



Costs Decisions

Inquiry Held on 14 January 2020, 26 – 29 January 2021, 24 – 25 February 2021 and 6 April 2021

Site visit made on 22 June 2021

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 25th June 2021

Costs application 1 in relation to Appeals Ref: APP/Y3940/X/19/3222425 (the LDC appeal) and APP/Y3940/W/18/3210938 (the s78 appeal)

Land North of Bath Road, Corsham, Wiltshire, SN13 0QL

- The application is made under the Town and Country Planning Act 1990, sections 78, 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Wiltshire Council for a partial award of costs against Gladman Developments Ltd.
 - The inquiry was in connection with appeals against:
 - (1) the failure of the Council to issue a notice of their decision within the prescribed period on an application for a certificate of lawful use or development (LDC) for existing operations constituting material operations to begin development in accordance with the planning permission granted on appeal Ref APP/Y3940/A/14/2222641 on 27 May 2015 (the planning permission), which was for the erection of up to 150 dwellings, up to 1,394sqm B1 offices, access, parking, public open space with play facilities and landscaping; and
 - (2) the refusal to grant consent, agreement or approval of the details required by condition 22 of the planning permission.
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Costs application 2 in relation to Appeal Ref: APP/Y3940/W/18/3210938

Land North of Bath Road, Corsham, Wiltshire, SN13 0QL

- The application is made under the Town and Country Planning Act 1990, sections 78, 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by the Pickwick Association, as a 'Rule 6 party', for a partial award of costs against Gladman Developments Ltd in relation to the inquiry concerning the LDC and s78 appeals detailed in relation to costs application 1 above.
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Decision

1. The applications for awards of costs are allowed in the terms set out below.

Preliminary matters

2. The applications and response were made in writing¹. Although I set out the main points below, I have had regard to the full content of the written submissions.

¹ Inquiry documents 71, 72, 74, 76 and 80.

Application 1

The submissions for Wiltshire Council

3. The nature of Gladman's unreasonable behaviour has been both procedural and substantive and the Council seeks all its costs which have arisen since the 14 January 2020 adjournment.
4. The scheme before the inquiry changed many times over the course of the appeals. The inquiry was originally scheduled in the Spring and then July of 2019. Between those dates Gladman accepted what the Council had been saying since November 2016, namely that a bespoke and more robust foundation solution was required, such as spring foundations. In a letter of 13 June 2019, the Council told Gladman it would seek a full costs award on the basis that the entirety of its case had been prepared to respond to a scheme which was no longer being pursued.
5. Furthermore, Mr Smith's proof of evidence for the July 2019 listing of this inquiry made clear that "noise sensitive building" referred to the office components of the development.
6. Gladman was given until 13 November 2019 to submit an updated technical note concerning its foundation designs. The Council's expert gave feedback to Gladman's expert during November and December 2019, highlighting concerns about the effects of water absorption by the polymer elements; water filling the voids between the bearings and short circuiting them; and the stiffness of the sidewall isolation material. The crucial importance of these matters was emphasised in Mr Thornley-Taylor's December 2019 proof of evidence.
7. Only when these points were further underlined by the Council in opening did Gladman appreciate their significance and request an adjournment. This was reluctantly granted, "to allow the production of evidence regarding the water table and revised foundation design, in response to concerns about the impact of water ingress to the proposed elastomeric bearing foundation." That new information was required by 31 March 2020 with any new proofs by 23 June 2020, in advance of the scheduled resumed inquiry in July 2020.
8. The Covid-19 lockdown caused unexpected further delay, but Gladman used the long break to recast its case again, submitting completely revised foundation proposals to the Council in March 2020, and further noise assessments in October and November 2020. The Council instructed another witness, Ms Allington, to respond to these matters based on all the data supplied by Gladman. However, Gladman then put in further documents, namely a groundwater monitoring report of 18 September 2020, a rebuttal from Alan Dixon of Cole Easdon and "technical notes" from Gavin Campbell and Lauren Ballerini of Wardell Armstrong.
9. Then in January 2021, years after the application to discharge the condition, Gladman submitted foundation designs for the office buildings attached to a proposed unilateral undertaking. After the inquiry resumed it transpired Gladman's earlier position on foundation depths was wrong, leading to further work between the experts, a further Statement of Common Ground and a second round-table session. They then tried to persuade the Inspector to accept new foundation designs covering the offices.

10. Information which should have been provided at application stage was only provided during the appeal and fresh and substantial new evidence was submitted at a late stage, necessitating an adjournment and extra work.
11. It is now clear the Council was right to refuse the original application to discharge condition 22. It could have sought to recover its full costs but only seeks them from and including the first day of the inquiry on 14 January 2020. Had the inquiry been determined on the basis of evidence before the Inspector on that date the appeals would have inevitably failed. They should still fail, but Gladman's numerous additional bites at the cherry obviously constituted unreasonable behaviour and the costs associated with responding to Gladman's ever-evolving case should not fall on the Council taxpayers.
12. Although the Council has accepted the appellant's course of conduct is just capable of falling within the rules of procedural fairness and could in principle be an exception to the general *Wheatcroft* principle, it is unreasonable. A line should be drawn under this kind of conduct and it should be publicly discouraged and sanctioned through the costs regime.
13. It is nonsense to say the Council's opposition to the appeals is motivated by desire to overturn the 2015 appeal decision "by the back door". It is noticeable that, rightfully so, no cost application has been made against the Council

Application 2

The submissions for the Pickwick Association (PA)

14. A partial award is sought in relation to costs arising from the adjournment of the 4 day inquiry programmed for 14 to 17 January 2020 after lunch on the first day. All the costs incurred from that date are sought because:
 - Gladman acted unreasonably in seeking an adjournment at the eleventh hour on 14 January. The request arose because of what was said to be a need to "tweak" the foundation design to respond to the Council's concerns regarding water ingress, first raised by Mr Thornley-Taylor on 15 November 2019 in response to an updated technical note with revised foundation designs submitted 2 days earlier. These concerns were reiterated in his 18 December 2019 proof. The failure to grapple with this point until it was summarised in the Council's opening comments on 14 January 2020 and the request for an adjournment to introduce new evidence to deal with it was unreasonable.
 - The basis on which the adjournment application was made, and the reason it was granted, was that Gladman would be severely prejudiced should it be refused. It was effectively conceded that absent any evidence on this issue, the appeal was bound to be dismissed, and the only prejudice to the Council and PA would be wasted costs, which could be covered in a costs award. That was one of the reasons the adjournment was granted. The costs of continuing to respond to an appeal that (but for Gladman's unreasonable behaviour in seeking a last minute adjournment) would have failed should not fall on the PA.
 - Since the adjournment, Gladman has introduced a significant amount of substantial new evidence, which should all have been prepared prior to the inquiry.

- Some of that new evidence had nothing to do with the reason for the adjournment and fell outside the scope of the Inspector's directions when adjourning. This included an "updated" Foundation Zoning Plan, extended to provide foundation depths beneath the office buildings and new foundation designs for each house type.
 - Significant additional work was necessitated, including, but not limited to: a meeting between experts to discuss the revised foundation design; considering a note of that meeting with agreed issues, actions and timescales; considering revised foundation design and updated ground borne noise assessment submitted to PINS on 1 May 2020; considering a new draft noise SOCG submitted 20 May 2020; considering further foundation drawings submitted 2 December 2020.
 - None of that extra work would have been necessary, but for the adjournment. The PPG says *"introducing fresh and substantial evidence at a late stage, necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen"* is an example of unreasonable behaviour.
 - The scheme before the inspector is completely different to the one originally presented;
 - The PA has had to respond to twists and turns introduced by Gladman, including a change of focus from the need for a protected species licence, to the question of whether blasting would constitute a nuisance, to the argument that a ROMP review would be inevitable and all this has involved significant additional work.
15. Under the heading: "What is a partial award of costs", the PPG states: *"The partial award may also be limited to a part of the appeal process. For example, where an unnecessary adjournment is caused by the unreasonable conduct of one of the parties, the award of costs may be limited to the abortive costs of attending the event on the day of the adjournment"*.
16. The starting point is that the PA is entitled to its abortive costs of attending the inquiry on 14th January 2020. The morning session was not wasted, and the costs of this are not sought. However, the afternoon was scheduled for a noise roundtable session. Mr Clarke (and Ms Allington) were both in attendance (and had incurred costs in preparing) for this. In addition, Ms Allington had prepared for her evidence scheduled that week, and the PA had paid a brief fee to its Counsel, and costs to its solicitors, for the preparation for a 4 day inquiry. Given the time that elapsed (and the additional evidence that was subsequently submitted by the Appellant before the inquiry resumed over a year later, this preparation was "wasted", since it had to be repeated² (and new costs incurred) 12 months later.
17. The appellant accepts the PA is entitled to its wasted costs for the half day on 14 January 2020, but this should be extended to the costs of preparation prior to that, which would have to have been repeated, even if the inquiry had resumed in July as originally anticipated; the PA is entitled to those costs.

² Not just because of the delay because of Covid – the originally anticipated delay to July would have necessitated repeat preparation.

18. Paragraph 28 of the PPG says one of the purposes of the costs regime is to *"Encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case."* All the evidence produced by the appellant after 14 January 2020 should have been produced before.
19. A substantive award is also sought in relation to the costs incurred by the PA in relation to ecology evidence called by Gladman, some of which predates 14 January 2020. The PA is not criticising Gladman for calling evidence and legal argument to address blasting. However, even if the ecology evidence had been accepted by the inspector, it failed and did not even attempt to discharge the agreed evidential tests, which Mr Goodman never appeared to grasp.
20. It is agreed that "blasting" should be only disregarded as the worst case of future mining for the purposes of condition 22 if there is no realistic prospect of it occurring. Mr Goodman accepted he could point to no evidence that this threshold was crossed, and suggestions that concerns over ecology may trigger a ROMP review are hopeless. That constitutes unreasonable behaviour and unnecessary costs were incurred in responding to the ecology evidence. Much of Mr Hart's and Ms Allington's evidence dealt with the side issue of bats, along with their rebuttals in response to further points in Mr Goodman's updated proof for January 2021.
21. The PA is not trying to overturn the outline planning permission; the permission includes condition 22, which is of fundamental importance, and the PA is simply seeking to enforce it.

The joint response by Gladman Developments Ltd to applications 1 and 2

22. The most important event in the background to these appeals is the fact that planning permission was granted on appeal in 2015. During that appeal, residential amenity was the concern of the Council, the appellant had to address and protect the ongoing presence of bats at the site, and blasting was never mentioned or considered. The result of the appeal was so unpalatable to the Council and the PA they have used every effort to try and essentially overturn the appeal decision by the back door.
23. When in June 2019 Mr Thornley-Taylor's proof indicated that an alternative scheme using a different approach to foundation design would make the probability of exceeding the limits in condition 23 "vanishingly small", the appellant decided to be pragmatic and promote such a scheme, though it believed it unnecessary, being the gold standard of acoustic design usually found in concert halls. This would have left the red herring of blasting to be considered and it was assumed the provision of a foundation design which would protect residential amenity would satisfy a reasonable local authority.
24. However, the Council seemingly needed to find a new issue to frustrate the development. It therefore raised the issue of water ingress in November 2019. This was expanded into two paragraphs in Mr Thornley-Taylor's December 2019 proof and then became a key part of the Council's case in opening in January 2020. The appellant was granted an adjournment and accepts some cost liability arises from that, but it was not unreasonable to produce more evidence to deal with an entirely new point, raised beyond the 11th hour.

25. When it became apparent during 2020 that water ingress was being adequately dealt with by design, a new witness for the Council, Ms Allington, raised new issues in relation to drainage and hydrogeology, even though her expertise in drainage remains unclear. Three issues were raised in relation to artesian water, silt clogging of filters and the backing up of stormwater drains. The appellant was justified in calling evidence from Lauren Ballerini and Alan Dixon to deal with these points, which were misconceived. If there is any unreasonableness it does not rest with the appellant.
26. As the appellant dealt with these points, the Council's stance became that offices should be considered as noise sensitive, which has never been a mainstay of the Council's position.
27. At the same time, the PA grasped the straw of blasting. This was in the full knowledge that, as the condition was never intended to cover blasting and it was not a possibility canvassed at the original appeal, it would be impossible to discharge the condition in those circumstances. Like the Council, the PA raises issues and then seek to criticise the appellant for calling evidence and legal arguments to address them.
28. The reason the appellant, with the permission of the inspector, using the power in section 79 of the 1990 Act, altered their foundation design was to provide a scheme which was said by Mr Thornley-Taylor in 2019 to result in a "vanishingly small" prospect of a breach of condition 23 and thereafter to address specific concerns raised late in the day by the Council and PA.
29. The aim of all reasonable parties in this context, a discharge of condition appeal where the planning merits have been established, must be that if a design can be reached which protects residential amenity then that should be welcomed. The appellant has continually met the shifting goal posts of the Council and PA to ensure that. This narrative sits at the heart of the resistance to the costs claims. Those who have not been reasonable are now professing that those they have unsuccessfully opposed have been unreasonable.
30. It is accepted that the Council and PA are entitled to their wasted costs for the half day on 14 January 2020. This does not extend to the preparation for the inquiry on that day, nor is it accepted that the delay before resumption caused by Covid has been so lengthy as to necessitate further work. When applying for the adjournment in January 2020 it was recognised that it would be reasonable for Gladman to bear the limited costs impact upon the other parties. Until the late applications for costs, there was no notice of a wider application.
31. It is hard to follow the logic of the claims for costs after the adjournment. It is suggested that, but for the adjournment the appeals would have failed, but the adjournment was granted, and the appeals have been contested in a similar way to how they would have been before the inquiry was adjourned. The costs the PA claimed they had budgeted for surely would be carried over to the post-adjournment sitting days. Just because additional expenses arise out of work that the adjournment allowed for and wasted costs are justified for that single adjourned half day, does not mean everything flowing from the adjournment is unreasonable and merits a costs award.
32. The majority of the Council and PA's further costs have arisen from their own unreasonable demands and unwarranted issues which the appellant had to deal with, rather than from a revised design and modelling of that design. The

design has only evolved where necessary to attempt to reach an agreed acceptable design or react to new issues raised late by the Council or PA.

33. Neither party has identified unreasonable behaviour or shown how broad assertions directly caused every single expense incurred after 14 January 2020, even where their evidence has not changed since. Neither party is entitled to their costs incurred beyond the half day wasted on 14 January 2020.
34. The PA's claim in relation to ecology costs is misconceived. Mr Goodman's evidence was relevant not just to the need for a European Protected Species licence but also to a potential review of the ROMP. The PA cannot say the appellant has called no evidence to support its case and it cannot be said they have incurred significant sums when they do not identify what those sums were used for and did not call ecology evidence.

Reasons

35. The Planning Practise Guidance (PPG) indicates that costs may be awarded against the party has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

36. In short, the Council seeks:

- all costs from and including the first day of the inquiry on 14 January 2020.

The PA seeks:

- costs for the half day wasted on 14 January 2020;
- the cost of preparing for the inquiry on 14 January 2020;
- all costs incurred since lunch on 14 January 2020; and
- all costs relating to ecology, including those incurred prior to 14 January 2020.

37. The foundation designs for the dwellings evolved after the Council's refusal to approve them. In a letter to the appellant dated 13 June 2019, the Council expressed its concerns about this and questioned whether the previously appointed Inspector would have the power to allow such a fundamental shift in its case. The Council indicated it would be taking legal advice on these matters and would make submissions. It also reserved its position regarding whether a fundamentally altered scheme would fall within the exception to the *Whitley*³ principle.
38. For reasons I need not rehearse, but with which I see no cause to disagree, the previously appointed Inspector indicated in a pre-inquiry note⁴ that the inquiry would provide all parties with a fair opportunity to consider the revised dwelling foundation designs, such that the test in *Wheatcroft v SSE* [1982] JPL 37 would be met. She invited further consideration of the *Whitley* point. Come January 2020, the Council did not open on the basis that I had no power to consider the revised designs; it simply submitted that they still did not meet the

³ *F G Whitley & Sons Co. Ltd v Secretary of State for Wales & Clwyd CC* [1992] WL 895744

⁴ 'PRE-INQUIRY NOTE & DIRECTIONS (2)'

requirements of conditions 22 and 23. Furthermore, it accepted that, if appeal B were allowed, appeal A should also be allowed, as the position would be analogous to that in *Whitley*.⁵ Similarly, the PA did not suggest I could not consider the revised dwelling foundation designs and it echoed the Council's position on the *Whitley* principle.⁶

39. I note that, when referring in her pre-inquiry note to the fact that the issue of individual spring foundations had been first raised in November 2016, the previously appointed Inspector said, "...I will deal with any costs application if and as it is made...". I cannot say for sure what would have happened had a scheme for individual elastomeric bearing foundations for the dwellings been submitted before the Council determined the application. However, given that the Council remains dissatisfied with the revised scheme for the dwelling foundations, I have no reason to believe an appeal would have been avoided.
40. Given that the Council suggested a bespoke solution might be effective, such as individual spring foundations, it was not unreasonable of the appellant to pursue that, even though it might have submitted such a solution from the outset. Ultimately, all parties accepted that I should consider the appeal based on a design for the dwelling foundations, which was revised after the initial submission to the Council. The Council's decision not to seek a full award, notwithstanding its indication in its letter of 13 June 2019, appears to be an acceptance that this did not constitute unreasonable behaviour in itself. Similarly, the PA does not seek a full award. Accordingly, all the extra costs arising purely from the fact that the dwelling foundation designs have been revised are not recoverable.
41. However, the Council signalled its concerns regarding water ingress to the bearings as early as 15 November 2015 and the appellant has effectively conceded that it was unreasonable to request an adjournment on 14 January 2020 to respond to those concerns and that both applicants are entitled to their costs in respect of half of that day. I did hear opening submissions and representations from interested parties on that first day and so it was not entirely wasted.
42. I am not persuaded that all the costs incurred following that date arose out of that unreasonable behaviour. Had there been no adjournment and no new evidence, the inquiry was scheduled to run for 4 days anyway. Ultimately, I sat for 8 days but, whilst that was partly due to the introduction of new evidence, I am also satisfied that it was a consequence of the inquiry having to proceed on a virtual basis. Progress was slower than would normally be the case and sitting days had to be shortened to ease the strain of staring at screens for extended periods.
43. Furthermore, following the submission of revised foundations after the adjournment on 14 January 2020, additional concerns were raised by the Council. The appellant suggests this was unreasonable behaviour on the Council's part but does not apply for its own costs on that basis. Nevertheless, it was not unreasonable of the appellant to seek to respond to those fresh concerns, even though that led to more evidence, a longer inquiry, and increased costs. I am unable to discern a firm basis for awarding all costs following the January 2020 adjournment.

⁵ ID7 paragraphs 4, 10 and 16.

⁶ ID8, paragraphs 21 and 22.

44. Although the period between adjournment and resumption will have meant that some preparation had to be repeated, I do not accept that all the preparation prior to the first day of the inquiry was wasted. Subsequent preparation will have built on that initial work and I am not in a position to identify even the broad extent of any expense that may have been unnecessarily incurred.
45. Unlike the Council's application, the PA's claim also specifically relates to the ecology evidence. When cross examined, and in response to questions from me, the appellant's ecology witness (Mr Goodman) accepted, albeit reluctantly, that he was unable to say blasting could not take place in the mine. This was because he could not say it was beyond reasonable doubt that bats would be disturbed. I do not criticise Mr Goodman for the detail of his evidence, but the appellant had not properly considered the implications of the agreed test, which flowed from the use of the word "ensure" in conditions 22 and 23.
46. The argument that Mr Goodman's evidence was relevant to a potential review of the ROMP does not assist the respondent. His evidence that blasting would be likely to affect bats using existing tunnels may well indicate that blasting would trigger a ROMP review. However, it does not follow that a ROMP review would result in blasting being prohibited under all circumstances in all parts of the mine. The production of evidence which could not assist was unreasonable behaviour and the PA incurred unnecessary expense in addressing it, notwithstanding that it did not call formal ecology evidence.
47. For the reasons given, the Council and PA are entitled to the costs associated with half an inquiry day on 14 January 2020 and, in addition, the PA is entitled to the costs it incurred in addressing the ecology evidence of Mr Goodman.

Costs Orders

48. 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 Gladman Developments Ltd shall pay to:
- (i) Wiltshire Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to half a day's inquiry time on 14 January 2020; such costs to be assessed in the Senior Courts Costs Office if not agreed; and
 - (ii) The Pickwick Association, the costs of the appeal proceedings described in the heading of this decision limited to: (a) those costs incurred in relation to half a day's inquiry time on 14 January 2020; and (b) those costs incurred in addressing the ecology evidence of Kurt Goodman, all such costs to be assessed in the Senior Courts Costs Office if not agreed.
49. The applicants are now invited to submit to Gladman Developments Ltd, 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.

J A Murray

INSPECTOR