



Appeal Decision

Site visit made on 30 May 2024

by Mr Cullum Parker BA(Hons) PGCert MA FRGS MRTPI IHBC

An appointed person by the Secretary of State for Energy Security and Net Zero

Decision date: Friday 5th July 2024

Appeal Ref: APP/V2255/3343902

SI 2020 No 0000 - REQUIREMENT 3 - Cleve Hill Solar Park

- The appeal is made under Schedule 1, Part 3 of Statutory Instrument 2020 No. 0000 'The Cleve Hill Solar Park Order 2020' (made 28 May 2020, in force 19 June 2020) against a refusal to discharge Requirement 3 (set out in Schedule 1, Part 2 Requirements of the Order).
 - The appeal is made by Pinsents Masons LLP and Envams Ltd on behalf of Cleve Hill Solar Park Limited against the decision of the discharging authority: Swale Borough Council.
 - The application Ref 23/503812/SUB, was refused by notice dated 1 March 2024.
 - The application sought to discharge Requirement 3 which states:
'Battery safety management
3.—(1) Work No. 2(a) must not commence until a Battery Safety Management Plan ("BSMP") has been submitted to and approved by the relevant planning authority.
(2) The BSMP must prescribe measures to facilitate safety during the construction, operation and decommissioning of Work No.2(a) including the transportation of new, used and replacement battery cells both to and from the authorised development.
(3) The BSMP must accord with the outline battery safety management plan.
(4) The relevant planning authority must consult with the Health and Safety Executive and Kent Fire and Rescue Service before determining an application for approval of the BSMP.
(5) The BSMP must be implemented as approved.'
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Decision

1. The appeal is allowed and Requirement 3 (Battery safety management) under Schedule 1, Part 2 of the Order of Statutory Instrument 2020 No. 0000 'The Cleve Hill Solar Park Order 2020' is approved and discharged for the *Battery Safety Management Plan (Phase 2), December 2023 Revision B*, in accordance with the application Ref 23/503812/SUB.

Informative

2. The Appellant is reminded that any other Requirements must still be discharged and/or approved. This decision only relates to Requirement 3 as set out above. Furthermore, the Battery Safety Management Plan (BSMP) must still be implemented as approved, as required by Requirement 3.

Costs

3. An application for the costs of the appeal was submitted in the Appellant's appeal covering letter dated 10 April 2024. This is the subject of a separate Costs Decision.

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Procedural Matters

4. The Secretary of State for Energy Security and Net Zero has appointed me in accordance with Schedule 1, Part 3 Procedure for discharge of Requirements, Article 24 of the Order to determine the appeal and make a decision.
5. The appeal relates to the discharge of Requirement 3 of *The Cleve Hill Solar Park Order 2020* (herein the Order). Whilst within the scope of the procedure set out in the Order to consider wider matters¹, I have principally contained my focus to this matter.
6. A document titled *Battery Safety Management Plan (Phase 2) August 2023, Revision A* was originally submitted with the application. The document titled *Battery Safety Management Plan (Phase 2), December 2023 Revision B* is the most recent Battery Safety Management Plan, and the one which the original discharging authority and consultees commented upon before permission was refused. I have therefore based my considerations on this latter document.
7. I undertook an unaccompanied site inspection on Thursday 30 May 2024 to view the appeal site and its wider context from the public realm. Whilst not necessarily required in terms of the discharge of Requirement 3 (as this relates to whether or not it satisfies the requirements therein), I am content that this inspection from the public realm allows me to understand the relationship between the site and nearby buildings and their occupiers.

Background

8. As this was a project which met the necessary threshold, it was a Nationally Significant Infrastructure Project (NSIP). This meant that an examination was held by an Examining Authority and a report submitted to the Secretary of State. The Secretary of State considered the report, and in 2020, *The Cleve Hill Solar Park Order 2020* (Statutory Instrument 2020 No. 0000) was made. This takes the form of a Development Consent Order (DCO), which put simply, is a Statutory Instrument which has the force of law. The Order sets out various Requirements² and processes which are specific to the Order and to the development which consent has been given.
9. In this case, the Appellant submitted information to discharge Requirement 3 of the proposal, under Schedule 1, Part 2 of the Order. This Requirement requires a Battery Safety Management Plan (BSMP) to be submitted and approved by the relevant planning authority. It also requires that the discharging authority must consult with the Health and Safety Executive and Kent Fire and Rescue Service. They are, in effect, mandatory consultees in respect of discharging Requirement 3.
10. An Extraordinary Planning Committee meeting was held on 28 February 2024. A comprehensive and detailed Officer's Report was submitted assessing the information before the discharging authority. This detailed, with links, the various consultation responses from Kent Fire and Rescue Services and the Health and Safety Executive among others. It also details representations made by Parish Councils in the local area, individual local residents, local amenity groups including GREAT (Graveney Rural Environmental Action Team)

¹ See Schd. 1, Part 3, Article 24 (6)(b)

² Requirements are similar to planning conditions imposed when planning permission is granted. They can set out a number of criteria or actions that need to be fulfilled before a development, or parts thereof, can take place.

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and The Faversham Society, and the Campaign to Protect Rural England (CPRE). The Officer's Report recommended that the submitted BSMP was acceptable and that detail pursuant to Requirement 3 of the DCO is 'approved'.

11. On 1 March 2024, following a Planning Committee resolution, the discharging authority, Swale Borough Council, refused the details for the following reason:

The Battery Safety Management Plan fails to demonstrate that risks to public safety have been adequately assessed by virtue of a lack of on-site water storage capacity; insufficient access to the battery storage enclosure in the event of a fire and the lack of a detailed emergency evacuation plan and risk assessment, and as such the proposal would be contrary to Bearing Fruits 2031 - The Swale Borough Local Plan 2017 and the National Planning Policy Framework.

12. The Order sets out, in Schedule 1, Part 3, the process for the discharge of requirements. This includes Article 21 Interpretation, Article 22 Applications made under requirements, Article 23 Further Information regarding requirements, and Article 24 Appeals. More specifically, Article 24 sets out the process at any appeal stage where the discharging authority refuses to discharge the Requirement.
13. Article 24, section (2) of the Order sets out the timescales for the process, in summary: an appeal must be made within 42 days, there are ten business days from the 'start' date specified by the appointed person for the discharging authority and any consultee (if applicable)³, there are ten business days for any counter-submissions from the Applicant of receipt of the written representations, and thereafter the appointed person must make a decision with reasons as soon as reasonably practicable after the end of the ten day period for counter-submissions. This is the process I have followed in making this decision as the Appointed Person.
14. Furthermore, for the avoidance of doubt and to provide clarity, I have determined this appeal on the basis of the appeal documents and those provided in the original application for the discharge of the Requirement. These documents can be found on the internet at Swale Borough Council's Planning Public Access page using the Council's application reference: 23/503812/SUB. This includes all the consultation and representations made during the various stages of the consideration of this case.

Main Issue

15. Whether the submitted Battery Safety Management Plan meets the criteria set out in Requirement 3, and if so whether it should be discharged.

Reasons

16. Requirement 3 sets out criteria, which I consider individually below.

Work No. 2(a) must not commence until a Battery Safety Management Plan (BSMP) has been submitted to and approved by the relevant planning authority.

17. I undertook a site inspection to view the site and its surrounding area on Thursday 30 May 2024. I saw that whilst works had taken place in relation to

³ In this case the Health and Safety Executive and Kent Fire and Rescue Service as they are specifically referred to in the Requirement.

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the solar aspects of the Order, the works relating to the Battery Storage elements do not appear to have commenced. Accordingly, on the basis of the information before me, I find that this criterion is met.

The BSMP must prescribe measures to facilitate safety during the construction, operation and decommissioning of Work No.2(a) including the transportation of new, used and replacement battery cells both to and from the authorised development.

18. The submitted BSMP is divided into eight chapters. This includes Chapter 3 Design Response to Risk, Chapter 4 Emergency Response Protocols (during construction), Chapter 5 Standard Operation Procedures (relevant to safety), Chapter 6 Emergency Response Protocols (during operation), Chapter 7 Battery Transportation Plan and Chapter 8 Environmental Risk Assessment.
19. On its face, this would suggest that the requirements of this criterion have been met. Upon closer inspection of the detail within the chapters cited above, and the BSMP considered as a whole, it is clear that these aspects have been considered by the Appellant within the BSMP.
20. I am reinforced in this view by the fact that the Council's independently appointed battery storage and safety expert (BST&T)⁴ together, with Kent Fire and Rescue and the Health and Safety Executive (H&SE) have raised no substantive objection that this has not been adequately addressed within the submitted BSMP. As such, I find that the submitted BSMP fulfils this criterion.

The BSMP must accord with the outline battery safety management plan.

21. On pages 2 and 3 of the BSMP, the detailed design information requirements within the Outline BSMP have been set out in Table 1. This would suggest that the Outline BSMP has been complied with.

22. KFRS state in their letter dated 16 January 2024:

'KFRS makes safety issues associated with lithium-ion batteries, including BESS, a high priority. We have spent significant time understanding these issues and, in this case, applying that understanding to the Cleve Hill BESS site. We remain satisfied with the proposals detailed in the Cleve Hill BSMP (December 2023, revision B). Additionally, the review of the BSMP by BST+T provides additional independent scrutiny. I hope this letter provides you with the assurance you need.'

23. The independent review undertaken by the Council's appointed BST&T Consultancy Services expert concluded that *'The BSMP accords with the outline BSMP and incorporates the latest safety standards and best practice guideline'*.
24. Lastly, no objection has been received from the H&SE which indicates that the submitted BSMP fails to achieve this accord. As such, the submitted BSMP fulfils this criterion.

The relevant planning authority must consult with the Health and Safety Executive and Kent Fire and Rescue Service before determining an application for approval of the BSMP.

25. The Local Planning Authority, as the relevant planning authority, consulted the H&SE and Kent Fire and Rescue Service (KFRS) before determining the refusal of the BSMP. Changes were made to the August 2023 version of the BSMP,

⁴ As detailed within the Officer's Report, Paragraphs 6.3 and 6.4

and these bodies were re-consulted on the December 2023 version of the BSMP. At the point of submitting their appeal, the Appellant provided copies of appeal documentation to these bodies (as well as some other bodies who made representations). Once the appeal was valid and started, DESNZ consulted the H&SE, KFRS, and the original planning authority, Swale Borough Council, in accordance with the Order. The first part of this criteria has clearly been fulfilled at all stages of this application.

26. In terms of the responses, it is clear that KFRS have had at the forefront of their minds their duty to protect the communities they serve in Kent. This is especially so in this case, where it is evident from the Examining Authority's 460+ page Report that concerns over any battery energy storage systems and the risk of fire were raised by the local community and considered both by the Examining Authority and the Secretary of State. This forms one of the reasons for the imposition of Requirement 3.
27. Pragmatically, KFRS have looked specifically at this site, and this proposal in order to understand and address the risks and/or issues that could arise. They provided comments on 6 October 2023, on 19 December 2023, and on 16 January 2024 which were reported to the Planning Committee. Their most recent comments were that *'We remain satisfied with the proposals detailed in the Cleve Hill BSMP (December 2023, revision B).'*
28. The H&SE provided a fairly generic response to the Council's consultation. However, this did detail *'The fundamental principle of health and safety law is that those who create risks are best placed to control them. Designers, installers, and operators all have a duty to ensure this is the case. HSE expects the dutyholder to assess the specific situation and implement necessary control measures, to manage the risks identified.'* I have considered the comments from the H&SE to be neutral. But nonetheless, they re-iterate the principle of those who create risks are best placed to control them. That is what the submitted BSMP seeks to address in this instance.
29. I am satisfied that both bodies who have been specifically identified to be consulted in the Order in relation to this matter have been notified and provided with ample opportunity to raise concerns, objections or any other commentary. As such, I find that this criterion is fulfilled were Requirement 3 approved.

The BSMP must be implemented as approved.

30. There is nothing before me to suggest that the submitted BSMP, which the two named consultees did not raise an objection to and the Council's own independent experts found accords with the Outline BSMP and incorporates the latest safety standards and best practice guidance, would not be implemented as approved. In the absence of such doubt, I can only conclude that this criterion is met.

Other Matters

31. I note that a number of objections were received from other parties. These raise a number of concerns over the proposed BESS, including examples of where there have been battery fires in a site near Liverpool and at other sites around the world. Concerns have also been raised in terms of the lack of on-site water storage capacity (including references to the National Fire Chiefs

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Council's Guidance), access to the battery storage enclosure and the lack of a detailed emergency evacuation plan and risk assessment. Clearly, these concerns are important. Many of them appear to have been raised at the examination stage in broad terms and informed the imposition of Requirement 3 to the Order.

32. In the unlikely, but still remotely possible event of a battery fire, it will be local residents, and children at the nearby school and employees who will be at the most immediate risk from smoke and/or toxic fumes and/or fluids escaping into the local environment. As such, the concerns raised are a result of an entirely rationale fear of what might occur in the extremely unlikely event that a fire or other catastrophic event occurs at the BESS site. It is these individuals, and not various experts potentially miles away, that would be directly affected by such an event. In this respect, I have been fully cognisant with the concerns raised by other parties in determining this appeal.
33. Nevertheless, whilst I note these, they do not provide justification, whether individually or cumulatively, for the dismissal of the appeal. This is because, when considered as a whole and against the Requirement, I find that the submitted details comply with the conditions of the Requirement as set out above.

Conclusion

34. Having taken into account the totality of the evidence before me, including at both the application and the appeal stages, I find that the submitted details would fulfil the requirements of Requirement 3. Furthermore, I find that the detailed evidence presented with the application would accord with the intent of the Requirement and the reasons for its imposition. As such, the logical and rationale assessment of it leads me to the conclusion that it should be discharged and the details approved.
35. For the reasons given above, I conclude that the appeal should succeed.

C Parker

INSPECTOR



Costs Decision

Site visit made on 30 May 2024

by Mr Cullum Parker BA(Hons) PGCert MA FRGS MRTPI IHBC

an Inspector appointed by the Secretary of State for Energy Security and Net Zero

Decision date: Friday 5th July 2024

Costs application in relation to Appeal Ref: APP/V2255/3343902 SI 2020 No 0000 - REQUIREMENT 3 - Cleve Hill Solar Park

- The application is made under the Schedule 1, Part 3 of Statutory Instrument 2020 No. 0000 'The Cleve Hill Solar Park Order 2020' (made 28 May 2020, in force 19 June 2020), and having regard to the national Planning Practice Guidance.
 - The application is made by Cleve Hill Solar Park Limited for a full award of costs against Swale Borough Council (as the original Discharging Authority).
 - The appeal was in connection with an appeal against the refusal discharge Requirement 3 relating to the submission and approval of a Battery Safety Management Plan (BSMP).
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Decision

1. The application for an award of full costs is allowed in the terms set out below.

Background

2. *The Cleve Hill Solar Park Order 2020* (Order) sets out on page 40, in Schedule 1, Part 3 that in relation to costs:
 - (11) *Save where a direction is given pursuant to sub-paragraph (12) requiring the costs of the appointed person to be paid by the discharging authority, the reasonable costs of the appointed person are to be met by the applicant.*
 - (12) *On application by the discharging authority or the applicant, the appointed person may give directions as to the costs of the appeal and as to the parties by whom the costs of the appeal are to be paid. In considering whether to make any such direction and the terms on which it is to be made, the appointed person must have regard to relevant guidance on the Planning Practice Guidance website or any official circular or guidance which may from time to time replace it.*
3. The Department for Energy Security and Net Zero decided not to seek the reasonable costs of the appointed person in this instance from the Applicant. Accordingly, the application for costs relates only to the costs of the appeal in this case.
4. The Planning Practice Guidance (the Guidance) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
5. The Guidance also states that the aim of the costs regime is to:

<https://www.gov.uk/planning-inspectorate>

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- *encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case*
- *encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay,...¹*

The case of the Applicant

6. The Applicant (Cleve Hill Solar Park Limited) applied for costs in their letter dated 10 April 2024. Put simply, the Applicant considers given the evidence in support of approving the submitted Battery Safety Management Plan (BSMP) the appeal should not have been necessary. In such circumstances, they consider that it is appropriate and proportionate for the Council to pay the Appellant's costs of the appeal.

The case for the discharging authority

7. Swale Borough Council, as the original discharging authority, were provided an opportunity to respond to the application. Put simply, their response was that a Planning Committee is not bound to reach the same decision as their professional officers. They also refer to a s78 TCPA planning appeal in Devon and the 'advice' of the National Fire Chiefs Council. In light of these, the Council considers that it did have reasonable grounds to refuse the application and that a decision maker can reasonably depart from conclusions reached by an expert consultee or consultant.

Reasons

8. The implementation of the DCO had a clear provision for BESS to be provided on the site; as such the principle of a BESS element for the site and in the location shown was established when the DCO was made in 2020. The appeal revolved around whether the details satisfied the conditions of Requirement 3.
9. Requirement 3 of the Order sets out clearly that the discharging authority must consult two bodies before approving details submitted pursuant to the Requirement. These are Kent Fire and Rescue Services (KFRS) and the Health and Safety Executive (H&SE). Both bodies were consulted and neither objected nor commented adversely against the details submitted.
10. The Council appointed an 'independent' consultant (BST&T) who concluded that *'the BSMP accords with the outline BSMP...'*. This was not a condition of the Requirement, but the Council felt that it was appropriate to do so in order to inform the decision-maker. To summarise, their view was that the submitted details accorded with the outline BSMP.
11. A detailed Officer's Report (of around 62 pages) was prepared and provided to the Planning Committee to assist their decision-making. This recommended approval of the submitted details.
12. Before the Planning Committee was also a number of reports and documents submitted by the Applicant in support of their application. There was also a

¹ Paragraph: 028 Reference ID: 16-028-20140306 Revision date: 06 03 2014

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number of representations from third parties who were consulted - although this was not itself a condition of the Requirement.

13. The Minutes of the Extraordinary Planning Committee meeting of the 28th February 2024² details that points raised by Members during discussion included (amongst others):
- *this was a very complex application with a lot of very technical information;*
 - *Members were being asked to use their planning judgement, but they had no experience of this type of application;*
 - *it would be difficult to give sound planning reasons for any refusal;*
 - *considered this was outside of the Planning Committee's remit;*
 - *this was an enormous decision the Committee was being asked to make;*
 - *the application was evidence based and Members should delegate to officers; and,*
 - *happy with the experts' advice.*
14. Clearly, the above points are snippets of information from the Planning Committee meeting and not a verbatim record of the meeting. Nonetheless, there is nothing in the Minutes where it is explained as to why the Committee, acting on behalf of the Council as a whole as the discharging authority set out in the Order, departed from the advice provided by KFRS, H&SE, their independently appointed expert, or indeed their professional officers.
15. Whilst it is a well-established maxim that a decision-maker can depart from the professional advice provided, it is also true that any such departure requires a reasoned justification. Such justification assists the applicant, and others, as to what further information may be required to make the details acceptable or ways in which the concerns have to be addressed in future applications.
16. In this case, there is very little evidence as to why the advice of these various bodies and the Council's own appointed experts was disregarded beyond there being other matters which the Committee felt required further information. For example, it is unclear as to why the consultee response from KFRS, who were a mandatory consultee identified by the Examining Authority in the Requirement and therefore the DCO itself, were disregarded when they indicated in their letter of 16 January 2024:

*'KFRS makes safety issues associated with lithium-ion batteries, including BESS, a high priority. We have spent significant time understanding these issues and, in this case, applying that understanding to the Cleve Hill BESS site. **We remain satisfied with the proposals detailed in the Cleve Hill BSMP (December 2023, revision B).** Additionally, the review of the BSMP by BST+T provides additional independent scrutiny. I hope this letter provides you with the assurance you need.'*³

² These can be found here: <https://services.swale.gov.uk/meetings/mqAi.aspx?ID=18030>

³ Emphasis mine.

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17. In this case, I see little support within the Minutes, or indeed the rest of the Council's case, which justified a departure from the professional advice of their Planning Officers, their appointed consultant, KFRS or the H&SE.
18. I note the points made about the National Fire Chiefs Council (NFCC) Guidance; however it is KFRS who is the mandatory consultee in this case and not the NFCC. Moreover, it is guidance from the NFCC and it is clear that KFRS took this into account and then deployed their site specific and local area knowledge in providing their responses.
19. The task at hand for the discharging the Requirement was simple – did the information submitted satisfy the conditions of Requirement 3 or not. If it did, then the details should have been approved. If it did not then the details should have been refused; with clear and cogent reasons given for the refusal and an explanation as to why the decision deviated from the specialist advice provided by the local fire service.
20. In failing to explain why the advice of the mandatory consultees was departed from in this case I find that the Council did act unreasonably. In failing to explain why the advice of the Council's own independently appointed 'expert' and their Planning Officers was also departed from, I find that the Council acted unreasonably.
21. Whilst it is open to the discharging authority to refuse to approve the details submitted pursuant to Requirement 3, little justification has been provided as to why the advice of the mandatory consultees was departed from. Indeed, the unreasonable behaviour I have identified above has directly led to the need for the appeal to take place. This could have been avoided. The unreasonable behaviour has led to unnecessary and wasted expense for the Applicant in having to pursue the appeal process for a scheme where the mandatory consultees set out in the Requirement did not object.

Conclusion

22. Taking into account all of the above, I find that the discharging authority, Swale Borough Council, has behaved unreasonably and that this behaviour has resulted in unnecessary and wasted expense for the applicant. I therefore find that the application should succeed and the application for a full award of costs for the appeal is allowed.

Costs Order

23. In exercise of the powers under Schedule 1, Part 3 of Statutory Instrument 2020 No. 0000 The Cleve Hill Solar Park Order 2020, IT IS HEREBY ORDERED that Swale Borough Council shall pay to Cleve Hill Solar Park Limited, the costs of the appeal proceedings described in the heading of this decision and such costs to be assessed in the Senior Courts Costs Office if not agreed.
24. The applicant is now invited to submit to Swale Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

C Parker

INSPECTOR