
Costs Decision

Inquiry held from 17 to 27 January 2017

Site visit made on 25 January 2017

by Alan Novitzky BArch(Hons) MA(RCA) PhD RIBA

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

Decision date: 10 April 2017

Costs application in relation to Appeal Ref: APP/R3325/W/16/3152932 Land at Shudrick Lane, Ilminster, TA19 0AR

- 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 C G Fry & Son Ltd and the Dillington Estate for a partial award of costs against Somerset County Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for demolition of existing farm buildings, erection of up to 220 No dwellings (Class C3), creation of vehicular access from Shudrick Lane and Townsend/Long Orchard Hill, public open space and associated landscaping and engineering works.
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Decision

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

Submissions and response

2. The submissions and responses were made in writing, as set out in the document list below.

Reasons

3. The Planning Practice Guidance (PPG) 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.
4. The PPG states that local planning authorities, appellants and interested parties who have taken part in the process, including statutory consultees, may apply for costs, or have costs awarded against them.¹ Somerset County Council (SCC), as the local education authority, is a statutory consultee and took part in the appeal process, including submitting a statement of case dated December 2016, setting out the need for contributions. It also contributed to South Somerset District Council's document, Planning Obligations – Statement of Compliance, January 2017.²
5. No credible evidence has been put forward to suggest attempts were made to obstruct its participation. SCC is, therefore, liable to be the subject of a costs application in this appeal process.

¹ Reference ID: 16-029-20140306

² Doc C2 in the Inquiry Document Lists

6. Caroline Waller of Clarke Wilmott LLP, for the appellant, sent an email dated 14 December 2016 to Anne Bennett of Carbon Law Partners, acting on behalf of SCC, attaching a draft of the s106 Agreement incorporating the principles and critical wording of the final engrossed version.³ The email notes that it is unlikely agreement will be reached on the education provisions before the Inquiry, and explains that the attached s106 has been amended so that the contributions are dealt with on an either/or basis.
7. In Anne Bennett's responding email dated 22 December addressed to Jade Lyus of Clarke Wilmott, she states that her instructions are, regarding Education Contributions, 'your drafting for the First School Contribution in the alternative is agreed.' Moreover, in her email of 3 January 2017 she confirms, 'the draft is now agreed'. In her email dated 19 January 2017, she acknowledges that the engrossed Agreement had been received, however her email the following day states that the education officer will not authorise sealing as they are not happy with the either/or provision for the contribution.⁴
8. At this point, with only four sitting days left of the Inquiry, the appellant committed itself to converting the s106 Agreement to a Unilateral Undertaking (UU). This course of action was clearly understood by SCC since, in Anne Bennett's later email of 20 January, it asked for a copy of the Undertaking when available. The circumstances relevant to the matter of education contributions did not change in any material way between the agreement of 22 December 2016 and SCC's refusal to seal the s106 Agreement on 20 January 2017.
9. SCC notes in its response to the costs application that it was always open to the appellant to submit a UU in the event that no agreement could be reached on the scope of the obligations. However, agreement had been reached and was subsequently reneged upon. Moreover, it is in both parties' interests and the interests of the Inquiry to submit a s106 agreement rather than a UU, which leaves matters without agreement.
10. SCC also tells us that such a UU could have been submitted after 14 December when it became clear to the appellant that no agreement would be reached on the education provisions. It goes on to suggest that the only reason for continuing with the Agreement process was to avoid SCC as local education authority objecting to the appeal.
11. However, agreement had been reached on the use of a form of words providing alternatives for the Inspector to decide upon. Had SCC become dissatisfied for any reason following the agreement of 22 December, it could have followed up its statement of case with an objection to be considered by the Inquiry. Instead, it did nothing until it received the engrossed document on 20 January.
12. SCC argues that the 20 December deadline for submission of evidence had passed by the time it received the engrossed Agreement. However, SCC could have objected after receiving the draft on 14 December and, in any event, late submissions can be considered if circumstances change.
13. SCC also alleges flaws in the drafting of the Agreement which became apparent on inspection of the engrossments. It points to the wording of paragraph 1.1 of Schedule 1, saying that it was unnecessary and confusing since it repeated

³ Doc A13 Appendix 1

⁴ Doc A13 Appendix 3

the conditionality found in Clause 3.1 of the Agreement, that a particular obligation could not be enforced if the Inspector found it not to comply with the Community Infrastructure Levy Regulations.

14. I don't find this confusing, rather it points to the areas of disagreement between the parties, nor do I see any evidence that SCC's solicitor immediately alerted the appellant's solicitor to the drafting issues, and proposed alternative drafting as is claimed.⁵ Moreover, the wording had not changed from that in the draft agreed on 22 December 2016.
15. SCC also contends that the provision of alternative figures as drafted was unworkable, since it requires the approval of one figure or the other. If other developments were to come forward earlier than the appellant's, then an intermediate figure might be appropriate. This may be a valid point, but SCC appears not to have made it until it responded in writing to the costs application.⁶ Moreover, SCC clearly agreed to the format of alternative figures in its email of 22 December.
16. Overall, I find that SCC has caused the applicant to incur unnecessary or wasted expense. SCC notes that whilst an agreement was not completed, the negotiations served to settle the majority of the terms and these were incorporated into the UU.⁷ This appears to be true and I will therefore limit the costs order to those costs incurred in converting the engrossed s106 Agreement into the UU.

Costs Order

17. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Somerset County Council shall pay to C G Fry & Son Ltd and the Dillington Estate, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in converting the engrossed s106 Agreement into the Unilateral Undertaking; such costs to be assessed in the Senior Courts Costs Office if not agreed.
18. The applicant is now invited to submit to Somerset County Council, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Alan Novitzky

Inspector

DOCUMENTS

- A13 Costs Application by C G Fry & Sons Ltd and the Dillington Estate
- CC1 Response by Somerset County Council
- A27 Final comments by the applicant

⁵ Doc CC1 para 14

⁶ Doc CC1 paras 21 and 22

⁷ Doc CC1 para 3b and para 28