



Costs Decision

Inquiry held on 22 – 31 January 2019

Site visit made on 16/17 April and 17 June

by Phillip J G Ware BSc DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29th July 2019

Costs application in relation to Appeal Ref: APP/M0933/W/18/3204360 Kirkby Moor Wind Farm, Kirkby Moor and Lowick High Common, Grizebeck

- 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 Zephyr Investments Limited for a partial award of costs against South Lakeland District Council.
 - The Inquiry was in connection with an appeal related to a limited period condition in respect of the use of the land as a wind farm.
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Decision

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

Background

2. The proposal was made under s73 of the 1990 Act and sought an extended period for the retention of an existing windfarm until 2027. Planning permission had initially been given by the Secretary of State in 1992 for a 25 year limited period.

The submissions for Zephyr Investments Limited

3. The costs application relates to:
 - A partial award of all costs related to the production of heritage evidence
or
 - A partial award of costs related to the production of rebuttal evidence by the appellant's heritage witness

All costs related to heritage

4. Before the application was refused, the Council's conservation officer provided a detailed response to the authority. This went into more detail than simply using the 'less than substantial harm' category in the Framework and assessed the degree of harm to the significance of each of the designated assets. However the Council did not rely on this evidence at appeal but commissioned a separate professional witness to prepare evidence and appear at the Inquiry.
5. This witness's evidence was of no assistance to the Inquiry. He did not engage in what he defined as 'intangibles' and was not prepared to advance a case based on the effect of the retention of the proposal on the significance of the

designated assets. Aside from implications which might be taken from the Council's questions to the appellant's heritage witness, the Council did not articulate the degree of harm. The Inquiry was left without any assistance as to whether the authority considered the harm to significance to be greater, the same, or less than that put forward by the appellant and the Council's own conservation officer.

6. The Council's approach was unreasonable in that it was not prepared to agree the assessment put forward by its own conservation officer and therefore caused the appellant to go to the expense of preparing expert heritage evidence. Its heritage witness refused to engage with the planning process. The issue of heritage impact could have been dealt with by a Statement of Common Ground with further submissions as to weight.

Costs related to rebuttal heritage evidence

7. This matter relates to the effect on the significance of a Scheduled Ancient Monument (SAM) on Kirkby Moor itself.
8. In the Council's appeal questionnaire, the authority stated that the proposal would not affect a SAM. The Council's Statement of Case subsequently stated that the authority would refer to five designated heritage assets – without specifying them. There was still no reference to the SAM.
9. The appellant then sought to identify which assets the Council was referring to. The authority finally responded with a list four months after the Statement of Case. This list, which the appellant was entitled to rely on and which was produced only five days before the exchange of evidence, did not include the SAM. The appellant prepared its evidence on that basis.
10. When the Council's evidence was produced it included, for the first time, reference to the SAM. The appellant therefore had no option but to prepare rebuttal evidence to deal with the late introduction of the SAM. This was in breach of the Procedure Rules and caused the appellant unnecessary expense.

The response by South Lakeland District Council

All costs related to heritage

11. The fact that the Council did not accept the views of the conservation officer is self-evident. Members disagreed with the recommendation of officers – as they were entitled to do. With that background it was inevitable that the authority had to prepare a separate heritage assessment.
12. The appellant's criticism of the heritage witness for the authority was unworthy. The heritage witness helped to identify the assets in question, to which he attributed greater significance than the Council officer. Whether his approach was 'academic' (as the appellant characterised it) is immaterial, as his approach was useful.
13. There was a complaint that he did not distinguish degrees of harm within the 'less than substantial' scale as set out in the Framework. But there is no reason why he should have done so and this is not a policy requirement. The authority engaged with the appeal process and the Council's heritage witness was prepared to answer questions and give his professional views.

Costs related to rebuttal heritage evidence

14. The Council's position was not adequately set out in the Statement of Case. However one has to look at the primary material, which includes the heritage elements of the appellant's Environmental Statement. In that document the effect of the proposal on the SAM was set out. Although the Council differed with the assessment, it was proper that this matter should be considered by the Inquiry.
15. It was inevitable that the impact on the SAM was considered by the Inquiry. Although the Council may have introduced this matter late in the process, the appellant's work would have been necessary in any event.

Reasons

16. Planning Practice 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.

All costs related to heritage

17. The Council was entitled to take a different view on heritage matters from its officer. Given that it did so, it was reasonable for the authority not to rely on the views of its own conservation officer but to engage a witness who felt professionally able to defend the Council's position. There is nothing unreasonable in that approach.
18. The Council's evidence in this respect identified the heritage assets in question and asserted that the proposal would cause harm to their significance. There is no requirement for the assessment of harm to be undertaken on some sort of sliding scale within the 'less than substantial' category set out in national policy. I do not criticise the witness for declining to subdivide this category.
19. Although the Council's evidence went little further than that and was not of particular assistance in understanding the precise position of the authority, this goes to the weight I can attribute to the evidence in the s78 balance. It does not mean that the authority was unreasonable in putting forward the case which it did.

Costs related to rebuttal heritage evidence

20. There is no doubt that the Council's position, up to the submission of the evidence, omitted the effect of the proposal on the SAM which is on the appeal site itself. Given the location of the SAM this may well be regarded as unusual, especially as the presence of this heritage asset had been flagged up in the appellant's Environmental Statement. The appellant was entitled to rely on the Council's position to that date, which was that there was no issue related to the SAM.
21. When the Council's concern with the effect on this asset was revealed, it was inevitable that the appellant produced additional evidence setting out their case on the new position adopted by the Council.
22. The Council's behaviour was clearly unreasonable in that it initially did not engage with the appellant in defining the heritage assets potentially affected by the proposal, and then introduced a new element far too late in the process.

However, to qualify for an award of costs, it must be shown that this unreasonable behaviour caused unnecessary expense.

23. The production of the evidence related to the SAM would have been necessary in any event, albeit at an earlier stage in the process, if the authority had given due warning of its position. In addition, given that heritage matters were one of the issues in dispute between the Council and the appellant, the presence of a SAM on the appeal site itself could hardly have been overlooked and it would have been necessary to inform the Inquiry of the positions of the parties. There was no unnecessary expense, just a difference as to when the expense was incurred.

Decision

24. I find that unreasonable behaviour leading to unnecessary expense, as described in Planning Practice Guidance, has not been demonstrated and that a partial award of costs is not justified in respect of either aspect of the claim.

P. J. G. Ware

Inspector