



Costs Decision

Inquiry Held on 10-13 April and 17-19 April 2018

Site visit made on 19 April 2018

by Brendan Lyons BArch MA MRTPI IHBC

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

Decision date: 13th September 2018

Costs application in relation to Appeal Ref: APP/P1560/W/17/3185776 Land South of Bromley Road, Ardleigh, Colchester CO7 7SE

- 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 Gladman Developments Ltd for a partial award of costs against Tendring District Council.
 - The inquiry was in connection with an appeal against the refusal of outline planning permission for the erection of up to 145 dwellings, the removal of prefabricated livery stables and the provision of public open space, landscaping and sustainable drainage systems and vehicular access point from Bromley Road.
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Decision

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

Submissions for the parties

2. The appellants' cost application was submitted in writing shortly before the final adjournment of the Inquiry. The Council's response and the appellants' reply were submitted in writing after the adjournment, in accordance with an agreed timetable.
3. The claim for a partial award of costs relates solely to the issue of ecological impacts. The Council's reason for refusal on this ground was based on a lack of survey evidence to inform the potential impact of development on protected species and Species of Principal Importance, resulting in a failure to assess and adequately mitigate ecological impacts, and also on a lack of information to allow assessment of any significant effects on designated European sites and their SSSIs.
4. Following the submission of the appeal in early October 2017, the appellants produced an updated Ecological Appraisal ('EA'), setting out the results of further survey work, and this was provided to the Council on 1 February 2018, with a request for comment. The EA formed the basis of the appellants' case on this ground at the Inquiry.
5. In summary, the appellants' claim on procedural grounds is that the Council was unreasonable in not co-operating to identify the matters of concern, in particular by failing to respond to the submitted EA in order to narrow or eliminate specific issues.

6. The claim on substantive grounds is that the Council continued to make general unsubstantiated assertions about lack of survey information, introducing an area of concern not previously raised (acid grassland), without properly considering the potential mitigation, and without the benefit of a site visit. This amounted to a failure to substantiate the reason for refusal and to making vague, generalised assertions about the proposal's impact, unsupported by an objective analysis.
7. In summary, the Council's response on the procedural point is that the time between receipt of the updated EA and the submission of proofs of evidence was too short to allow meaningful dialogue. Responses on the EA from the two objecting consultees, Natural England ('NE') and Essex Wildlife Trust ('EWT') were not received until 27 February and 6 March respectively. The Council acted immediately to appoint an expert witness on receipt of NE's response, but proofs had to be submitted by 13 March. Because of the late submission of the EA, time was short.
8. In any event, there is no requirement for contact between the parties prior to exchange of proofs. The National Planning Policy Framework ('NPPF') promotes co-operation on planning applications and not appeals¹. The appellants had adequate time once proofs were exchanged to understand the Council's concerns, and their reaction has been to dismiss them as without foundation. There is nothing to suggest that informal contact would have led the appellants to alter their case or to carry out further surveys. Both witnesses would still have had to present their case to the Inquiry. The appellants separately confirmed that they would be calling their witness to respond to EWT's objection.
9. The Council's response on the substantive ground is that the reason for refusal makes no positive case of harm to biodiversity, but that harm cannot be ruled out because of a lack of information. The evidence prepared explains why the new EA does not address the concerns. It is focused, specific and clear. No site visit was necessary to show that the EA wrongly rules out the presence of dry acid grassland. The Council's evidence covers each of the three areas where survey data is lacking. It could not propose mitigation until adequate survey information was available. There are no vague or inaccurate assertions.

Reasons

10. The Planning Practice Guidance ('PPG') on Appeals 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 process².
11. With regard to the procedural issue, I accept the Council's point that the timing of the submission of the revised EA, some four months after the appeal was submitted, limited the opportunity for further exchanges. Given that the Council was heavily reliant on the views of outside bodies, the appointment of an expert witness was not unduly delayed.

¹ The parties have referred to the requirement to "look for solutions rather than problems" found in paragraph 187 of the 2012 NPPF. This has not been carried forward into the 2018 edition. However, the new NPPF (paragraph 38) continues to require planning authorities to approach decisions "in a positive and creative way", and to "work proactively" with applicants to secure development that will improve the economic, social and environmental conditions of the area.

² Paragraph 028

12. I do not agree that the advice on proactive working necessarily relates only to the application stage. The Planning Inspectorate Procedural Guide³ refers to the importance of continuing discussion, even after applications have been refused. That may well be in the context of seeking to avoid an appeal being made, and would normally rely on the appellant seeking to initiate contact to understand the Council's concerns. But the general principle is also applicable once an appeal has been made, and any action that would help to reduce unnecessary time and expense in the appeal process is to be welcomed. Joint discussion between expert witnesses can be productive in this regard, even after the exchange of proofs, if there would still be an opportunity to agree more common ground before the event.
13. However, I do not see failure to initiate such contact as equivalent to the "lack of co-operation with the other party" cited by the PPG⁴, which I take to involve a more resistant failure to engage. In advising on substantive awards, the PPG refers to "refusing to enter into ... discussions, or to provide reasonably requested information"⁵. In this instance, I accept that in the time available, the Council's priority was to receive the advice of consultees and to take steps to address the issue in accordance with the appeal timetable. The submission of the proof of evidence effectively provided the response to the EA sought by the appellants.
14. I agree that in preparing the proof, it could have been beneficial for the Council's witness to have contacted the appellants, particularly to explore the issue of acid grassland. But it also would have been open to the appellants to initiate such contact once they had understood the concerns outlined in the proof. The complaint that the Council's evidence does not specify what additional surveys are required could have been addressed in discussion.
15. In any event, I accept that there is little indication from the Inquiry evidence that prior consultation would have been successful in significantly narrowing or eliminating any of the issues raised by the Council. Whether or not the appellants were committed to calling their witness to respond to EWT's objection, they would almost certainly have needed to present oral evidence to deal with the Council's case.
16. The issue on which prior discussion could have been most helpful is that of acid grassland, and this is relevant to the substantive ground of the costs application. I agree with the appellants that the reason for refusal did not include plant species and habitats. The case on acid grassland was therefore a new issue.
17. In the appeal decision, I have found that the appellants' survey effort was adequate to allow a reasoned judgement to be made on the impact on protected species. But I accept that the Council's evidence on this issue was a properly reasoned professional opinion on the possible need for further survey work. The evidence was limited to the narrow point of lack of information as outlined in the reason for refusal. As the Council was not seeking to present its own full assessment of the site, it was possible to present this critique without the need for a site visit. The evidence did not amount to vague generalised assertions.

³ Procedural Guide: Planning Appeals – England July 2018 paragraph 1.3.2

⁴ Paragraph 047

⁵ Paragraph 049

18. The case on acid grassland was different because it went outside the reason for refusal. The appellant had had no indication from the refusal that this was a matter that might require further survey work. As a result the relevant sections of the EA were not updated, but I accepted oral evidence that surveyors had monitored habitats on their later visits to the site.
19. The PPG advises that introduction of fresh and substantial evidence at a late stage, necessitating extra expense for preparatory work that would not otherwise have arisen, can constitute unreasonable behaviour⁶. In this instance, by introducing this additional concern at a very late stage, and then failing to substantiate it at the Inquiry, the Council acted unreasonably. The appellants incurred unnecessary expense in the preparation and examination of evidence on the matter.
20. An award of costs, limited to the expense of dealing with the issue of acid grassland only, is justified.

Costs Order

21. 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 Tendring District Council shall pay to Gladman Developments Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in ecology evidence in respect of acid grassland; such costs to be assessed in the Senior Courts Costs Office if not agreed.
22. The applicant is now invited to submit to Tendring District 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.

Brendan Lyons

INSPECTOR

⁶ Paragraph 047