
Costs Decision

Site visit made on 21 February 2020

by Melvyn Middleton BA(Econ), DipTP MRTPI

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

Decision date: 8 June 2020

Costs application in relation to Appeal Ref: APP/L3055/W/19/3229935 Redhill Marina, Redhill Lock, Ratcliffe on Soar, Nottinghamshire, NG11 0BE

- The award is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The award is made in favour of Nottinghamshire County Council for a full award of costs against Mr R Morley.
 - The appeal was against the refusal of planning permission for the construction of an inland leisure marina, associated ancillary building, infrastructure, car parking and landscaping with incidental mineral extraction.
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Decision

1. An award of costs is made in the terms set out below.

Reasons

2. The Planning Practice Guidance (PPG) says that an award of costs exists to discourage unnecessary appeals and that an appellant is at risk of an award of costs being made against them if they make an appeal that has no reasonable prospects of succeeding.
3. Planning permission was refused for six reasons. Three of these concerned the provision of inadequate information about environmental matters and a fourth the implications of the proposal for the safeguarding route of High-Speed Rail Two, Phase 2b, (HS2b). The Government through the National Planning Policy Framework (Framework) considers these to be important considerations and recommends that decision makers should attach significant weight to them, when determining planning applications and appeals. Planning permission can be and often is, refused when applicants have not demonstrated that proposals could meet the relevant tests and considerations with regard to any one of these considerations.
4. In this case the County Council clearly pointed out in each case that the proposal does not conform to the provisions of the Framework and additionally referred to the relevant Development Plan (DP) policies that the proposal was in conflict with. Section 38 (6) of the planning and Compulsory Purchase Act 2004 says that if regard is to be had to the DP for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise. I have not been referred to any material considerations that suggest that I should set aside DP or national policies concerning any of these matters.

5. A previous application for a similar proposal on a larger site was dismissed in 2015¹, following a failure of the County Council to make a decision within the prescribed period. In retrospect it referred to the reasons that it would have used if it had determined the application. These included the inadequacy of the information accompanying that application to enable the proposal to be fully assessed against these matters. That Inspector did not conclude positively on any of them. These findings should have alerted the Appellant to the inadequacy of the material that supported that application. They should have also suggested that if a successor application was to be successful, then more comprehensive and up to date information about these matters would need to be submitted with the application.
6. The ecological policy background is referred to in reason for refusal 3. and paragraphs 52-59 of the decision letter, which also discusses the reasons why the proposal does not comply with the relevant provisions. In reaching its conclusions re inadequate environmental information, the County Council was supported by the Appellant's ecologist who specifically recommended that additional species surveys should be undertaken. Despite the submission of some additional environmental information, following the appeal, not all of the relevant species surveys were satisfactorily undertaken. Consequently, some of the deficits in environmental information identified by both parties still remains.
7. In determining the previous appeal, which had clear environmental benefits that are not a part of this proposal, that Inspector was unable to conclude any more than a neutral effect from the proposal on biodiversity. This should have told the Appellant that without comprehensive base-line information and a clear beneficial mitigation strategy to compensate for the losses, then this proposal would be unlikely to produce a positive outcome from the environmental perspective. The subsequent exclusion of the environmental benefits that accompanied the previous appeal, reinforces the importance of this. It should have alerted the Appellant further about the need and importance of comprehensive environmental information if the outcome on this matter was to be positive rather than neutral or negative.
8. The Framework says at paragraph 175 that if significant harm to biodiversity, resulting from a development, cannot be avoided, adequately mitigated or as a last resort compensated for, then planning permission should be refused. The excavation of the site would cause very significant harm to biodiversity but there is no adequate mitigation or compensation strategy, accompanying the appeal.
9. Reason for refusal 5 refers to the inadequate environmental information provided in the context of the potential impacts on nationally significant archaeology. Paragraphs 44-51 of the decision letter explains why I agreed with this conclusion. Section 16 of the Framework clearly expects convincing justification to be provided if such assets are to be harmed or lost. It also requires applicants to assess the significance of heritage assets and in doing so to provide sufficient information to enable the potential impact of the proposal on the asset's significance to be assessed.

¹ Appeal Ref: APP/L3055/A/13/2194755.

10. As well as being clearly out of date, the archaeological field evaluation that was submitted, was incomplete in the context of the appeal site and for the most part referred to areas outside of the appeal site. Indeed, the authors acknowledged at the time (2007) that the “wetlands” (that comprise the appeal site) were not concentrated on and admit that the trenching programme carried out was not designed to map the substantial paleochannel deposits that potentially lie underneath the appeal site. In the absence of more comprehensive information, significant remains could be lost as a result of excavations to remove the mineral. This was consequently an important consideration in the appeal’s determination.
11. The previous Inspector found that it was a factor that weighed against the proposal. Notwithstanding the further passage of time and the request from the County Council for additional information on the significance/potential of the wetland zone, the Appellant chose not to submit further information on this matter. Without this it is difficult to see how a subsequent decision maker could arrive at a more favourable conclusion on this matter than the previous Inspector. Whilst the site is undoubtedly smaller than that covered by the previous appeal, there is still very likely to be archaeological remains of national significance underneath the site and these should be properly assessed before the granting of planning permission for any development involving excavation is considered.
12. Reason for refusal 6, referring to flooding, points out that the submitted flood Risk Assessment does not comply with the requirements of the Framework and the National Planning Practice Guidance (NPPG). This is because it fails to provide adequate information to fully assess the flood risk arising to the proposed development or demonstrate that it would not lead to increased flood risk to surrounding land or property or adversely affect existing flood defences. In reaching this conclusion the County Council is supported by the representations from the Environment Agency. I discuss this aspect of the appeal in paragraphs 36-43 of the decision letter.
13. The extensive flooding at this site in 2019 and on other past occasions, should have been sufficient to demonstrate to anyone that flooding at this site is a matter that needs to be taken seriously. Despite requests from the County Council, no additional flooding information was submitted by the Appellant to enable the decision maker to fully assess flood risk, thereby leaving no other course of action open to any reasonable person, other than to refuse planning permission.
14. Reason for refusal 3 refers to the conflict with the safeguarded alignment of HS2b. The Framework clearly says that such routes should be protected. The national and regional benefits of this project are important and attract very significant weight. Nevertheless, no evidence was submitted in an attempt to demonstrate how these considerations could be mitigated or outweighed. In such circumstances it is difficult to perceive a basis upon which a decision maker could grant planning permission.
15. Furthermore, whilst the site may not have been affected by the route of HS2b in 2012, when the previous application was submitted, it was in 2016

when this application was made and by the time the appeal was submitted (see paragraphs 60-62 of the decision letter) there was a draft design for the part of the proposal that affects the appeal site. The Appellant requested and obtained a postponement of the appeal's determination, in November 2019, to allow the anticipated parliamentary report on HS2 to be taken into account in the determination of the appeal. Despite this, the Appellant did not withdraw the appeal when subsequently that report, which did not change HS2b as it affects the appeal site, was published and the safeguarded route reconfirmed.

16. As the Appellant points out, Rushcliffe Borough Council did not object to the proposal. In this context if the application had been refused solely on the Green Belt and countryside landscape aspects of the proposal then an appeal would not have been unreasonable. However, there were four other reasons for refusing the planning application that I have discussed above, and which were not adequately addressed by the Appellant.
17. I also note that in its consultation response, Rushcliffe Borough Council caveated its decision, not to object, by requiring the County Council to satisfy itself that biodiversity, protected species and archaeology had been fully addressed in the submissions before granting planning permission. The County Council could not do so because the Appellant's submissions do not fully address these considerations. Despite requests for information that may have enabled it to do so, none was forthcoming to an extent that satisfied the statutory requirements.
18. Additionally, Rushcliffe Borough Council asked for the existing moorings along the riverbank to be removed as a part of the proposal and for the new moorings to be limited to leisure moorings. Unlike the circumstances of the previous unsuccessful appeal, when these matters counted towards very special circumstances, there was no Agreement to secure the removal of these moorings or to ensure that the new moorings are for leisure purposes only, accompanying this appeal.
19. The ability given to Inspectors to make an award of costs where unreasonable behaviour has been found, including where no application has been made by another party, is consistent with the guidance in the NPPG and in support of an effective and timely planning system in which all parties are required to behave reasonably. As pointed out in the NPPG, this ability to award costs exists to discourage unnecessary appeals and if it is not used in appropriate circumstances then the number of unnecessary appeals is unlikely to be reduced to the maximum extent.
20. In the above circumstances, I therefore consider that this appeal had no reasonable prospect of succeeding. Whilst Nottinghamshire County Council may not have asked for costs, there is an overriding case for making an award of costs against the Appellant to compensate the County Council for the unnecessary costs that it incurred in resisting the appeal and defending its decision.

Costs Order

1. 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 Mr R Morley shall pay to Nottinghamshire County Council, the costs of the appeal proceedings described in the heading of this decision.
2. Nottinghamshire County Council is now invited to submit to Mr R Morley, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Mel Middleton

INSPECTOR