



Ministry of Housing,
Communities &
Local Government

Our ref: APP/P5870/W/20/3250891

Mr Rob Walker
Trowers & Hamlins LLP
3 Bunhill Row
LONDON
EC1Y 8YZ

10 May 2021

By email only: RWalker@trowers.com

Dear Sir

**LOCAL GOVERNMENT ACT 1972 – SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 78 AND 320
APPEAL MADE BY KIER
LAND AT SHEEN WAY PLAYING FIELD, SHEEN WAY, WALLINGTON, SM6 8NR
APPLICATION REF: DM2019/00959**

APPLICATION FOR AN AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying his decision on the appeal as listed above.
2. This letter deals with your client's application for a full award of costs against the Council. The application as submitted and the Council's response are recorded in the Inspector's Costs Report (CR), a copy of which is enclosed.
3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.
4. The Inspector's conclusions are stated at CR55–65. He recommended that your client's application for a full award of costs be refused.
5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in his report and accepts his recommendation. Accordingly, he has decided that a full award of costs against the Council, on grounds of

Mike Hale, Decision Officer
Planning Casework Unit
Ministry of Housing, Communities & Local Government
3rd Floor, Fry Building
2 Marsham Street
London, SW1P 4DF

Tel 0303 444 5374
Email: PCC@communities.gov.uk

'unreasonable behaviour', is not justified in the particular circumstances. The application is therefore refused.

6. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.
7. A copy of this letter has been sent to the Council.

Yours faithfully,

MA Hale

Mike Hale

For decisions made by ministers: This decision was made by the Secretary of State and signed on his behalf.



Costs Report to the Secretary of State

by D J Board BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Date 8 February 2021

TOWN AND COUNTRY PLANNING ACT 1990

LOCAL GOVERNMENT ACT 1972

COUNCIL OF THE LONDON BOROUGH OF SUTTON

APPEAL MADE BY KIER

Inquiry Held on 28 September – 7 October 2020

Sheen Way Playing Field, Sheen Way, Wallington, SM6 8NR

File Ref: APP/P5870/W/20/3250891

File Ref: APP/P5870/W/20/3250891

Sheen Way Playing Field, Sheen Way, Wallington, SM6 8NR

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Kier for a full award of costs against the Council of the London Borough of Sutton.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for the erection of part one, part two storey building (4, 943m²) for special needs school (Use Class D1 for 246 students with a range of learning difficulties, together with ancillary multi-use games area (MUGA), landscaping and parking).

Summary of Recommendation: The application for a full award of costs be refused.

The submissions for the Appellant¹

1. It is the Appellant's submission, the conduct of the Council of the London Borough of Sutton (the Council) in dealing with the Application has been unreasonable in the context of both procedural and substantive matters pursuant to the Planning Practice Guidance (PPG)², and the Joint Ministerial Policy Statement – planning for schools development (2011), specifically bullet point 6.
2. The PPG provides that, while parties in planning appeals and other planning proceedings normally meet their own expenses, all parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs³.

Failure to determine the application in a reasonable period

3. The Site is allocated in the Local Plan (adopted February 2018) under the terms of Policy 40 for "Special Educational Need School and Open Space", with S97 – Former Playing Fields, Sheen Way, Wallington being the relevant Site Allocation. It is implicit in this allocation that the Site could accommodate a school of the size proposed and the principle of locating a SEN school on the Site is not and never has been in issue.
4. Pre-application discussions began in September 2018. The Council never issued a formal response to the pre-application process, which resulted in the Appellant proceeding with the Application. The Application was submitted in June 2019 but not validated until July 2020. The Appellant, in order to assist Officers, agreed to frontload the highways/transport plans and for these to be analysed and tested during the application process. Normally these would be dealt with post-decision and controlled through conditions.

¹ CD 22.1

² Paragraph: 031 Reference ID: 16-031-20140306

³ Paragraph: 028 Reference ID: 16-028-20140306

5. Throughout the pre-application process the Council raised new issues that needed to be addressed and delayed the determination of the Application⁴. The Council sought to agree an extension of time for determination of the Application on 14 April 2020 at 17:47⁵, the day prior to the ending of the six month period for determination. The Appellant had sent the prior Inquiry notification to the Council on 30 March 2020⁶. Eventually, to protect the Appellant's position, an appeal was lodged on the evening of 14 April 2020.

Putative reasons

6. This matter is dealt with in detail in Trowers & Hamlin's (the Appellant's instructing solicitor) letter of 15 July 2020⁷ addressed to the South London Legal Partnership (the Council's legal service). The opening paragraph of that letter states:

"Our client has serious concerns regarding the formal record of the Planning Committee meeting held on 28 May 2020 and the subsequent reasons for refusal which were produced as part of the LPA's statement of case. It appears that Officers have acted without necessary authority and in doing so are expanding the issues that will need to be dealt with at the appeal, thus exposing our client to unnecessary wasted time and costs..."

7. The Appellant would respectfully refer the Inspector to the remaining paragraphs of this letter, which should be regarded as incorporated into this application for costs. The response of the Monitoring Officer⁸ to this letter displayed a disregard for the seriousness of the allegations and failed to address the specifics of the letter of complaint. The Appellant incurred costs in dealing with this matter. In particular the extensive correspondence and communications which were required to establish what the Council's reasons for refusing the scheme actually were.

The approach of the planning committee

8. The decision of the Council's Planning Committee at the Meeting held on 28 May 2020 was wrongly based on Members' mistrust of the expert evidence that was before it in support of the Application and was unsupported by any alternative evidence. As such, it was wholly unreasonable, which the Council's own Officer remarked towards the end of the meeting.
9. To repeat, there was no evidence before the Committee which could have served to undermine the expert evidence relied on by the Appellant in the form of the Transport Assessment and Construction and Logistics Plan, together with the other submitted documents dealing with the highways issues, and there was no evidence to substantiate the concerns expressed by Members.

⁴ see Appendix 6 to the Appellant's SoC, Core Document 7.7

⁵ CD 22.4

⁶ CD 22.2

⁷ CD 12.1

⁸ CD 12.2

Ultimately, the reasons for refusal that were the subject of the Committee's resolution, and those in the form in which they eventually were put before the Inquiry, rested on an unreasonable failure on the part of the Committee to follow the advice of their own Officers, who had recommended that the putative decision of the Committee should be one to approve the application.

10. There was, therefore, no reasonable basis upon which the Committee could have resolved that permission would have been refused had the decision on the Application fallen to it, requiring the Appellant to incur the costs associated with an appeal. This position is not altered by the fact that the Council has, evidently, felt compelled to hire external experts to present its highways and planning cases, retrofitting their evidence in an attempt to justify putative reasons for refusal which are wholly lacking on merit and without foundation.

Failure to engage with the appeal process

11. The appeal process was subject to numerous delays on the part of the Council in responding to the Appellant, and in their failure to properly engage with the appeal process⁹.
12. Intertwined with this issue is a failure on the Council's part to explain its case. The Council's Statement of Case was very light on detail, while the Statement of Common Ground provided on 13 July 2020 simply listed points as vague as "amenity" as matters not agreed. Likewise, the Schedule of Matters in Dispute, provided two working days before Proofs were due, is incredibly light on any detail in comparison to the range of issues set out in the Council's Highways Proof of Evidence. Again, this was unreasonable behaviour on the Council's part, leading the Appellant to incur unnecessary and/or wasted costs in attempting to deal in evidence with a case which was entirely unclear.

Attempts by the Council to delay the appeal

13. The Council repeatedly sought to obtain an adjournment to the appeal or a two month deferral¹⁰ on the basis that it did not feel it could hold a meeting during lockdown, and essentially sought an indefinite hold. This was despite legislation being passed by the Government to enable virtual decision-making and numerous local authorities taking advantage of this. Numerous emails and correspondence were exchanged back and forth at a cost to the Appellant as Trowers & Hamblins had to send formal letters¹¹ dealing with this matter. Eventually PINS upheld the timetable¹². The Council held the virtual meeting and has since held many virtual meetings of the Planning and other committees.
14. After The Planning Inspectorate (PINS) refused a two month deferral, the Council then sought an extension of time to file its Statement of Case¹³.

⁹ CD 22.1, Page 5 and para 20

¹⁰ see correspondence at Appendices E to H - CD 22.6, CD 22.7, CD 22.8, CD 22.9

¹¹ Appendices F and G - CD 22.7, CD 22.8

¹² Appendix H - CD 22.9

¹³ Appendix I - CD 22.10

Again, this was refused by PINS but the Appellant incurred costs having to respond to this unreasonable request¹⁴. Notice of the appeal was sent to the Council on 30 March 2020 and the appeal was lodged on 14 April 2020, and the Statement of Case did not have to be filed until 3 June 2020.

15. Following the letter from PINS announcing that the Inquiry would start on 29 September 2020, the Council then sent correspondence seeking a one week adjournment¹⁵. Again, costs were incurred and there was no apparent merit to seeking such an adjournment.

Allegations that the Appellant's team were instructed not to respond to the Council

16. This contention is both unreasonable and unfounded. The Appellant's team were not instructed in this manner. The request made by the Appellant, rather, was that the Appellant's responses to queries should be co-ordinated by and through the Appellant's legal team. This was a reasonable suggestion on the part of the Appellant and did not prejudice and could not have prejudiced the Council in any way.

Conclusions

17. The Council has behaved unreasonably both in relation to events before the appeal was brought and throughout the appeal process; and its unreasonable behaviour has caused the Appellant to incur unnecessary and/or wasted costs as a result.
18. In summary, it is the Appellant's firm position that the appeal could have been avoided entirely if the Council had acted proactively during both the application and appeal processes and based its resolution at the meeting held on 28 May 2020 on the evidence that was before it and the advice of Council Officers. This justifies a full award of costs against the Council.
19. If this argument is not accepted then, it is nevertheless clear that if the Council had acted more pro-actively during both the application and appeal processes, and had properly presented its case at an earlier stage in the proceedings, then the appeal could have explored fewer issues, taking up substantially less Inquiry time. This would justify an award of costs to the Appellant in relation to the additional costs which have been incurred as a result, and which are referred to above.

Response for the Council¹⁶

20. The Council does not accept that its conduct amounts to unreasonable behaviour and, in any event, its actions have not caused the Appellants to incur any unnecessary expense.

¹⁴ Appendices H and I – CD 22.9, CD 22.10

¹⁵ Appendix L – CD 22.13

¹⁶ ID 15

21. The Council requests that the Appellants claims for costs are rejected outright. The Council submits that the Appellant has no evidence whatsoever to support their claim that the Council has behaved unreasonably in the context of either procedural or substantive matters according to the advice in the Planning Practice Guidance and the Joint Ministerial Policy Statement - Planning for Schools Development (2011), bullet point 6.
22. The Appellant cites a number of grounds to support this claim which are dealt with below under subheadings. The Council rejects each and every one of these claims as set out below.

Failure to determine

23. The Appellant says that through policy 40 and site allocation S97 "*it was implicit in this allocation that the site could accommodate a school of the size proposed*". The Appellant is clearly mistaken in this comment as neither the site allocation, policy 40 or the Development Plan read as a whole make any reference to the amount of development that would be anticipated. Furthermore, the Appellant assumes that because a site is allocated then this automatically means that a subsequent planning permission would be granted.
24. The site allocation lists those matters to which any future development should pay particular regard. The fifth bullet is important as it says a development must ensure that traffic flow on the local roads network is unduly affected. It is the Council's case that traffic flows will be affected and will give rise to severe harm and so the appeal proposal is contrary to the advice in paragraphs 108 and 109 of the National Planning Policy Framework (the Framework), Policies 6.3 and 6.12 of the London Plan and Policies 29 and 36 of the Sutton Local Plan 2018.
25. The Appellant complains that the Council did not issue a formal response to the pre-application process which resulted in them proceeding with the application. The reason the Council did not issue a pre-application response was because discussions had not been concluded on any substantive issues, especially the Construction Logistics Plan. In this respect the Council has followed the advice in paragraph 94(b) of the Framework.
26. The Appellant, through the Education Funding Agency/Department for Education (DfE), was perfectly aware that access to the site was challenging and would be a key issue to resolve before the application was submitted. The Council's concerns about the access to the site can be traced back to 2012 and the Site Development Policies DPD which designated the site for housing but safeguarded it for a primary school (if required). When the disposal of the site was discussed at the Strategy & Resources Committee on 17 July 2017 an additional recommendation was added at the request of Members. This set out that it be requested that the Education and Skills Funding Agency conducts early feasibility work involving residents on transport and access issues and the feasibility of constructing the school on this constrained site. While the Appellant places considerable reliance on the feasibility study (dated 20 April 2018) in their evidence, there is no evidence to confirm that they acted on the additional recommendation added by the Members at Strategy & Resources Committee before entering into pre-application discussions. The Council in

preparing its evidence found reference to a High Level Transport Study in para 2.1 of the 2018 feasibility study but the Appellant refused the Council's request to see this document¹⁷ which was uncooperative behaviour by the Appellant.

27. It is the Council's submission that the Appellant did not properly engage with the issue of the access prior to the planning application being submitted contrary to the expectations of the Strategy and Resources Committee. The Appellant opened up pre-application discussions with the Council in September 2018 although the site had been allocated in the Local Plan in February 2018 and the DfE had been present at the Local Plan Examination in public in September 2017 when site allocations were discussed. The Council submits that the Appellant had more than ample opportunity to bring forward discussions sooner, but did not, which tends to negate their argument that urgent educational need must be afforded the greatest weight in this appeal. Had there been an urgent requirement to replace the existing accommodation at Carew Manor, then why did the Appellant take so long to come forward with their proposals?
28. The correspondence set out in Appendix 2 demonstrates that the Appellant had not satisfactorily addressed the Council's concerns about the timing of the submission without concluding the pre-application process. This correspondence is included for the Inspector to note that it was clear from the response by the Appellant that not all of the Council's issues had been addressed, not just the highways matters which have been the main issues under consideration in this appeal. It is noted in the email from Mr Considine¹⁸ that the Appellant recognised the Council's concerns in this regard related to the construction and operational phases of the development.
29. The Council has acted in accordance with the guidance contained in paragraphs 38-46 as well as paragraph 94 (b) of the Framework. There are no grounds for an award of costs for procedural reasons and the Appellant fails to explain their application within the context of this advice. Furthermore, the Joint Ministerial Statement says:- 'We expect all parties to work together proactively from an early stage to help plan for state-school development and to shape strong planning applications. This collaborative working would help to ensure that the answer to proposals for the development of state-funded schools should be, wherever possible, "yes"'.
30. It is the Council's submission that the Appellants did not work with the Council to shape a strong planning application and broke off pre-application discussions prematurely. The Council asks that the Appellant's application for an award of costs on this ground is rejected.
31. The Appellant says that the Application was submitted in June 2019 but that there was a significant delay in validation.

¹⁷ID 15 Appendix 1

¹⁸ Agent for the application

32. The Appellant refers to frontloading the application process saying that highways/transport plans would normally be dealt with post-decision and controlled through conditions. The term frontloading is about dealing with key planning issues before applications are submitted¹⁹ and that simply did not happen bearing in mind the additional recommendation by the Strategy & Resources Committee.
33. The Appellant complains that the Council introduced new issues that needed to be addressed which they say delayed the determination of the application. The Council is mystified by this statement, keeping in mind its concerns that the application was submitted before pre-application discussions were concluded and the acknowledgement by Mr Considine²⁰ that there were a number of issues that were unresolved by the time the application was submitted. Furthermore, it is the Appellants responsibility to demonstrate how their proposals comply with the relevant guidance and policy, including the Development Plan. Therefore, none of the issues raised should have come as a surprise to them, particularly as the Council had drawn attention to the key issues during the pre-application stage. The Appellants intransigence by refusing to agree to a Design Review Panel (DRP) after the application was received was a significant concern to the Council. The Appellant only reluctantly agreed to this on the proviso that the Council met the fees for this panel, which are normally paid by the Appellant to the DRP, but in this case they refused to pay the DRP's fees²¹.
34. The Appellant refers to matters arising which led them to lodge their appeal against non-determination of the application which they clarify in paragraph 13 was to 'protect the Appellant's position'. The Inspector should note that the correspondence the Appellant refers to was during the period when the Covid-19 pandemic had placed considerable strain on the Council in common with other Local Authorities in dealing with a national emergency. In this context, the Council would make the following observations (1) that all matters concerning the Construction Logistics Plan (CLP) were still ongoing on 1 April (see CLP chronology - CD 7.7) and (2) that the appeal was lodged only 5 working days before Government legislation came into effect to enable, amongst other things, Council meetings to be held virtually. This latter point is highly significant as the Council was seeking to agree a period of time that would enable the CLP to be agreed but also to put in place measures to hold the Planning Committee virtually. The need for a virtual Planning Committee was in view of the type of application which is required to be heard that way in view of the considerable public interest in the application.
35. The Council submits that the Appellant acted unreasonably in not agreeing an extension of time to accommodate the points raised above and further submits that the Appellant was aware that the application had the support of Officers. It was because the Appellant did not have confidence that the Planning Committee would support the Officers that they did not agree to an extension of time, being of the view that if they waited they would still end up having to

¹⁹ para 94(b) of the NPPF

²⁰ ID 15 Appendix 2

²¹ ID 15 Appendix 3

appeal. Regardless of the eventual outcome, none of this had any bearing on the timing of the project which had by this time been thrown into considerable doubt due to the pandemic. It is the Appellants decision to have brought the appeal, not the actions of the Council. There are no grounds for a procedural award of costs.

Putative reasons of the Planning Committee

36.The Council submits that the assertion that the putative reasons go beyond those put forward by the Planning Committee is without foundation. This has been dealt with and the Appellant will know that for the avoidance of any doubt the Council's reasons for refusal were further endorsed at the Planning Committee on 5 August 2020. This is a non-issue for the Inspector who has acknowledged that the main issues for her consideration are the two reasons for refusal.

The Planning Committee resolution failed to have proper regard to the development plan and was made in the absence of evidence

37.The Appellant has clearly approached this Inquiry by relying on the Officers report and recommendation to the Planning Committee and the transcript of the meeting to support their case. The Appellant now seeks to make a spurious application for costs on grounds that the Council has not produced evidence to substantiate harm. The Council respectfully asks that the Inspector disregards the Appellants application, because it is evident that the decision made by the Planning Committee had full regard to the Development Plan and the Officer report was comprehensive in setting out the issues.

38.The application attracted a total of 183 objections, the majority of which raised concerns about the approach roads to the site being too narrow to accommodate both construction and operational traffic. The Planning Committee clearly had regard to the views of local residents living in the streets adjoining the site especially those situated on the route for construction traffic. This was clearly a material consideration to which it gave considerable weight, separating out the reality from the theoretical modelling.

39.The Appellant goes on to say there was no reasonable basis for the Planning Committee resolution. The Council says that this complaint is misplaced. One of the reasons why the Appellant would not allow the Council more time to convene a virtual Planning Committee during the peak of the Covid-19 pandemic was to 'protect their position' and was well aware that there was a possibility that it might be refused. The Council would reiterate that not all matters were resolved.

40.It would have been entirely inappropriate for Council Officers to give evidence at this appeal as they recommended approval. The Appellant glosses over the fact that Members are entitled to disagree with an Officer recommendation, especially one which was so finely balanced. Therefore, the Council consider that it is entirely appropriate to appoint professional witnesses to contest the appeal based on the putative reasons for refusal. The Appellant is completely misguided in seeking to support their case by relying on references to Officer support, because Members are entitled to take a different view. In this case,

the report to the Planning Committee fairly sets out the issues which were finely balanced, and on this occasion, they were not satisfied on the evidence that the proposal would result in no harm.

Failure to engage with the Appellant and the appeal process

41. The Appellant refers to 'numerous delays by the Council in responding to the Appellant and a failure properly to engage with the appeal process'. The Appellant cites the Statement of Common Ground, schedule of matters in dispute, s.106 and conditions in the latter regard and goes on to criticise the Council for 'attempts to delay the appeal'. These claims are unjustified, unsubstantiated and should be rejected.
42. Taking the matter of conditions. The Appellant has no right to criticise the Council whatsoever about progress over conditions. The Appellant has had sight of the draft conditions since the report to the Planning Committee was published on 19 May 2020. Since lodging their appeal, the Appellants team completely disengaged with the Council and there were no comments made on the Officer report, no comments on conditions prior to the Planning Committee, and no one from the Appellant's team attended Planning Committee to speaker answer questions. The Appellant's obvious reluctance to field anyone from their team to speak at the Planning Committee or answer questions is a matter of serious concern to the Council as it should be to the Inspector.
43. In a case where the Officer's report was not one of unequivocal support but was finely balanced, Members might have decided to accept the Officer's recommendation had they heard from the Appellant in person, at least to answer questions. The Appellant, for reasons best known only to them, decided to completely disengage and for this reason the Council submits that they should take full responsibility for this appeal as they had an opportunity to persuade the Planning Committee that the application should be approved but they did not take it.
44. The Appellant has been determined to obstruct and frustrate the Council at every opportunity when it reasonably sought to negotiate more time to hold a virtual Planning Committee and meet the timetable to provide a Statement of Case. It should have been clear to the Appellant that the Council was dealing with the frontline response to Covid-19 when this appeal was lodged. The Council reasonably sought the Appellant's agreement that the appeal timetable could be placed in abeyance so that the meeting to consider this application virtually could be held. The Appellants refused citing delays to their programme at a time of the biggest global pandemic for over a century and when it must have been clear to them (the DfE) that the project would be delayed at that time because of the national restrictions in place. This is completely and utterly unreasonable, especially because the secondary legislation on holding remote meetings only took effect on 4 April 2020, 5 working days before the DfE submitted their appeal against non-determination.
45. The appeal did not have a start date until 29 April 2020 and so the Council would not in any event have made any progress on the appeal until after that

date. In any event, the Council had made it clear to the Appellant, with agreement by the Planning Inspectorate, that the Council would concentrate on meeting the deadline for the statement of case by 3 June after the application was considered by the Planning Committee on 28 May 2020. The fact that the Council met that deadline within 4 working days of the resolution by the Planning Committee demonstrates a high level of commitment to assist the appeal process, contrary to the assertions of the Appellant.

46. The Appellant's complaints about the alleged delays on agreeing the Statement of Common Ground (SoCG) and matters of dispute do not amount to unreasonable behaviour. The Appellant was aware of the Council's putative reasons for refusal from 28 May and so it would have been apparent that there were few areas of difference between the main parties. Despite this the Appellant wasted a significant amount of Council Officer's time with their persistent and wholly unjustified complaints that the two reasons for refusal, which have been agreed by the Inspector as being the main issues for the appeal, exceeded that which was resolved by members of the Planning Committee on 28 May. The SoCG and schedule of matters of dispute are still in draft form. The Appellant complains of delays in receiving the Council's comments but does not explain how this has caused them to incur further costs.
47. The report to the Planning Committee on 28 May 2020 set out that if the appeal had not been submitted, the recommendation was that permission would be granted subject to conditions and a unilateral undertaking. The Committee was over four months ago, and the report available to the Appellant for longer. As stated above the Appellant completely disengaged with the Council after lodging the appeal and made no comments on the report, conditions or legal agreement. The Council therefore does not accept that there has been any lack of engagement on the s.106 in the context of the Appellants conduct in this respect.
48. The Appellant further complains that the Council has not explained its case. The Council asks the Inspector to reject this unsubstantiated complaint. It is not for the Appellant to judge whether the SoCG or matters of dispute are, of themselves, documents of substance, as they are in any event supplementary to the evidence of the witnesses. This is a matter for the Inspector reading all of the available evidence. The strength of the Council's case has clearly been borne out by the evidence of Ms Howard who provided the Inspector with cogent reasons why the appeal should be dismissed and was fully familiar with her evidence. Again, the Appellant repeatedly fails to provide substantive evidence as to why they consider they have incurred any additional costs. The Council considers that the Appellants claim on these grounds are wholly without merit.
49. Finally, the Appellant says that they have incurred further costs because the Council sought their agreement to jointly approach the Inspectorate to agree a short delay to the appeal timetable. The Council wrote to the Inspectorate on 29 April 2020 asking that the appeal timetable be held in abeyance for a period of two months but were prepared to discuss a different timescale. The reason for this request was in view of the secondary legislation on holding virtual meetings only coming into effect on 4 April and in view of the pressures

on the Council in their front line response to Covid-19. The submission of the appeal placed the Council in a difficult position as it had to make all of the necessary arrangements to hold a virtual meeting, give sufficient training to Members as well as consider the public interest in this case which has attracted 183 objections from local residents.

50. The result of all of the correspondence between the Council, the Appellant and PINS was that the latter confirmed on 11 May 2020 that they did not agree to a delay to the appeal timetable. Whilst the Council was disappointed in this outcome, it nevertheless respects the decision of PINS, but asks that any claim for additional costs incurred by the Appellant should be rejected, because (a) had the Appellant been reasonable and agreed to approach PINS jointly to request a delay, there would have been no need for the protracted exchanges of correspondence and (b) because the Appellant did not agree a joint approach to PINS the Appellant can have no complaint that the Council fairly sought to obtain PINS agreement to a short delay to the appeal timetable.
51. The Appellant complains that the Council asked for an extension of time to produce a Statement of Case, but again this claim should be rejected. The Council has covered the reasons for his above but to reiterate the request was fairly and reasonably made because (a) the Council needed time to put measures in place to hold a virtual Planning Committee meeting and (b) there would be less than 4 working days between the date of the meeting and the date on which the Statement of Case was due. The Council strongly submits that this was a reasonable request. Regrettably the Appellant's decided to object to any of the Council's reasonable requests and then complain that they have incurred costs in writing a letter to that effect. Had they shown greater understanding and reasonableness then this would not have been necessary. The Council asks that the Appellant's claim is rejected on this basis.
52. The Appellant's final complaint is that the Council made unfounded allegations that the Appellant's team were instructed not to respond to queries from the Council. The Council's position on this is that the Appellant has shown a lack of cooperation since lodging this appeal by withdrawing contact with the Council at key moments including their refusal to attend Planning Committee and have been obstructive, as evidenced above, by not releasing a document requested by the Council. The Council accepts the Appellant's clarification in their costs application that all contact should be through their instructing solicitors, but in light of the Appellant's own conduct in this appeal the Council cannot accept that by making this clarification the Appellant incurred any costs.
53. In summary the Council for all the reasons set out above, respectfully invites the Inspector to reject the Appellant's application for costs in full. The Council has followed the NPPF advice in seeking to resolve all issues prior to this appeal application being submitted but the Appellant submitted their application without allowing time for this.
54. The Appellant's objections to the Council's reasonable requests to hold the appeal timetable in abeyance were made fairly and reasonably, and the Council has abided by the advice of the Planning Inspectorate. While PINS may not have agreed to the Council's requests, they have not said that those requests were unreasonable particularly as the circumstances were largely

informed by the biggest global pandemic in over a century. The Council submits that there should be no award based on procedural grounds. The Council considers that it has produced robust evidence to support the reasons for refusal and it will be for the Inspector, not the Appellant, to decide whether that evidence has been more than sufficient to dismiss the appeal as well as applicant's application for costs.

Conclusions

- 55.The PPG states that irrespective of the outcome of an appeal, costs may only 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 associated appeal process²².
- 56.The guidance makes it clear that it is necessary for local planning authorities, when failing to determine an application for planning permission, to give the applicant a proper explanation. In addition, in any appeal against non-determination the local planning authority should explain their reasons for not reaching a decision within the relevant time limit and why permission would not have been granted had the application been determined within the relevant period. If they have failed to do so they are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal. Failing to produce evidence to substantiate a reason for refusal on appeal, or making vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis, are cited as examples²³.
- 57.The PPG is clear that Awards against a local planning authority may be either procedural, relating to the appeal process or substantive, relating to the planning merits of the appeal²⁴. The Appellant's claim centres on procedural and substantive matters regarding whether the Council has behaved unreasonably in relation to events before the appeal and throughout the appeal process²⁵.
- 58.The reasons for the non-determination of the planning application stem primarily from ongoing discussions regarding the CLP. The Appellant considers that the application was significantly frontloaded and in contrast the Council are of the view that negotiations were cut short and therefore the application was made without key matters being resolved. It is clear to me from the evidence presented at the Inquiry that there have been ongoing detailed discussions regarding highway matters associated with the provision of the SEN school. Indeed, the Appellant has made multiple references to the productive discussions with the Council's Highway Officers and the support received from them for elements of the scheme. The Council has engaged with the Appellant pre-application and in this regard operated within the spirit of the Ministerial Statement [1, 29]. The change in position results from

²² Paragraph: 028 Reference ID: 16-028-20140306

²³ Paragraph: 049 Reference ID: 16-049-20140306

²⁴ Paragraph: 046 Reference ID: 16-046-20140306

²⁵ Paragraph: 031 Reference ID: 16-031-20140306

Members taking a different view on the matter. Whether this is unreasonable behaviour turns on whether the Council has supported its reasons for resisting the scheme. In particular did it provide adequate information to support its case at appeal²⁶.

59. It seems to me that the emails provided by the Council demonstrate that matters were not resolved to Officer's satisfaction when the application was submitted. Clearly the Appellant has sought to address highway issues throughout the process. The various email exchanges serve to demonstrate that both parties were seeking to negotiate detailed matters and that ultimately the Appellant made a decision to exercise their right to appeal. Overall, I do not think that Officers and by extension the Council acted unreasonably on the issue of failure to determine.
60. The Appellant is concerned that the putative reasons of the Council do not reflect the reasons given by the Members of the Planning Committee and go over and beyond those actually discussed at the meeting. Matters of conduct are for the Local Authority to deal with and the Appellant has addressed the matter with the Council's Monitoring Officer, albeit they are not satisfied with the response. Ultimately, the fine points of this issue would not have prevented the appeal as the Council raised substantive concerns regarding highway issues. As such there have not been unnecessary costs arising directly from the appeal on this matter.
61. The information from the Planning Committee demonstrates that they had a full committee report before them. This contained detailed information on the scheme, relevant Development Plan policies, consultee comments and specialist advice and an assessment of the scheme. The recommendation in the committee report was that planning permission should be granted. In circumstances where Officers' professional advice is not followed an authority is expected to produce relevant evidence on appeal to support the decision. It does not necessarily follow that because Members disagree with the recommendation of their Officers that they have acted unreasonably, particularly where issues are finely balanced. In this case the Members of the committee clearly placed greater weight on concerns regarding the construction and operational traffic associated with the scheme.
62. In this case the Council has provided a full defence of the putative reasons for refusal at the Inquiry. Expert witnesses were provided for both highways and planning matters. In this regard detailed evidence was presented regarding the areas of concern for highway matters and a link made to the development plan. Therefore, overall, I do not consider that the Council has retrofitted the evidence to justify the putative reasons. The issues are matters of judgement and I do not consider that there has been unreasonable behaviour on this point.
63. The Appellant considers that the appeal could have been avoided if the Council had been more proactive during the application and appeal process. This simply is not the case. It is clear that the Council Officers have throughout

²⁶ Paragraph: 049 Reference ID: 16-049-20140306

acted in a proactive manner. Members made a different decision to their recommendation and no amount of proactive engagement with the Appellant by Officers would have necessarily altered this. Whilst I accept the Appellant is not satisfied with the explanation of Members' reasons the Council has fully supported and substantiated the Council's case at the Inquiry.

64. The Council has met the statutory deadlines associated with the appeal. The Appellant lists a number of procedural areas where it is considered that engagement was lacking. The Council made it clear from the outset of the appeal process that the principle of development of the site for a SEN school was not a matter of dispute between the Council and the Appellant. The putative reasons were clearly set out in the Statement of Case. As such, whether the Appellant agreed with the content or not, the substantive issues for the appeal were known. The costs submission makes allegations of frustration and delay in the process. Clearly at some points the Council's responses have been close to deadlines and there have also been issues arising from resourcing due to the pandemic. Nonetheless, overall, the Council adhered to the statutory deadlines and those set at the case management conference. Therefore, in terms of this application, for the reasons set out, I do not consider that the Appellant has incurred significant wasted costs on these points²⁷.

65. For all of the above reasons I conclude that the Council has not behaved in such a manner as to substantiate a finding of unreasonable behaviour which has directly caused another party to incur unnecessary or wasted expense in the appeal process sufficient to justify either a full or a partial award of costs.

Recommendations

66. For the reasons set out above I recommend that the application for a full award of costs be refused.

D J Board

INSPECTOR

²⁷ Paragraph: 047 Reference ID: 16-047-20140306



Ministry of Housing, Communities & Local Government

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RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.