your complaint, I sought and obtained independent advice on your complaint from one of my professional advisers, an expert on planning matters.

Relevant Law and Procedure

The Town and Country Planning (General Development Procedures) Order 1995 (as amended) (“the Order”) specifies, amongst other things, the procedure relating to planning applications.

Article 8 of the Order sets out the publicity requirements for applications for planning permission. The Order requires that an application for planning permission for development of this kind, which is accompanied by an environmental statement, be publicised by site display in at least one place on or near the land to which the application relates and by local advertisement. In applications of other kinds publicity can also be provided by serving the notice on any adjoining owner or occupier.

The Order defines “by local advertisement” as meaning by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated, and where the local planning authority maintain a website for the purpose of advertising planning applications, by publication of the notice on the website.

The Order defines “by site display” as meaning by the posting of the notice by fixing it to some object, sited and displayed in such a way as to be easily visible and legible by members of the public.

The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the Regulations”) sets out the requirements for assessment of the impact on the environment of projects likely to have significant effects on the environment.

The Regulations define an “EIA application” as being an application for planning permission for EIA development. The proposed development in this case was such a development.

Background

Planning permission was originally refused for an application for a similar development on the same site in July 2009.

A second amended application was submitted to address the reasons given for the original refusal (which, in any case, Viridor Ltd was in the process of appealing when the latter decision was made).

The Council's Planning Committee resolved to grant planning permission for the development on 9 June 2010, subject to conditions and a s106 agreement. The s106 agreement was completed and planning permission (the decision notice) was issued on 29 June 2010.

The Council considered that a full and extensive consultation process had been undertaken for the development which satisfied the requirements of Article 8 of the Order.

The Council said that notification letters were sent to neighbouring occupiers, in accordance with that legislation. It said that the six site notices were displayed at key locations in the communities near the site as had been the case for the original application by Viridor. The Council stated that the locations were chosen to ensure maximum publicity was achieved. It said that the proposals were also advertised in the local press.

The Council told me that it publicised the application on its website in the weekly lists. It said that the application would not have been displayed in the press notice format because that practice had started some six months ago, after the Viridor application had been submitted.

With respect to the residents of Galleon Way, the Council said that they were not sent written notification of the proposals because the properties did not adjoin the application site. They were located approximately 560 metres from the application site.

Professional Advice

Mr Evans sought advice on your complaint from one of my independent professional advisers, an expert on planning matters. The adviser, Mr Y, is a retired planning inspector with twenty years experience of dealing with planning appeals. He is a Chartered Town Planner and a member of the Royal Town Planning Institute.

The adviser noted, as the Council had pointed out, that the statutory requirements for publicity for planning applications of this kind were complied with in this case. In addition, he noted that the Council had advised 17 adjoining owners by letter and fixed six notices in the vicinity of the application site.

The adviser said that your helpful plan showed that there was a group of high-rise apartments to the west of the site that did not benefit from a lamp post notice. He noted that the nearest notice was placed in Lloyd George Avenue some 0.5km away.

In the adviser's view, it should have been apparent to the Council that there was a group of residential / commercial properties to the west of the site which could have benefitted from lamp-post notices, if not letter consultations under the Council's discretionary powers to publicise significant planning applications.

The adviser considered whether, if sufficient shortcomings were found in the publicity to amount to maladministration, it was likely that the decision taken on the application would have been different.

The adviser commented that more widespread publicity for the application would probably have resulted in an increased number of responses from local residents. He said it was also most likely that many of the representations received by the Council would have been objections to the development. He stated that the question then was whether the extra weight of objection would have led to a refusal of permission.

The adviser noted that the committee report on the application referred to eight objections to the development and summarised them under 21 headings. These 21 headings generally fell within the main issues addressed in the report. The adviser said that it seemed to him unlikely that, had there been wider publicity for the application, a significant number of new issues would have emerged from the increase of objections. Given that the substance of the objections to the development were addressed in the committee report and found not to be of such weight as to warrant refusal of the application, he did not consider that extra publicity would have led to a different decision.

Mr Evans asked the adviser to consider whether the decision taken by the Council appeared to him to be manifestly unreasonable or perverse.

The adviser said that planning permission for a similar proposal (ref: 08/2616E) was refused by the Council in July 2009. The single reason for refusal concerned the need for the importation of substantial quantities of waste material from outside the Cardiff area and hazardous waste being exported to England. He stated that this would result in the unsustainable

transportation of waste material contrary to the objectives of TAN 21: Waste (guidance issued by the then Welsh Assembly Government relating to the planning framework for waste management in Wales).

The adviser said that the application that was the subject of the complaint differed from the earlier application in the ways listed at paragraph 1.3 of the committee report. In summary, these were: increases in the amount of recycled waste; a reduction in the amount of residual non-combustible waste; an additional recovery facility for incinerator bottom ash; an examination of the best way to deal with fly ash; a commitment to only treat waste from South East Wales; and minor highway improvements.

The adviser said that the committee report addressed these amendments in detail and concluded, on balance, that the development met the guidance in TAN 21 and the other relevant local and national policies. The adviser told me that in his experience, a decision to refuse permission and then, following amendments designed to address the Council's objections, to permit the development often happened where complex development was involved. The adviser stated that he could see nothing in the process or the decision reached that could be called manifestly unreasonable or perverse.

Review of key issues and conclusions

I acknowledge that in this case the Council's consultation exercise met that which was required of it under the Order. However, the wording of the Order gives considerable flexibility to the consulting authority so that it can meet and even relatively easily exceed the obligations that the Order imposes on it. Its requirements are not onerous and can be achieved without necessarily giving notification that is proportionate to the potential impact of a proposed development. Therefore, that the Council met the statutory minimum does not mean, in itself, that it had not acted maladministratively when it consulted about the application.

The proposed development was of considerable importance with potentially significant environmental implications for the immediate and wider locality. I agree with the adviser that it should have been apparent to officers visiting the site that there was a group of properties (both residential and commercial) to the west of the site in particular which would have benefited either from being notified directly of the application or from the erection of site notices in the immediate vicinity of their properties. I understand that determining the extent of the consultation exercise in developments of this kind involves the professional judgment of the officers concerned but given the nature, significance and siting of the proposed development I am of the view that the

consultation exercise fell short of what could reasonably be expected of it which amounted to maladministration on the part of the Council.

Despite that shortcoming, wide-ranging and often detailed objections were made about the application which was considered by the Council before the application was determined. The Council produced a comprehensive report to committee where the common issues arising relating to health matters, noise nuisance, odour nuisance, pollution etc were all considered in detail (the list is not exhaustive). In view of the objections that were made and considered, I accept the adviser's conclusion that it was unlikely that, had more representations been received as a result of a more extensive consultation exercise, other significant objections would have been raised which would have led to a different outcome.

I also accept the adviser's view that there was no evidence that the decision taken with respect to the planning application was either manifestly unreasonable or perverse. In light of that, I cannot question the merits of the decision.

You have argued that had the consultation been wider, the sheer weight and number of objections to the proposed development would have resulted in the Council refusing permission for the development. I am not persuaded that the application would have been determined differently even if a higher number of objections had been received. Whilst the strength of local opposition to a proposed development is something that the Council as the Local Planning Authority may have regard to in determining a planning application, it is highly unlikely that it would be the decisive factor, especially if the proposal is otherwise acceptable in planning terms, which it appears to have been in this case.

I should also make you aware that the potential negative effect of a proposed development on the value of nearby properties is not a material planning consideration.

Turning to the question of whether an injustice was caused to you personally by the matters complained of, given where you live, I am not persuaded that there is a personal injustice to you arising from the shortcoming identified in the Council's consultation exercise. Whilst I can understand your concerns about the possibility of widespread harm to health being caused by the incinerator, I am not persuaded that this possibility is directly linked to the shortcoming in the consultation process. That injustice, even if it could be

proven with any level of certainty, is linked to the development itself rather than the consultation exercise.

I note that you have now provided consent from three of the residents of Galleon Way authorising you to represent them. Given that these residents would have benefited had a fuller consultation been undertaken, namely the opportunity to object to the proposal, I am satisfied these residents did suffer an injustice in that they were denied the opportunity to make representations about the proposed development. However, given that the outcome would probably not have been any different, the injustice is limited to that lost opportunity.

Regarding your more recent correspondence and the extracts taken from the papers relating to the Council's Environmental Scrutiny Committee, whilst I can understand why you have submitted the papers, I do not consider that they constitute compelling evidence that the Council has acted maladministratively in this matter but rather they are indicative of the view(s) held by members of that committee.

In reaching my decision, I have been guided by, and accept in full, the independent professional advice set out above. I am, however, mindful of the exceptional nature of this development. Developments of this kind are rare. I should make it clear that in reaching my decision I am not setting a precedent as to how extensive consultation should be for future proposed developments of this kind. It will continue to be necessary to determine the extent of a consultation exercise undertaken for an application on its own merits. It was the very particular nature, location, and scale of this development that set it apart and led me to the conclusions I reached. I acknowledge that there was strong local opposition to this development. Nevertheless, the application was accompanied by an Environmental Statement, and was subject to a formal Environmental Impact Assessment. I am also mindful that the Environment Agency had in fact granted a permit for the operation of this incinerator.

Whilst I can therefore understand that you have concerns about the development and the health of the residents of Cardiff and its visitors, for the reasons set out above I **uphold your complaint** only to the extent that the residents of Galleon Way, who you represent, were denied the opportunity to make representations about the proposed development as a result of the shortcoming in the Council's consultation exercise.

I **recommend** that the Council:

1) Apologise to those persons you complained on behalf of, who were denied the opportunity to make representations because of the shortcoming in the Council's consultation exercise.

2) Review its consultation procedure relating to planning applications where the proposed development may have a significant and widespread impact on public health.

This letter concludes the investigation of your complaint, and I am sending a copy to the Council. An anonymised copy of the report has also been sent to Ms X, Deputy Clerk to the Petitions Committee at the National Assembly for Wales.

My office prepares an anonymised summary of every case investigated. My office is obliged to report on its work and the summaries can be used in information published by my office from time to time, and may be placed on the website. I attach a copy of the summary prepared about your complaint. As you will see, you cannot be identified from the information contained in the summary.

Please let my office know if you want any documents you have provided to be returned to you. We routinely destroy our files 15 months after the case is closed.

Yours sincerely

Peter Tyndall
Ombudsman

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FOOTNOTE

This letter constitutes a report under s.21 of the Public Services Ombudsman (Wales) Act 2005.