
Costs Decision

Inquiry opened on 13 December 2016

Site visit made on 19 December 2016

by David Prentis BA BPI MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 13 February 2017

Costs application in relation to Appeal Ref: APP/D3125/W/16/3148400 Land adjacent to Hanborough Station, Long Hanborough OX29 8LA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Commercial Estates Group for a partial award of costs against West Oxfordshire District Council.
 - The Inquiry was in connection with an appeal against the refusal of outline planning permission for the erection of up to 120 dwellings and provision of a building for Class D1 use together with associated works.
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Decision

1. The application for an award of costs is refused.

The submissions for Commercial Estates Group

2. A partial award of costs is sought in respect of the Council's conduct in the presentation of its case in relation to:
 - landscape and visual effects
 - the world heritage site (WHS)
 3. Planning Practice Guidance (the Guidance) identifies types of behaviour that may lead to an award of costs. These include lack of co-operation with the other party, delay in providing information, not agreeing factual matters common to witnesses, introducing fresh evidence at a late stage that requires the extra expense of preparatory work, providing information that is manifestly inaccurate and deliberately concealing relevant evidence.
 4. The costs application is both procedural and substantive. The Council's landscape consultant failed to agree in advance matters he then agreed in cross-examination. The Council's heritage consultant introduced new arguments which he failed to support with evidence. The timing of the application was influenced by events at the Inquiry, including the Council's landscape rebuttal statement and the cross-examination of the heritage evidence.
 5. In relation to landscape and visual effects, the Council's consultant failed to agree common ground on the methodology for the Landscape and Visual Assessment, failed to agree relevant viewpoints and produced photomontages which were shown to be inaccurate but necessitated rebuttal evidence.
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Moreover, it appears that the relevant evidence from viewpoint 3 was deliberately withheld. All of this was unreasonable behaviour which caused the appellant to incur the additional cost of producing rebuttal evidence and took up Inquiry time.

6. In relation to the WHS, The Council's consultant pursued an objection of impact on the WHS in relation to 'rides' on a 1709 plan and his thesis based upon it. This was outside the scope of the stated reason for refusal and the Council had failed to identify that this was part of its case. The objection was manifestly inaccurate on analysis, as the appellant's rebuttal evidence showed. It was unsustainable as the basis for an objection and flew in the face of Historic England's position. It was not abandoned even after it had been raised with Historic England and they did not change their position. This conduct was unreasonable and caused the appellant to prepare rebuttal evidence and to take up considerable Inquiry time.

The response by West Oxfordshire District Council

7. The conditions for an award of costs are that there must have been unreasonable behaviour and that behaviour must have caused the applying party to have incurred loss. Paragraph 47 of the Guidance sets out types of behaviour which might give rise to an award against a local planning authority. It includes all of the examples on which the appellant relies. The application relates to procedure and not the substance of the case. There is no suggestion that the reasons for refusal were themselves unreasonable or that there was a failure to provide evidence to substantiate them.
8. Applications for costs should be made as soon as possible, before the hearing where circumstances allow. This application is based on the production of photomontages and the reliance on the 1709 plan – matters which were known at the exchange of evidence. To the extent that the application relies on the rebuttal evidence relating to the production of photomontages, this was provided on the first day of the Inquiry. There has been more than enough time to provide a written application since then.
9. The submissions relating to the Council's engagement in the production of the landscape statement of common ground (SoCG) were misleading. The agreed SoCG is essentially as the appellant's consultant drafted it¹. It cannot be unreasonable for the Council's consultant to produce his own photomontages. The viewpoints chosen were clearly relevant to matters raised in the reasons for refusal. The 3rd reason expressly refers to the linkage between landscapes to the north and south of the site, as well as to harm to the landscape of the Eynsham Vale. In any event it is unusual for landscape reasons for refusal to identify specific viewpoints. With regard to the matter of valued landscapes, the 3rd reason for refusal refers to conflict with paragraph 109 of the Framework.
10. Turning to the accuracy of the photomontages, criticism of methodology does not amount to evidence of unreasonable behaviour. The Council instructed outside contractors to produce the images because it did not have the expertise to do so. The criticisms of viewpoints 1 and 2 go nowhere because

¹ Inspector's note – in cross-examination Ms Brockhurst agreed that the only changes made by Mr Radmall to her draft SoCG were the insertion of the words 'broadly' and 'include' in the first and third bullet points of paragraph 2.1

the images do not purport to show the scheme as it would be. The methodology for viewpoint 3 was exactly the same although it was presented differently. The Council's consultant did not seek to hide this evidence. He explained in chief that viewpoint 3 was for a different purpose, which was to assess whether the development could be seen. It was treated differently to ensure that the location was clearly shown.

11. As to heritage, the appellant's consultant explicitly rejected the opportunity to criticise the Council's consultant in relation to agreeing matters in the lead in to the Inquiry². The 4th reason for refusal refers to the agricultural landscape setting of the WHS including the Evenlode valley and the AONB north of the A4095. This is the area that the rides would have overlooked.
12. In any event the applicant has not shown that any loss has been incurred. The landscape rebuttal criticises the assessment in the Council's evidence and the methodology for producing photomontages. Rebuttals of this nature are commonplace in the Inquiry process and their production is not indicative of unreasonable behaviour. There is no procedural point here – the rebuttal grapples with substance. Dealing with these points in the Inquiry did not extend its scope.
13. The heritage rebuttal was just over a page. All it did was submit extracts of documents that were already core documents³. These documents were used to argue that the 1709 plan was of uncertain stature and not fully implemented, a point acknowledged in the Council's evidence, and that Figure 12⁴ did not feature in the views identified in the Parkland Management Plan. The latter point is not part of the costs application. There was no need for this rebuttal. It is not clear that the evidence took longer and, even if it did, the scope of the Inquiry was not extended.
14. Unreasonable behaviour has not been shown. Even if there were such behaviour it has not been shown that it caused loss. The application should therefore fail.

Reasons

15. The Guidance states that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. The application is for a partial award of costs in relation to two specific matters. The grounds are both procedural and substantive although there is no suggestion that any of the Council's reasons for refusal were unsubstantiated as a whole.
16. With regards to timing, the Council was made aware of the intention to make an application at some point during the Inquiry although the written application only emerged in the final session. Nevertheless, the application was focussed and briefly stated and the Council was able to respond to it without the need for any adjournment. I am satisfied that no party was prejudiced by the timing of the application.

² Inspector's note – in answer to questions from Mr Strachan, Dr Miele said he had tried to agree common ground in relation to the 1709 plan but there had been difficulties of timing/availability. He took no point against Mr Ayton in this regard

³ CD79, CD82, CD83

⁴ Mr Ayton's Watermeadow Lodge viewpoint

Landscape and visual effects

17. The landscape SoCG was a short document. However, there is no evidence that its brevity was due to any lack of co-operation on the Council's side. In fact the version of the SoCG before the Inquiry was very similar to that sent to the Council's landscape consultant by the appellant. Inserting the word '*broadly*' in the sentence '*this is broadly in accordance with the Guidelines.....*' appears to have been unnecessary because in the event the Council did not advance any criticism of the appellant's Landscape and Visual Assessment methodology. Whilst this change may have been less than helpful to my mind it fell well short of the threshold for unreasonable behaviour.
18. With regard to viewpoints, the starting point is that the Council's landscape consultant agreed all those viewpoints which had been agreed with the Council's officers prior to the submission of the planning application. He also added one further viewpoint (viewpoint 3). It is important to note that the Council's viewpoint 3 is located between the appellant's viewpoints 1 and 2 and is close to them. This is not a case where some wholly new line of landscape evidence has been brought forward. Moreover, the Council's viewpoint 3 is a view over the Evenlode valley towards the Eynsham Vale landscape character area. It is directly relevant to the 3rd reason for refusal.
19. The appellant produced a rebuttal proof setting out detailed technical criticisms of the Council's photomontages for viewpoints 1 and 2. In my view that was unnecessary. The scheme is in outline and it is inconceivable that an informed reader of the evidence would have construed these particular photomontages as an accurate representation of what the scheme would actually look like. That is a point which could have been made briefly and in general terms, without a detailed technical rebuttal. Photomontages 1 and 2 may have been of little assistance to the Inquiry but producing them did not amount to unreasonable behaviour.
20. It was unfortunate that the photomontage for viewpoint 3 was not presented in the evidence in the same way as the other viewpoints. In my appeal decision I have commented that it is hard to make out the appeal scheme in this photomontage. However, I have found that the proposed development would be visible to the naked eye, albeit that there would be no change to the general character of the view. It was therefore beneficial to have the Council's evidence on this matter before the Inquiry notwithstanding the problems that arose. Whilst I consider that the Council's presentation of the evidence on viewpoint 3 fell short of best practice, to my mind there was not an intention to mislead.
21. I conclude that unreasonable behaviour has not been demonstrated in relation to the evidence on landscape and visual effects.

Effect on the WHS

22. The nub of the 4th reason for refusal is that the appeal site forms part of an agricultural landscape which provides the setting to the WHS. Although the importance of the appeal site in that context was disputed, the fact that the site forms part of the setting was not. The Council's arguments based on the 1709 plan were an amplification of that point. It would have helped the Inquiry process if the appellant had been made aware of this line of argument in advance of the exchange of proofs of evidence. However, it seems that discussions between the respective experts did not take place for reasons of

timing and availability. The appellant's consultant made no criticism of the Council's consultant on this point.

23. For the reasons given in my appeal decision, I have not agreed with the Council's arguments based on the 1709 plan. Nevertheless, those arguments were based on detailed evidence and historical research. The position of Historic England is a material consideration but is not determinative. The Council sought independent advice on heritage matters and was entitled to reach its own view in the light of that advice.
24. I do not consider that unreasonable behaviour has been demonstrated in respect of the heritage evidence.

Conclusion

25. For the reasons given above, the application should not succeed.

David Prentis

Inspector