

# Complaint to the Local Government Ombudsman

## Notes For The Marlbrook Tip Working Group

### 2 December 2014

In August 2011 I first formally complained to the LGO that BDC failed to properly monitor the tipping and handle my complaints about this. Also, that after the Horner survey BDC failed to enforce the terms of the 25<sup>th</sup> January 2006 planning permission by requiring the owner to remove the excess tipping. After resubmitting the claim in February 2014, the LGO reached their final decision on 16 October 2014.

#### **Selected relevant paragraphs from the Ombudsman's final decision dated 16<sup>th</sup> October 2014**

##### **Para. 28.**

*The Council has provided an example of a similar, more recent development at a different site. The condition imposed on that permission requires the developer to undertake a topographic survey before the next stage of the development is approved. Plans for the development also have to be submitted in stages. It would not be in the developer's interests to not comply with the conditions as the stages of the development are dependent on each other. I consider if that type of condition had been imposed on this permission it is possible over tipping would not have occurred.*

##### **Para. 29.**

*While the Council has provided details of that application to show it has learnt lessons from this complaint I note this type of monitoring requirement was known to the Council at the time this application was considered. I say that because the planning committee received a verbal update from Worcestershire County Council's planning department when it considered the application in October 2005. Those comments include the following: 'I feel that given the requirements to meet the terms of the Environment Agency's notices it seems essential to impose a condition to require the works to be supervised by a suitably qualified civil engineer, with records being kept of all types and volume of material imported, regular surveys to ensure the levels are not exceeded and no progression into subsequent phases until approval has been obtained that satisfactory progress has been made on the preceding phase.' The Council did*

*not carry forward the second part of that recommendation to the condition. That part is similar to what is now applied to other similar sites. I have seen no evidence the Council considered including the wording recommended by Worcestershire County Council in the condition imposed on this permission. Failure to do so is fault. I consider if the Council had included that wording in the condition it would likely have prevented over tipping to such an extent.*

### **Notes on paras 28 & 29**

Probably the most significant event in this entire matter – Bromsgrove planning committee had a golden opportunity to ensure that the terms of the permission were robust and left little potential for over tipping. But, they did not listen to Worcestershire County Council and they did not act on imposing sufficiently exacting conditions on the site owner.

### **Para 30.**

*It is clear from the Council's own findings there has been a breach of condition given the amount of material tipped. The question for me to consider is whether that is due to fault by the Council. As the Council points out, it was not responsible for monitoring the material brought onto the site. The monitoring role fell to a company employed by the applicant. I do not consider it unreasonable for the Council to rely at first on their monitoring reports showing tipping in line with expectations. However, I consider when the Council continued to receive complaints it should have looked into them rather than referring those complaining back to the reports. I say that as I note the Council did not receive any reports for the period May 2006 to February 2007 until 2011. In those circumstances, and as residents continued to report concerns, I consider the Council should have looked into the true state of tipping on the site by the end of 2006/beginning of 2007. Failure to do so is fault. I consider if the Council had inspected the levels on site at that point it would likely have identified the reports were not accurate.*

### **Para 31**

*In reaching that view I understand the Council carried out covert monitoring. I do not have any details about that. As I understand it though officers only checked the number of lorries going to the site and compared them to the quarterly reports to check accuracy. I have seen no evidence the Council checked the weights brought on to site or the difference between the original levels and the levels in 2006 to seek to calculate the amount of material tipped. It does not seem to me simply looking at vehicle movements gave the Council any indication of the amount of material tipped, particularly as it turns out the lorries were carrying*

*almost twice the amount of material estimated. I do not consider that level of monitoring satisfactory given the continuing complaints from residents, reports to the tip monitoring group, missing monitoring reports from Company A and when the applicant had put back the completion date. In those circumstances I consider the Council at fault for how it responded to issues at the site between 2006 and 2011.*

## **Notes on paras 30 & 31**

Having allowed the site owner virtually a free hand to import material, it is unsurprising that these two paragraphs attract the greatest number of points where I feel action should have been taken.

The quarterly monitoring reports were the main, almost total, evidence used by the Council to utterly refute and reject any claims of over tipping. However, when the Horner survey showed that over 1,000,000 cubic metres of material in excess of the planning permission had been tipped, I asked for copies of all the quarterly reports. I received some of them almost immediately but it took until December 2011 to get the final five reports. This was because they had never previously been sent to BDC. It is worth remembering that tipping was stopped some nine months before in March 2011.

The missing reports were dated:-

1 December 2006 to 2 February 2007

25 May 2007 to 5 October 2007

12 October 2007 to 1 February 2008

8 February 2008 to 4 April 2008

11 April 2008 to 22 August 2008

Having finally received a complete set of reports, I discovered they were riddled with errors. Eleven of the nineteen reports were incorrect. These were basic mathematical errors including incorrect addition of rows of weekly tipping numbers, totals on reports incorrectly carried forward to the following report and missing columns of figures. They covered the following periods.

It is easy to see how and why the Council failed to properly monitor the progress of tipping. When they received the June 2007 report it appears they were oblivious to the fact that the previous report was still outstanding. Even worse, they did not then receive another report until the one for the quarter to November 2008. Therefore, from the 18<sup>th</sup> of May 2007 until early December 2008, the Council had no evidence of the progress of tipping. During that period of eighteen months, the Council always stoutly defended all, and any, suggestions of over tipping by claiming the unimpeachable accuracy of the

reporting system.

For example:-

The minutes of the 22nd October 2008 meeting of the Marlbrook Tip Monitoring Group the minutes recorded the following:-

*“Mike Adams, on behalf of the Lickey Community Group, has written to the Planning Department at BDC requesting an independent topographical survey be carried out at the Marlbrook Tip site. Planning Officer Dale Birch has responded advising that such a survey is not necessary and the Faber Maunsell reporting is adequate for the purpose of the planning permission”.*

At that time, although Dale Birch was clearly using the quarterly report figures to defend the progress of the tipping, he could not have seen any figures since the week ending 18<sup>th</sup> May 2007 - **some seventeen months before.**

### **Para. 32.**

*The Council recognises the tip monitoring group was not set up in a way which enabled it to feedback problems to the Council for investigation. I welcome the Council's proposals to address future monitoring of significant or unusual sites. Had the tip monitoring group members had proper roles and responsibilities assigned, with clear routes to feed back issues to managers, it is likely such significant over tipping could have been avoided.*

### **Notes on para. 32**

The Tip Monitoring Group was set up by BDC to provide a forum for residents, local community groups, County, District and Parish Councillors and the site owner to discuss progress on the Tip. The Ombudsman's findings speak for themselves.

### **Para. 33.**

*Mr B is concerned the Council failed to take enforcement action to have the levels of the site reduced. I understand why Mr B would want that to happen. However, it is clear from the documentary evidence this is now something that is out of the Council's control. That is because there is a reservoir on the site and the qualified civil engineer does not agree with the Council's original plan for landscaping of the site. Instead he has required the landowner to bring more material on to the site. The Council's legal advice has confirmed the Environment Agency's actions take precedence and the Council could not take enforcement action alongside it. In those circumstances I cannot criticise the Council for declining to take enforcement action. I recognise Mr B will be disappointed with that view.*

*However, as I said in paragraph 2, it is not my role to comment on the merits of the Council's decision. As the Council's decision is also based on legal advice I have no grounds to criticise it.*

### **Para. 34**

*In reaching that view I understand Mr B may be concerned the Council did not take enforcement action between 2011 and 2014. The documentary evidence I have seen satisfies me the Council intended to take action. Indeed, it had tasked Company C with drawing up plans and had taken legal advice on the form of words to use in an enforcement notice. While there may have been delays in that process I do not intend to pursue that point further. That is because even if the Council had progressed its planned enforcement action between 2011 and 2014 it would have had to abandon those plans when the panel engineer produced his report needing more soil on the site. So, the situation for Mr B would be the same even if the Council had progressed enforcement action quickly.*

### **Notes on paras 33 & 34**

The Council worked, from 2011 to early 2014, to try to improve the situation but once the Environment Agency took a closer interest they were unable to try to enforce any plans to improve the situation. The small pond on the southern side of the bridge over Alvechurch Highway assumed disproportionate significance and informed all the decisions taken by the E.A. and the Qualified Engineer.

### **Para. 36.**

*As I said in paragraphs 30 and 31, I consider the Council at fault for not looking into the case at the end of 2006 or beginning of 2007. Tipping began at the end of 2005. It stopped in early 2011. I cannot say when the materials tipped on site had reached the approved amounts as the monitoring records are not accurate. On a crude calculation though, dividing 1,479,200 m<sup>3</sup> by five years would equate to 295,840 m<sup>3</sup> tipped each year. On that calculation the owner of the site could have reached the limit imposed by the condition within 16 months of beginning tipping. It therefore seems possible if the Council had monitored the site more closely tipping would have finished sometime in 2007. On that calculation Mr B would have experienced at least three years less disruption. It is possible the height of the land, and its impact on the green belt, would have been reduced, although I do not consider the increased height of the land to warrant a remedy on its own. .... On the balance of probability I consider tipping would likely have ceased by the end of 2007.*

## **Notes on para. 36**

The Ombudsman made an attempt to calculate, from the limited information they had, when it was possible the tipping would have reached the agreed planning permission if the site had been properly monitored by the Council.

The LGO used, as they put it, “a crude calculation” to estimate the date when tipping should have ceased. They suggested that the **“site could have reached the limit imposed by the conditions within sixteen months of beginning tipping” as “sometime in 2007”**

However, from the full set of nineteen quarterly reports it is possible to more accurately estimate this date.

If the reports had simply been arithmetically correct, that date would have been during the week ending 3<sup>rd</sup> April 2009 - some 23 months before tipping was actually stopped.

If, however, you assume that each lorry was carrying a more realistic load of 13.3 cubic metres, tipping should have stopped during the week ending 26<sup>th</sup> October 2007 – this time over 40 months earlier.

According to the final report, as submitted to BDC, 52,395 lorries had only tipped 365,369 cubic metres of material and the site owner was still some 7,464 cubic metres short of target.

It is impossible to say, with any degree of accuracy, when the planning permission was genuinely reached because we now know from the survey that the figures sent to the Council were very significantly understated.

At the very least, on a generous estimate, residents endured three years and four months of unnecessary disturbance to their lives. During that time the tip continued to grow and we are now living with the consequences.

It is ironic to note that although a vast number of excess lorries were allowed to tip on the site, BDC subsequently refused all requests to remove any of the excess tipping on the grounds

*“it was not in the public interest to do this as they did not want to inflict the local residents with any more lorry movements to and from the Tip”.*

What great pity that this concern for the residents was not exhibited a few years earlier.

## ***The Ombudsman’s final decision***

*I have completed my investigation and found there was fault by the Council which*

*caused injustice to Mr B. I am satisfied the action the Council will take is sufficient to remedy Mr B's injustice.*