

Re: Grange Landfill Site, Droppingwell, Rotherham

EXECUTIVE SUMMARY OF ADVICE TO RMBC

1. I have been asked to advise Rotherham Metropolitan Borough Council (RMBC) on the prospects of successfully challenging the validity or operation of the environmental permit for the operation of Grange Landfill Site, Droppingwell near Rotherham.
2. On the facts as they stand, my opinion is that the prospects of making a successful challenge are low (below 20%). In my opinion it would be very difficult to justify a speculative claim on public interest grounds when the prospects of success are so limited. Further, there would be a significant risk to RMBC on costs.

Background

3. This case concerns the proposal to re-commence tipping operations at the Grange Landfill Site. Deposits ceased more than 20 years ago. In 2006/07, the original operator failed to comply with the requirements under the Landfill Directive and the Landfill (England and Wales) Regulations 2002 to submit a conditioning plan to permit the site to continue operations. That should have triggered the Environment Agency to take steps to ensure the definitive closure of the site, however the EA failed to comply with its duty and the permit was allowed to continue as if it had remained an operational site. This failure allowed a proposed new operator (Grange Landfill Ltd) to obtain a transfer of the permit of a what was (in effect) a 'mothballed' site.

4. The new operator now wishes to re-commence operations by tipping on the Phase 2 area. This has given rise to considerable local opposition. There are understandable concerns about the impact on local housing, landscape, wildlife and road safety. There are concerns about the amenity and safety of children using the football club next door.
5. I was first asked to consider these issues in 2018 and early 2019. We identified two separate issues:
 - 5.1. The apparent failure to comply with planning conditions relating to the restoration of Phase 1, completion of which was a pre-condition to the start of works on Phase 2. This was considered potentially to be a strong ground of challenge.
 - 5.2. The ongoing failure of the EA to ensure the closure of the site following non-compliance with Landfill Directive requirements. This was considered a weak ground of challenge.

Framework - The Functions of the LPA

6. RMBC has a wide power to bring legal proceedings where it is expedient to do so in the interests of the inhabitants of the Borough. In the present context, that power to take legal action could arise ancillary to a number of different functions, including environmental health, development control, protection of amenities and recreational facilities, highways or road safety. The power can also be used in a range of other circumstances where it is consider appropriate to protect the local population. Any decision on the commencement of legal proceedings requires careful consideration of (i) evidence, (ii) legal merits and (iii) the public interest considerations arising under Section 222 of the Local Government Act 1972.
7. RMBC also has specific functions in which it acts as statutory regulator, in particular as the Local Planning Authority (LPA). It is beyond dispute

that valid planning consent exists for the operation of the site as landfill. RMBC must approach its planning decisions relating to the site fairly, without any prejudgments and based on an impartial evaluation of the evidence.

Planning Issues

8. The planning issue which arose in relation to this site was that on the face of the original permission the completion of the approved landscaping scheme relating to Phase 1 was a precondition to the commencement of operations at Phase 2. As a result of our discussions in 2019, a formal referral was made by those who instruct me to RMBC's Planning Department. After a full review, it was concluded that the tipping levels of Phase 1 had in fact been approved as a minor amendment to the scheme in 1994. Independent counsel advised on the issue. It was concluded that the pre-commencement conditions were either no longer valid or had been complied with.
9. It follows that there is no evidence of a breach of planning controls and no basis for challenge on planning grounds.

Breaches of Duty by the Environment Agency

10. The Environment Agency have failed to follow a proper process in two respects.
 - 10.1. First, they failed to serve a Closure Notice in 2007, contrary to the requirements of the Landfill Directive, the Landfill (England and Wales) Regulations 2002 and the Environmental Permitting Regulations 2007.
 - 10.2. Second, they made a substantial variation to the permit in 2016, allowing operations to resume, without advertising the application or undertaking any local or public consultation (including

consultation with RMBC). That is contrary to the Environmental Permitting Regulations and the EA's own guidance.

11. Although these were serious legal errors, neither of them automatically invalidated the permit. There is no evidence that anyone within the EA acted in bad faith or with any improper motive. The permit (including the transfer to the new operator and the subsequent variations to the permit) remain legally valid unless and until they are struck down by an Order of the Court.

Prospects of Success in a Claim for Judicial Review

12. The principal breach by the Environment Agency (the failure to serve a Closure Notice) took place in 2007. In my opinion, this has made a significant practical difference: had the EA complied with its duty, the condition of the site would be very different and any operator would have faced an extremely difficult task in obtaining a new permit to recommence operations.
13. However, any claim based on the original breach is now long out of time. A challenge could only be based on a recent or continuing breach of duty. In my opinion the prospects of a claim for judicial review succeeding on that basis are now very poor (below 20%).
14. This is no longer a 'mothballed' site. The new operator is genuinely working towards the re-opening of the site and putting in place the improvements which should have been done in 2006/07. The new operator has incurred a significant investment of time and money into the ongoing development of the site. Even if a breach was proven, it is probable that the High Court would refuse to make an Order on discretionary grounds. The investment which the new operator has made in reliance on the permit is an important consideration.

15. There are two reasons why RMBC should not bring speculative proceedings where the prospects of success are low.
 - 15.1. As noted above, the power of a local authority to bring legal proceedings is prescribed by statute. A speculative legal action which is likely to fail would not be justified under the legal test
 - 15.2. There would be a significant risk to the local authority on costs. It is likely that any proceedings would have to be brought against both the Environment Agency and the operators of the site. If RMBC lost the case, it is highly likely that it would have to pay its own legal costs, plus the costs of both the EA and the operator.

Other Issues

16. I am not aware of any other potential grounds for legal action at the present time. RMBC has a number of relevant legal duties and also an overarching power to protect the interests of local inhabitants. If problems were to arise in operation, action could be considered in the following areas:
 - 16.1. breach of planning controls;
 - 16.2. statutory nuisance including noise, dust or pests (which is an important safeguard available to an LPA);
 - 16.3. safeguarding of wildlife (normally a matter for the police, but local authorities frequently make such referrals).
17. Constructive dialogue with the Environment Agency is important. At a practical level, the EA are better placed to resolve issues and mitigate the adverse effects of the operation, for example through requirements which can be specified within the site's Environmental Management System. Issues such as the traffic arrangements outside the site boundary may be controlled in this way. These are areas which are best resolved through dialogue with the EA and with the operator. The LPA

has a power to bring Court proceedings but compared with the EA's regular monitoring they are powers of last resort.

The Operator Competence issue

18. A number of issues have been considered in the overall review of RMBC's legal position. It is not necessary or appropriate to set them all out within this Summary, but it is appropriate to address the specific issue of Operator Competence.
19. Before authorising the transfer of a permit, the Environment Agency must be satisfied that the operator will operate the facility in accordance with the permit (referred to the 'Operator Competence' test). Although this is not quite the same as a 'fit and proper person' test, EA guidance states that the regulator should take into account any evidence of '*a record of poor behaviour or non-compliance with previous regulatory requirements*'. The EA also has the power to revoke an existing permit on those grounds.
20. In the present case, there have been adverse findings made against one of the directors. The findings were made in unrelated civil proceedings concerning a different waste operation.
21. In my opinion the findings of the High Court can and should be taken into account. The EA's guidance is clear that evidence of '*poor behaviour or non-compliance*' does not have to be in the form of a criminal conviction. However, those findings have already been drawn to the attention of the EA in correspondence. Their conclusion remains that the Operator is competent to comply with the permit.
22. It is the responsibility of the EA to assess Operator Competence, not RMBC or anyone else. It is regrettable that the EA's failure to comply with its duty of consultation before transferring the permit meant that the issue was only considered in retrospect, but it has now been taken

into account. The Administrative Court would be reluctant to interfere with the exercise of the EA's judgment unless the decision was plainly irrational. In any event, that decision was made in 2018 and any prospect of a challenge is now long past. The evidence of past non-compliance remains a matter of record and will justify particular vigilance of compliance with the permit.

Conclusion

23. The prospects of any challenge to the continuation of the permit are very poor (below 20%). Although permitting is a matter for the EA, going forwards RMBC continues to have an important role in monitoring the operation of the site in accordance with its various statutory functions and its general power to protect the interests of the inhabitants of the Borough.

Andrew Thomas QC
Lincoln House Chambers
Manchester