The Planning Inspectorate

Costs Decisions

Inquiry Held on 13-16 and 20 April and 14-16 September 2021

Site visits made on 22 April and 21 September 2021

by Patrick Hanna MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 November 2021

Costs application [A]
in relation to Appeal Ref: APP/W0340/W/20/3259296
Hambridge Lake, Hambridge Road, Newbury RG19 3TR

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by West Berkshire Council for a full award of costs against Mr Hamilton.
- The inquiry was in connection with an appeal against the refusal of planning permission for erection of 41 holiday chalets and clubhouse, access, parking and landscaping.

Costs application [B]
in relation to Appeal Ref: APP/W0340/W/20/3259296
Hambridge Lake, Hambridge Road, Newbury RG19 3TR

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Hamilton for a full award of costs against West Berkshire Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for erection of 41 holiday chalets and clubhouse, access, parking and landscaping.

Decisions [A] and [B]

1. Both applications for an award of costs are partially allowed in the terms below.

Procedural matters

2. As set out above, there are two costs applications relating to the same appeal. I have considered each application on its merits. However, to avoid duplication, I have dealt with both applications together. Both main parties should properly be described in these decisions as 'applicants' for the purposes of their own respective applications for award of costs. To avoid confusion, they are hereafter referred to as the Council and the appellant. Both main parties submitted both their cases and replies in writing and therefore there is no need to repeat them here in full.

3. As described in my appeal decision, on the second day of the inquiry the appellant requested an adjournment in order to allow additional time for ecological surveys to be carried out. Following submission of new ecological information from the appellant, the inquiry resumed in September.

Reasons

4. The Planning Practice Guidance (PPG) advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has

directly caused another party to incur unnecessary or wasted expense in the appeal process. Behaviour may be either procedural or substantive.

Costs application [A]

5. The following grounds for the Council's application for costs are said to overlap the procedural and substantive categories of behaviour set out in paragraphs 52 and 53 of the PPG:
    - the appellant did not proceed with the inquiry as scheduled; the application to adjourn on Day 2 was late, unnecessary and unreasonable;
    - the appellant artificially narrowed the ecological issues, and
    - the proposal is manifestly not in accordance with the local development plan, and the appellant unreasonably sought to reduce the weight to be given to relevant policies.

Application for adjournment

6. On the second day of the inquiry, the appellant sought an adjournment in order to undertake further ecological surveys. The Council maintain that this represented a substantial change in the appellant's case, causing wasted expense. It further claims this is unreasonable because the appellant was not ready to demonstrate that his own ecology surveys complied with standing guidance from Natural England (NE) and the Department for Environment, Food and Rural Affairs, as referenced in the PPG on the natural environment.

7. In response, the appellant states that the Council's earlier withdrawal of the first part of the fifth reason for refusal caused the Council to shift the appeal from a question of harm to the new issue of the reliability or absence of information and surveys. The lack of clarity and precision in the remainder of the fifth reason for refusal is described as being the reason why an adjournment was sought. I return to this matter in more detail in the Council's claim regarding narrowing of issues and the appellant's claim regarding extension of the reasons for refusal. In summary, it will be seen that I have found the Council's reason for refusal to be insufficiently clear and precise.

8. Nonetheless, instead of seeking an adjournment, it was open to the appellant to give ecology evidence to the inquiry, defend the ecological information which he had already submitted, and rebut the Council's requests for further surveys and information. The appellant chose not to and, in making the application for adjournment, stated that the adjournment was necessary in order to ensure that it could not subsequently be alleged that the standard of survey work was such that it would put myself, as the decision maker, in breach of s40 and s41 of the Natural Environment and Rural Communities Act 2006 (NERCA) and Regulation 10 of The Conservation of Habitats and Species Regulations 2017 (the Habitats Regs)(hereafter referred to as the statutory duties) [1].

9. This is, in effect, a concession that the appellant did not have confidence in the robustness of his own evidence, notwithstanding the eventual outcomes of the adjournment surveys. Regardless of the extent of any alleged deficiencies in the information or surveys, or when or by whom[2] this had been raised, the appellant and his professional team should have submitted a planning

[1] In summary, the duties are accepted by both parties as requiring both the Council and the Inspector in considering an application or appeal to have regard to biodiversity as a material consideration.
[2] In addition to the Council's objections, the Berkshire, Bedfordshire and Oxfordshire Wildlife Trust also made representations to the Inspectorate in respect of the surveys CHECK NAME & WORDING

application and an appeal in the confidence that the information supporting the proposal was sufficiently robust that the decision maker would, as an absolute minimum, be able to carry out those identified statutory duties.

10. Put simply, it is not reasonable for the appellant to submit information or evidence in support of an application or appeal that he cannot then rely upon to meet government standards or ensure the decision maker can comply with statutory duties. Whilst the appellant points the finger of blame at the Council for not having highlighted such failings beforehand, the primary responsibility lies with the appellant, particularly in light of the statutory duties.

11. Both the application and appeal processes must be co-operative processes, for which both sides including the appellant, must take responsibility to take part in an active, constructive and proactive manner. All parties are expected to behave reasonably to support an efficient and timely process, including in providing all the required evidence and ensuring that the timetable is met.

12. The appellant highlights that I could have refused the application to adjourn had I found the request to be unreasonable or unnecessary. Instead, after hearing submissions from both parties, I made it quite clear to the appellant what the risks were in proceeding. Although the inquiry sat for all planned dates in April and it would not have been possible to finish in the allotted time in any case, the Council was nonetheless put to wasted expense in responding to and addressing the new information for the resumption of the inquiry.

13. By seeking an adjournment, the appellant specifically sought to introduce fresh and substantial evidence at a late stage. Even though the appellant considers that the need for the adjournment arose from the unreasonable behaviour of the Council, I find that the appellant's approach represents a clear example of one of the unreasonable behaviours set out in paragraph 52 of the PPG.

Narrowing of ecological issues

14. The Council's correspondence of 31 March 2021 indicated that it would no longer be relying on impact on any ecologically protected sites in the vicinity of the appeal site, nor any potential impact on water quality off site, including SSSIs. The effect of that withdrawal is, in this regard, to leave standing the final lines of the fifth reason for refusal:-

> *"Finally it is considered that the future disruption caused on the lake site by increased use from anglers and dogs will inevitably impact upon the habitat of protected species on the site such as reptiles (submitted surveys out of date) and the potential habitat of e.g. Desmoulins Whorl snail and internationally recognised species. This again is unacceptable and contrary to well established policy"*

15. The Council asserts that the appellant artificially narrowed the ecological issues before the inquiry so that impacts beyond those species explicitly mentioned in the remainder of the fifth reason for refusal, that is Desmoulins Whorl snail and reptiles, look as if they were only included by the Council at the last minute as an afterthought. This directly contrasts with the appellant's claim that the Council widened the ecological issues, which is in part addressed here, but to which I also return to later.

16. Whilst the Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMP) requires a decision notice to state clearly and

precisely the reasons for refusal, decision notices are often only likely to represent a summary of the full objection. That is, the decision notice is not intended to be equivalent to a detailed officer or committee report. That the reason for refusal does not make direct reference to the statutory duties is not unusual, nor is it necessary. The DMP only requires that the relevant policies and proposals from the development plan are specified.

17. In this case, the decision notice contains seven reasons for refusal, in total covering some one and a half sides of A4 paper. The contested fifth reason for refusal is in itself some 25 lines in length and, in broad terms, there is no reason why any well-constructed reason for refusal on a single topic should be any lengthier than this. In specific terms, the Council suggest that use of the wording 'such as' in the above extract is very broadly written and cannot reasonably be read as referring to reptile habitat only.

18. The Council also suggest that the appellant was aware of what the fifth reason for refusal meant in any case, and that the impact of the proposal on these species and biodiversity in general was in issue from the date the planning application was submitted. In this respect, the Council refer to the appellant's Updated Ecological Appraisal (UEA), Planning Appeal Statement (PAS) and the Ecological Appeal Statement (EAS).

19. The UEA was submitted at the planning application stage and identifies the suitability of the site for bats, Desmoulins Whorl snail, reptiles, breeding and wintering birds, otter and other invertebrates. It goes on to recommend further bat surveys. The PAS provides an outline summary, in fairly simple terms, of what the appellant considers at that stage to be the issues arising from the fifth reason for refusal. The EAS indicates an awareness that the lack of surveys described in the reason for refusal does not only refer to reptiles, with reference made to other protected species reports carried out by the appellant.

20. From this background, and bearing in mind the undisputed professional qualifications and experience of the appellant's ecologist, it would be improbable that the appellant was not fully aware of the range of potential surveys that may be required for the appeal site. The appellant's professional team can also have been reasonably expected to know that I would be obliged to the consider the impacts on protected and priority species. Furthermore, a detailed letter of objection to the appeal from Berkshire, Buckinghamshire and Oxfordshire Wildlife Trust dated 18 March 2021, also raised concerns about loss of priority habitat, lack of BNG assessment, impact on protected species, and lack of sufficient information and appropriate surveys.

21. However, it is not necessary for every potential survey to be submitted by an applicant for planning permission. Rather, an element of professional judgement is required based on the specific ecological context of any particular site. As such, it was only necessary for the appellant to submit, based on the professional team's view, what he considered to be required at the outset. In this case, this was done and the appellant initially defended that position, even though that position was subsequently resiled from. Thereafter, it was necessary for the Council to respond in clear and precise terms whether there was any shortfall in the appellant's initial submitted information or surveys that required to be updated or addressed.

22. However, there is little evidence before me to explain what the Council's clear and precise response was to that range of potential information and surveys, at

least not until the appeal process was well underway. The reason for refusal was insufficiently clear and precise to fully explain the Council's position. Neither has it been suggested that the officer report or the ecology consultation response identify the full range of information and surveys that were subsequently requested.

23. In my view, it is not enough to refer to the absence of survey requests in the reason for refusal and expect the appellant to deduce full meaning from that. In the end, the Council's statement of case expands upon its position further, but it was not until proofs of evidence were exchanged on 18 March 2021 that a fuller picture emerges of the Council's position in this regard.

24. That I am required as decision maker to have regard to the statutory duties whether they were explicitly raised by the Council or not does not obviate the necessity for the Council to provide clear and precise reasons. The appellant did not complete the Scott Schedules that the Council had initiated at my request, yet then went on to heavily rely on that uncompleted document as a basis for cross-examination of the Council's witness. Such behaviour by the appellant represents a somewhat duplicitous approach to the PPG's expectation of co-operation with other parties, regardless of the assertion that there had been a breakdown in trust between the parties in the run up to the inquiry. Whether or not this was unreasonable, I had directed that Scott Schedules be submitted so no wasted expense was incurred by the Council as a result.

25. That the appellant refers to an outdated and indicative main issue from the inquiry case management conference (CMC) does not reflect the current position, as will be seen from the identified main issues in my appeal decision. The appellant did inaccurately apply the *Wray et al* criteria, and accepted this to be the case, which was subsequently corrected. Although this was careless, and some inquiry time was spent dealing with it, there is no suggestion that this minor error was deliberate. I do not find this mistake represents unreasonable behaviour on the part of the appellant.

26. Overall, I therefore conclude that the appellant did not artificially narrow the ecological issues to a degree that was unreasonable, even if the appellant was aware of what the potential range of issues may be. The wide gulf between the parties on this matter itself demonstrates, to my mind, a lack of clarity and precision in the wording of the remainder of the fifth reason for refusal, which I return to later. Such polarised views on this particular matter are unlikely to have emerged had a clearly and precisely worded reason for refusal been provided by the Council when the planning application was refused.

Accordance with development plan

27. The Council consider that the appellant unreasonably sought to reduce the weight to be given to the relevant policies of the development plan by:
    - contending that the tilted balance applied;
    - contending that the site is previously developed land; and
    - inviting that very substantial weight be given to the economic benefits yet failing to submit any proposal specific evidence.

28. The PPG states at paragraph 053 that an appellant is at risk of costs where the development is clearly not in accordance with the development plan and where other material considerations are advanced for which there is inadequate supporting evidence.

29. It will be seen from my appeal decision that the matters relating to the tilted balance and previously developed land form only a very small part of my overall decision. In doing so, I concluded that the tilted balance did not apply in this case and that whether or not the site comprised previously developed land was largely not relevant to the primary test under policy ADDP1. Nonetheless, the appellant was entitled to make those arguments. Although I was not persuaded by those arguments, that does not mean that it was unreasonable to present a case on that basis. In any case, it is clear from my appeal decision that this is not a case where it can be said that the proposal is clearly not in accordance with the development plan. Indeed, in this regard, the Council suggest a smaller scale development at this site could potentially be acceptable in policy terms.

30. The Council contend that no evidence at all relating to economic benefits was presented which was specific to the development. However, the appellant did call an expert witness to give evidence to the inquiry on the economic benefits that would derive from the project. Whilst that evidence was largely derivative, it is also the case that the appeal proposal is a somewhat unusual one for which limited directly comparable evidence is likely to be available. Furthermore, the weight to be attached to economic benefits is a matter of planning judgement. Indeed, it is a matter that can often tip the balance of a finely poised proposal, and it was not unreasonable for the appellant to make a case on that basis, even though I reached a different conclusion.

Conclusion on application [A]

31. Overall, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated in relation to the adjournment and the introduction of fresh and substantial evidence at a late stage. A partial award of costs is justified in the terms described.

Costs application [B]

32. The appellant refers to paragraph 047 of the PPG, which includes a non-exhaustive list of examples of procedural unreasonable behaviour:-
    - lack of co-operation with the other party or parties;
    - introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not have otherwise arisen;
    - prolonging the proceedings by introducing a new reason for refusal;
    - withdrawal of any reason for refusal; and
    - deliberately concealing relevant evidence at planning application stage or at subsequent appeal.

33. The application for a partial award of costs is the Council's behaviour:-
    - withholding correspondence from NE that they could not support any of the objections;
    - withdrawing the most important part of the fifth reason for refusal after proofs had been exchanged and within only two weeks of the inquiry opening; and
    - extending the Council's objection far beyond the scope of the original reasons for refusal, causing the appellant to apply for adjournment

and to carry out further extensive ecological survey work to resolve the new objections.

34. The basis for the application for a full award of costs is that the Council's fourth reason for refusal is an in-principle objection to the development of the site which is without merit.

Withholding NE correspondence

35. An initial response from NE to the planning application proposal was sent to the Council on 30 March 2020, after the decision notice on the planning application had been issued on 13 March 2020. The correspondence starts by indicating that NE wouldn't have an objection to the proposals subject to safeguards being put in place. However, it then goes on to conclude that NE understood the reasons for the Council's concerns and would not disagree with any of the points made in this regard. On its face, this correspondence can be read as being in support of both the appellant's case and the Council's case.

36. Following the CMC on 23 February 2021, I issued a summary note directing that the Council seek a formal consultation response to the proposal from NE. Two days later, on 25 February 2021, NE emailed the Council giving the unequivocal advice that NE could not support any of the Council's concerns with sufficient certainty to take to an inquiry. That NE response should have been shared with the appellant and the Inspectorate forthwith, in the spirit of co-operation and transparency that is expected by the appeal process, but it was not. The Council offers three responses for not doing so.

37. Firstly, that the Council were deliberating the implications of the NE response on its own position. Such deliberation is in itself only to be expected, however that does not prevent the sharing of the consultation response before reaching a conclusion. Secondly, some two weeks later, on 9 April 2021, the Council entered into further correspondence with NE to query its response, in an email labelled as confidential. The Council is of course entitled to question NE's advice when it differs from its own findings. But, again, that does not prevent the sharing of important information.

38. Thirdly, the Council indicated in cross examination that this omission was not intentional, but due to workload. Whilst that may be the case, a critical document from a statutory consultee on a matter relating to a main issue at a public inquiry should be given commensurate attention and actioned accordingly by the Council.

39. Overall, I find that no reasonable explanation has been provided as to why this important NE document was not circulated forthwith. Moreover, the receipt of that NE response by the Council came at a critical point in preparing for the inquiry, being some three weeks before the exchange of proofs. I find it extremely surprising that no reference was made to that NE correspondence in the Council's ecology proof of 18 March 2021.

40. In the apparent absence of an NE response, the Inspectorate wrote to NE on 26 March 2021. In NE's response dated 29 March 2021, reference is made to its earlier correspondence of 25 February 2021[3]. Astonishingly, this is the first

[3] NE actually refer to correspondence sent in January 2020 which the Council indicate refers to the correspondence of 25 February. Whilst the veracity of this claim is questioned by the appellant, no evidence has been submitted to indicate existence of any such earlier correspodence.

time that the existence of this important NE correspondence was made known to the appellant and to the inquiry. The Council subsequently withdrew the relevant section of the fifth reason for refusal on 31 March 2021.

41. Although there is not sufficient evidence before me to find deliberate concealment of relevant evidence, the Council nonetheless demonstrated unreasonable behaviour through delay in providing information and lack of co-operation with the other party. That resulted in the appellant having to prepare proofs of evidence based on an incorrect evidence base, until such time as the NE letter became available and the Council withdrew its concerns. Whilst the amount of work required as a specific result of this was relatively limited, it was nevertheless unnecessary and wasted expense.

Late withdrawal of a reason for refusal

42. Withdrawal of a reason for refusal may in itself represent unreasonable behaviour. However, in this case, the first part of the fifth reason for refusal related specifically to off-site ecological impacts on the SAC/SSSI, a matter to which the Council look to NE for advice. I have already found a lack of clarity in the initial NE response, with specific regard to the last sentence stating that NE would not disagree with any of the Council's points made. As such, the Council could reasonably conclude that this issue was not 'a lost cause'. The final NE response clarified the NE position and thereby represented a change in circumstance that justified the withdrawal of this part of the reason for refusal.

Extending the reasons for refusal

43. The appellant asserts that, following the withdrawal of aspects of the fifth reason for refusal, the Council extended the remaining reasons for refusal, which contains no reference to birds, bats, otters, fish, invertebrates or any other species, or to biodiversity net gain, and acted unreasonably by subsequently requiring additional ecological information and surveys.

44. I have already dealt with part of this claim when dealing with the Council's opposing assertion that the appellant artificially narrowed the reasons for refusal. I found that the fifth reason for refusal is simply too vague to meet the clear and precise test required by the DMP, even if the appellant was fully aware of what the reason meant. On that basis, I conclude that this represents unreasonable behaviour by the Council.

45. Costs can only be awarded where there is both unreasonable behaviour and unnecessary expense. No significant amount of inquiry time was in the end spent disentangling what was, and what was not, an appropriate set of surveys as a result of the Council not having earlier explained its position clearly and precisely, as these discussions took place separately. Accordingly, the wasted expense relates to that separate period of dialogue between the two ecologists to try and reach agreement on the additional information required. Therefore, even though the amount of work involved would be relatively modest, there was nonetheless some limited wasted expense.

46. However, before these discussions were concluded, the appellant applied for an adjournment. Up until that point, it could reasonably be inferred that the appellant was intending to defend his position. Instead, at that point the appellant in effect conceded that he was not sufficiently confident that his own

surveys would be adequate for the purposes of ensuring that I was able to carry out my statutory duties.

47. The unreasonable behaviour of the Council ceases at the point the adjournment of the inquiry was requested. This is because the primary responsibility for the adjournment lies with the unreasonable behaviour of the appellant in not submitting in good time what even he ultimately considered to be necessary ecological information. Although the appellant claims that seeking the adjournment was the only reasonable response to the Council widening its case, in my view this was not the primary instigating factor for the adjournment.

Principle of development

48. The appellant makes an application for full award of costs on the basis that the Council unreasonably objected to the principle of the development. The PPG indicates that preventing development which should clearly be permitted may represent unreasonable behaviour.

49. In summary, the fourth reason for refusal states that the local plan does not allow for such new development on sites outside the settlement boundary, and that no special justification can be made. In cross examination of the planning evidence, the Council agreed that the site's location does not give rise to any in-principle objection to chalet development. The Council further stated in its closing statement that its case has never been that the site should not be built on at all. It will also be seen from my appeal decision that I come to the same conclusion on the principle of development.

50. However, the fourth reason for refusal is far from being a stand-alone matter. There are another six reasons for refusal, and it is not the case that all of those other objections had been resolved or amount to no more than local impacts, as can be seen from my appeal decision. Indeed, a significant amount of evidence was put forward by both sides in respect of all these other matters. As such, I am not persuaded that if the appellant had been faced with a refusal notice absent the fourth and fifth reasons for refusal an appeal might not have been sought.

Conclusion on costs application [B]

51. Overall, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated in relation to non-disclosure of the NE correspondence and not providing a sufficiently precise and clear objection in respect of ecological matters. A partial award of costs is justified in the terms described.

Costs Order [A]

52. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Mr Hamilton shall pay to West Berkshire Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in contesting Mr Hamilton's case and the preparation of evidence for the inquiry in respect of the additional information that was submitted following the adjournment; such costs to be assessed in the Senior Courts Costs Office if not agreed.

53. West Berkshire Council is now invited to submit to Mr Hamilton, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Costs Order [B]

54. 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 West Berkshire Council shall pay to Mr Hamilton, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in contesting the Council's case and the preparation of evidence for the inquiry in respect of, firstly, the period of non-disclosure by West Berkshire Council of the Natural England correspondence dated 25 February 2021 until 29 March 2021 and, secondly, establishing the extent of additional ecological information that was being required by the Council up until the point of the adjournment; such costs to be assessed in the Senior Courts Costs Office if not agreed.

55. Mr Hamilton is now invited to submit to West Berkshire 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.

Patrick Hanna

INSPECTOR