



Costs Decisions

Hearing Held on 1 September 2021 and 28 September 2021

Site visit made on 1 October 2021

by C Dillon BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16/11/2021

Costs application in relation to Appeal Ref: APP/W4515/W/21/3268413 Land at Eccleston Close, Station Road, Backworth, Newcastle-upon-Tyne NE27 0RX

- The application 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 application is made by The Northumberland Estates for a full award of costs against North Tyneside Metropolitan Borough Council.
 - The hearing was in connection with an appeal against the refusal of an application for planning permission for the construction of 67 residential dwellings (C3) and 14 No B1, B2 and B8 commercial units totalling 650 sqm, with associated road infrastructure, car parking spaces, open spaces, gardens and landscaping.
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Decision

1. The application for an award of costs is allowed in part for the costs incurred in respect of:
 - reasons for refusal Nos 1 and 2, in terms of the appeal documentation which was prepared subsequent to the Council's review of their decision on 16th March 2021 and securing consultancy support for the hearing sessions; and
 - reason for refusal No 3, in terms of the preparation of the response to the Council's late evidence and also the costs directly associated with adjournment of the hearing in regard to noise matters.

The submissions for Northumberland Estates

2. The Northumberland Estates has submitted that North Tyneside Metropolitan Borough Council's behaviour has been unreasonable on substantive grounds and that behaviour has resulted in significant unnecessary and wasted expense.
3. They state that as confirmation of the Council's revised stance occurred some 6 months after the decision was made, in that intervening period they had no alternative other than to rebut the 3 reasons for refusal through the appeal process and prepare detailed evidence, in full, to address each on the basis that the Council would be pursuing the reasons for refusal at the hearing. The Northumberland Estates also claims that the Council's revised stance has led them to having to address evidence submitted by interested parties.
4. In terms of reasons for refusal Nos 1 and 2, the Northumberland Estates states that the appeal proposal is the same as the planning application. They argue

that the outstanding matters could have been dealt with by a planning condition and legal agreement and that they had no alternative but to submit that information to the appeal in response to that reason for refusal.

5. The Northumberland Estates has also advanced unreasonable behaviour from the Council in terms of the submission of late evidence relating to the Council's revised stance. They state that this evidence was key to understanding the reasons for the Council's position in the appeal. They advise that they had previously sought to view that evidence to no avail. They claim that this had previously been concealed, and its submission necessitated an adjournment of the hearing to a later date. The Northumberland Estates advise that their appeal team, including a noise expert were fully prepared and attended the hearing on 1 September 2021 with the full expectation that noise would be dealt with that day. They consider that had that evidence been released earlier, the subsequent adjournment and wasted expense in terms of further consultancy support to respond to the evidence and attend the resumed hearing would have been avoided.

The response by North Tyneside Metropolitan Borough Council

6. North Tyneside Metropolitan Borough Council states that it does not consider that it has acted unreasonably and opposes the claim of costs made by the Northumberland Estates. The Council believes it has continued to act and behave in a cooperative and reasonable way throughout the process in the context of daily and legal constraints. They advise that Members apportioned a different degree of weight than Officers to the ecology and noise matters, and this resulted in a refusal on 3 grounds which was not unreasonable.
7. The Council considers that its decision not to defend the reasons for refusal is reasonable as they sought to avoid wasting time and expense. The Council asserts that the Northumberland Estates was advised of their revised position at the earliest possible time and before the statements of case deadline. They are of the opinion that the Northumberland Estates could have withdrawn the appeal and submitted a new planning application or continued with the appeal without preparing further evidence.
8. In terms of reasons for refusal Nos 1 and 2, the Council states that the Northumberland Estates were aware of the Ecology Officers objections. The Council states that further negotiations and updated information were necessary to overcome the ecological concerns and that was not received until after the decision notice was issued. They maintain that the absence of confirmation that the proposed donor site could provide appropriate mitigation could not be remedied by a planning condition which would meet the statutory tests. They claim that it is not clear from the appellant's costs application what additional and unnecessary expense was incurred.
9. The Council maintains that there was no need for them to engage ecology and noise experts for the hearing. Subsequent to correspondence with the Planning Inspectorate, there was insufficient time for this to be arranged. The attendance of the Council's noise specialist at the resumed hearing would not have triggered any additional work for any of the participants.
10. The Council maintains firmly that they are not responsible for the hearing adjournment. They describe how they believe they correctly carried out their statutory duties upon the submission of the appeal. They advance that their

revised position was clearly stated in publicly accessible documents during the appeal and so this change should have not come as a surprise to any participants. The Council further argues that the adjournment was only because an interested party was insufficiently prepared for the hearing.

11. The Council states that the committee report of 16 March 2021 and review of the submitted noise assessment were confidential documents and they neither concealed nor denied those documents existed. The Council argues that those documents did not include any new or material evidence pertinent to the appeal and therefore cannot constitute late evidence. Rather, they believe they serve to confirm that due process was followed by Officers seeking not to defend the reasons for refusal and therefore do not therefore fall within the scope of the request set out in Paragraph 8 of the Inspector's pre-hearing note.
12. The Council points out that the Inspector requested the release of those documents only shortly before the hearing date. They advise that as this required involvement of the Council's Head of Law there was a delay in fulfilling that request, but they sought to fulfil the request expediently. They state that both the Planning Inspectorate and the appellant had been confident that the matters could be dealt with within the time scheduled. The Council concludes that the Inspector's objective to ensure fair treatment of the interested party present likely factored into the decision to adjourn, rather than the timing of the further documents.

Reasons

13. This appeal has arisen from the decision of the Council's Members which differed to the Officer's recommendation. This was not unreasonable as the decision was based upon the information before them and taken in accordance with the development plan as they found material considerations did not indicate otherwise. The Council's appeal submission is based on their revised position on all of the reasons for refusal. The Planning Practice Guidance clearly recognises that withdrawal of any reason for refusal can amount to substantive unreasonable behaviour, as can the failure to produce evidence to substantiate each reason for refusal on appeal or the deliberate concealment of evidence.
14. In terms of reason for refusal No 1, the officer report dated 30 September 2020 recommended that ecological matters could be adequately managed through planning conditions and a legal agreement. The appeal scheme remains unchanged from that time. The description of the additional information provided by the appellant after the decision was taken is provided in the committee report dated 16 March 2021. This covers matters included in condition No 19 which was advanced by the Council at the appeal stage. Furthermore, the Council has entered into a section 106 legal agreement which secures the further requirements and maintenance at the compensation site. Moreover, the submitted evidence has led me to accept the main parties current agreed stance on ecological matters. This all demonstrates that reason for refusal No 1 was capable of being addressed by a suitably worded planning condition and legal agreement and was therefore both unnecessary and unjustified.
15. In terms of reason for refusal No 2, it is evident from the application drawings that whilst the Local Wildlife Site would be reduced, the matters of concern could have reasonably been interpreted from the application drawings and

managed through planning conditions. That is contrary to what that reason for refusal alleges. I therefore find that reason for refusal No 2 was not adequately substantiated.

16. Moreover, the timing of the Council's revised stance in regard to reasons for refusal Nos 1 and 2 meant that the appellant had already committed to preparing their ecological case for the appeal so that they could meet the prescribed submission timescales. That action was a reasonable contingency. The Council acted unreasonably in respect to imposing reason for refusal Nos 1 and 2, and that also resulted in unnecessary costs for the Northumberland Estates in respect to the preparation of their ecological evidence and for consultancy support throughout the hearing.
17. In terms of reason for refusal No 3, from the evidence before me there is no firm indication that Members made their decision without having first considered all of the application documentation, including the representations made by interested parties. Moreover, I have arrived at the same conclusion for the reasons set out in my Decision, irrespective of the Council's revised stance. Consequently, the Council did not act unreasonably in respect to imposing reason for refusal No 3 at the outset.
18. The Council's change in stance does represent unreasonable behaviour, although their most recent noise related evidence seeks to defend the position of the Northumberland Estates and counter views of an interested party. Therefore, I do not find that this particular unreasonable action actually caused the Northumberland Estates to incur any unnecessary costs in respect to reason for refusal No 3.
19. The Planning Practice Guidance recognises that acts including deliberate concealment of relevant evidence or the submission of evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not have otherwise arisen can amount to substantive unreasonable behaviour. Irrespective of the Council's revised position, I am bound by the Appeals procedure to determine the appeal submitted against the reasons for refusal stated on the decision notice. The expectation that the Council would prepare its case and support the transparent and efficient running of the appeal on that basis is a reasonable one, not least because of their revised position and also because there were objections from interested parties which directly related to the matters that had been disputed.
20. Contrary to the Council's claim, the content of that assessment does constitute evidence which was key to understanding and testing the Council's revised stance. To assist the hearing, the Council should have prepared their case in the knowledge of the obligations placed upon an Inspector to test all disputed matters. In this case that includes the rationale for their revised position in the context of objections made by interested parties. The Northumberland Estates has demonstrated that they had previously sought to view that evidence to no avail. The Council's continued reluctance to share that evidence with the hearing participants only lifted after the implication of its absence on the weight that could be attributed to their revised position was appreciated. This undermines the Council's original argument of confidentiality. Crucially, the Council's continued reluctance to share that evidence or extracts from it meant that the very narrow window of opportunity which had existed was missed for all participants to review it and comment on whether postponement of the

hearing was appropriate. This did not assist with the transparent and timely progression of the appeal.

21. Consequently, whilst there is no firm evidence of deliberate concealment of that evidence, I find that the Council's actions in this regard were unhelpful in terms of their obligation to assist in the proper functioning of the appeal. This was to a point which was unreasonable and directly caused the hearing session relating to reason for refusal No 3 to be adjourned to another day in the interests of fairness to all participants. This directly resulted in the Northumberland Estates incurring wasted expense on the attendance of their noise expert and additional cost in securing consultancy participation at the resumed hearing session. Furthermore, the delayed submission meant that the Northumberland Estates had to make further submissions which led to further unforeseen costs for them. With greater transparency earlier in the process, these costs could have been avoided.

Conclusion

22. For the reasons given above, I find that unreasonable behaviour from North Tyneside Metropolitan Borough Council on substantive grounds, as described in the Planning Practice Guidance, is evident in regard to their behaviour which led to the scope of this appeal and also the adjournment of the hearing over matters relating to noise. This in turn has caused the Northumberland Estates to incur unnecessary expense in terms of securing consultancy support to respond to reasons for refusal Nos 1 and 2 prior to and at the hearing. Further unnecessary costs have been incurred in responding to the late evidence and securing further consultancy participation at the resumed hearing session. Therefore, a partial award of costs to the Northumberland Estates is justified in this instance.

Costs Order

23. 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 North Tyneside Metropolitan Borough Council shall pay to the Northumberland Estates the costs of the appeal proceedings described in the heading of this decision insofar as they relate to:

- reason for refusal Nos 1 and 2, in terms of the appeal documentation which was prepared subsequent to the Council's review of their decision on 16th March 2021 and securing consultancy support for the hearing sessions; and
- reason for refusal No 3, in terms of the preparation of the response to the Council's late evidence and also the costs directly associated with adjournment of the hearing in regard to noise matters.

24. The Northumberland Estates is now invited to submit to North Tyneside Metropolitan Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. Such costs are to be assessed in the Senior Courts Costs Office if not agreed.

C Dillon

INSPECTOR