



Costs Decisions

Hearing Held on 2 December 2021

Site visit made on 16 December 2021

by Mrs H Nicholls FdA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 February 2022

Costs application A in relation to Appeal Ref: APP/P1133/W/21/3273012 Land at Tollgate Farm, Chudleigh Knighton

- 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 Baker Estates Ltd for a full award of costs against Teignbridge District Council.
 - The hearing 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 planning permission for outline application for circa 60 residential dwellings, access, open space, drainage pond and associated infrastructure.
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Costs application B in relation to Appeal Ref: APP/P1133/W/21/3273012 Land at Tollgate Farm, Chudleigh Knighton

- 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 Teignbridge District Council for a partial award of costs against Baker Estates Ltd in connection with the appeal as described above.
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Costs Decisions

1. Costs application A is allowed in the terms set out.
2. Costs application B is refused.

Costs Regime

3. The Planning Practice Guidance (PPG) advises that costs may 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 appeal process. Whilst parties normally meet their own expenses, they are also expected to behave reasonably to support an efficient and timely process.
4. The PPG goes on to state that the award of costs can relate to either the procedural handling of the matter or substantive aspects – in relation to the merits of the appeal.
5. Examples of types of unreasonable behaviour by a local planning authority (LPA) of a procedural nature includes:
 - lack of co-operation with the other party or parties;
 - delay in providing information or other failure to adhere to deadlines;
 - not agreeing a statement of common ground in a timely manner or not agreeing factual matters common to witnesses of both principal parties;

- introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.
6. In relation to cases where the LPA fail to determine an application, a proper explanation should be provided as to why a decision was not reached within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period.
 7. In terms of the substance of the matter under appeal, LPAs may be at risk of a costs award in the following circumstances (not exhaustive):
 - by preventing or delaying development which should clearly be permitted;
 - failure to produce evidence to substantiate each reason for refusal;
 - vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis;
 - refusing to provide reasonably requested information; and
 - not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination) as part of sensible on-going case management.
 8. Appellants can be at risk of costs for similar reasons to the above. In a substantive context, appellants can be liable for an award of costs if material considerations are advanced and inadequate evidence is provided in support thereof.

Submissions in respect of Application A

9. The appellant submitted the costs application (A) in writing prior to the opening of the hearing setting out the following synopsis of events:
10. Outline application submitted as valid on 24.09.2020 with a 13 week target date of 24.12.2020. Council allocated a case officer on 04.01.2021. Revised plans submitted 22.12.2020 in response to consultee comments. Parties agreed extension of time until 31.01.2021. Updated Flood Risk Assessment and additional information submitted in January 2021. Subsequent meeting with Council on 21.01.2021 during which it was highlighted that only a limited review of the application had been undertaken.
11. Subsequent meeting between the parties on the 18.02.2021 during which the Council requested a further extension of time and indicated that a policy objection had been recently received concerning the principle of development.
12. The appeal was lodged on the 13.04.2021 and all documents, statement of case (SoC), draft planning obligation and draft statement of common ground (SoCG) were emailed to the Council on the same day.
13. Four months later on 23.08.2021, the start letter for the appeal was received from PINS providing a deadline of 27.09.2021 for the submission of the Council's SoC.
14. Following a change of Inspector, the Council sought an extension of time for submission of its SoC, which was agreed by PINS as 14.10.2021 and 03.11.2021 for the SoCG.

15. Following a prior email in September, the appellant emailed and requested a meeting with the Council, which was subsequently held on 19.10.2021, after the submission of the Council's SoC on 14.10.2021.
16. On 03.11.2021, a Pre-Hearing Note was received from the Inspector suggesting that the areas of disagreement be narrowed further, with particular reference to the five year housing land supply positions (5YHLS) and protected sites effects (in terms of the requirements of the Habitats Regs¹). Appellant emailed Council to request a meeting to discuss the SoCG further, and dates were agreed to discuss the respective topic areas on 15.11, 17.11 and 18.11.
17. Discussions in relation to Habitats Regs matters at the meeting and later by email resulted in no further agreement between the parties on this topic.
18. The summarised position of the appellant is that the Council failed to consider the outline application properly, which made the submission of an appeal unavoidable and that it also failed to consider the appeal in a timely way, even seeking an extension for submission of its SoC five and a half months after the submission of the appeal; even then failing to provide clear putative reasons for refusal, with the case remaining "*nebulous and undefined*". The appellant further claims that the Council failed to consider any of the submitted Habitats Regs information, other than during the month of November, following which it decided that it was not the competent authority and would not need to form its own view in respect of the same. Finally, the appellant highlights the lack of evidence to substantiate the 5YHLS position and general lack of co-operation in respect of agreement of a SoCG.

Response from the Council

19. The Council indicate that the original pre-application was based on an affordable housing-led scheme which was ultimately not what was applied for, hence the need to consider the policy context entirely anew and hence the late policy objection. The Council concede that it does not consider itself well practised in considering the policy position advanced by the appellant, as allegedly much of its housing delivery comes from allocated sites.
20. The Council asserts that when the appeal application was first validated in September 2020, it was still attempting to recover from the backlog that developed during the first lockdown which had resulted in the inability to visit sites for some duration and for many staff to adjust to home-working for the first time. The Council further explains that there was a significant staffing issue at that time, not all strictly related to the Pandemic, but unfortunately timed so that the effects were felt acutely in late 2020 and throughout 2021.
21. The Council highlights that the submission of amendments to the location of the drainage pond in December 2020 had the effect of amending the red line site location area (from an area previously within the blue line). The Council suggests that with the benefit of hindsight and more resources, it could have refused the application as originally submitted on ecological grounds in relation to this particular necessary change.
22. The Council did not refuse the application but accepted the red line changes and updated certificates without restarting the application determination period. Had it been restarted, the revised deadline would have been the

¹ The Conservation of Habitats and Species Regulations 2017 (as amended)

- 23 March. The subsequent submission of an amended certificate of notice (dated 25.01.2021) could have also resulted in a restarting of the 13 week determination period to a revised deadline of 26.04.2021, but again, did not.
23. The Council indicated in its Appropriate Assessment (AA) of 02.03.2021 that the proposal would likely result in an adverse effect on the integrity of the protected site, with additional mitigation measures requiring more clarity and certainty to enable permission to be granted. The Council sought an extension of time to consider this additional requested evidence and considers it unreasonable that it was only submitted as part of the appeal in April 2021. The number of exchanges of correspondence on this topic between the Council and appellant has been highlighted as evidence of proactive working.
24. The letter from the Council to the appellant of 17.03.2021, informed by a corrected planning policy response, was clear on its likely recommendation of refusal of the appeal application at that point in time. Though unsupportive in principle of the appeal application, the Council's letter offered to continue to work through the outstanding technical and detailed issues to 'scope down' the range and extent of matters not agreed. The Council highlights the lack of reply to this letter and notes that the appellant opted to submit the appeal on the 13.04.2021 instead.
25. The Council suggests that its decision not to review evidence relating to Habitats Regs matters stems, in part, from criticism received in relation to its conduct as part of another appeal. The Council indicate that it removed the Shadow AA submitted on the 27.10.2021 and commentary relating to it from the SoCG because it was considered unfair that the appellant was seeking this late submission to advance its position and that a further attempt of this nature was made through the appellant's submission of a detailed 11-page statement produced by Clarke Willmott Solicitors.
26. In response to criticisms about the delays with preparing the SoCG, the Council were faced with numerous staff absences which resulted in the need to compile a stand-in team of personnel, who had not previously had any involvement in the scheme. The Council allege that despite this, the SoCG was well advanced and would have been complete by the original deadline, even if that version would not have materially narrowed the gap on the 5YHLS.
27. In terms of 5YHLS, the Council indicate that it has not had to defend many appeals based on a challenge to an alleged deficiency thereof, and that having employed a specialist independent consultant, it is now aware that significantly more could have been done to present its 5YHLS position clearly and robustly, through the inclusion of the necessary evidence at the appropriate juncture.
28. The Council concludes that it has in fact been unduly helpful, has offered to work proactively with the appellant and brought all the available resource to the appeal despite continued challenging circumstances. Yet the Council also admits that the appeal has been a learning experience, having found itself unable to present evidence of a 5YHLS nature without exposing itself to costs; a matter which it says will be addressed going forward.

Submissions in respect of Application B

29. The Council submitted its costs application in writing during the hearing itself although no further verbal comments were offered. It is not specified whether a

full or partial award is being sought, though I have assumed the latter. The application points to four areas where it considers the appellant has contributed to wasted expense:

- a) not opting to scope down the areas of disagreement;
- b) 5YHLS matters;
- c) appropriate assessment required by the Habitats Regs; and
- d) legal work.

30. In respect of a), the Council suggests that the scope of the areas of disagreement could have been minimised, initially through the use of the pre-application process true to the nature of the actual proposal, or, through the continued negotiation under an agreed extension of time as was offered in the correspondence of 17.03.2021. It is also alleged that information on some aspects of the proposal was lacking and that such could not simply be required by condition. A point made in this regard by the Council is that the appellant was aware of the need for additional information in relation to Habitats Regs as set out in the letter, but chose to submit it only as part of the appeal.
31. In respect of b), the Council indicate that work on narrowing the gap on the 5YHLS disagreement, such as meetings held in November and subsequent work, was ultimately abortive as the appellant resisted its inclusion within the SoCG as it was considered to constitute new evidence.
32. In respect of c), the submission of the Shadow AA on the 21.10.2021 is highlighted as unreasonable, given the short timeframe available for the Council to consider it, and given that it would not be the competent authority.
33. In respect of d), the Council indicate that it has spent approximately 35 hours negotiating the terms of the planning obligation and providing standard clauses, much of which has still been omitted from the completed Unilateral Undertaking (UU). It is highlighted that such costs are usually covered by applicants, at least in part, and it should not necessarily have been as burdensome to the Council for the appellant to prepare a UU.

Response from the Appellant

34. The appellant responds that the substantial planning fee paid for the appeal application should have more than covered the time and resources that the Council needed to spend on considering the planning application. The appellant also highlights that at the meeting on the 18 February, at which the further extension of time was requested, the Council had had the application for 5 months. By the time the more detailed assessment had been undertaken and correspondence sent to the appellant on the 17 March indicating that a refusal would be imminent, around 6 months had passed.
35. The appellant asserts that an appeal was not entirely avoidable in any event, given the Council's indication of 17 March that it considered the principle of the proposal to be in conflict with the development plan.
36. In respect of a), the appellant considers that much of the information sought by the Council was capable of being addressed by way of conditions and/or obligations, and that this would have become clear had the Council reviewed the non-determination appeal as part of sensible on-going case management.

37. In respect of b), the appellant indicates that the Council would have been aware of the challenge to its 5YHLS from the submission of the appeal in April, which involved providing a copy of the SoC and draft SoCG to the Council by email. It is alleged that the Council ignored opportunities to discuss the SoCG, and submitted its SoC simply with reference to its '5 Year Housing Land Supply Position Statement', despite the critique of it detailed in the appellant's SoC.
38. The appellant indicates that the purpose of a meeting held on 15 November to discuss the 5YHLS element of the SoCG was to agree what common ground there was based on the submissions made by each party in their respective statements. The appellant theorises that the Council is attempting to recover costs incurred on instructing a consultant to consider the challenge to the 5YHLS position after it had submitted its SoC, six months after it had received the appellant's SoC and without the benefit of prior discussions on the SoCG.
39. In respect of c), the appellant highlights the Council's indication of 17 March that the application would be refused led to the requested Habitats Regs information being submitted with the appeal in April, along with a draft SoCG indicating the intent to submit a Shadow AA.
40. The appellant reasons that the Habitats Regs document (of 11 pages) (Clarke Willmott Solicitors, 29.11.21), was prepared (at added expense) with reference to evidence already submitted to assist the Inspector in light of the lack of agreement on this topic between the parties and because it was clear that the Council did not intend to provide any evidence of this nature, instead, opting to deal with this issue at the hearing. It is asserted that the Council did, in fact, introduce wholly new evidence of this nature through oral submission at the hearing which had not previously been seen or heard by the appellant, which extended the length of the hearing.
41. In respect of d), the appellant indicates that its intention to submit a UU was made clear to the Council at the outset and that it was ultimately for the Council to decide how much or little time to spend on providing comments, which the appellant indicated would be taken on board, subject to them being reasonable. It is also asserted that the request for a contribution to the legal costs is outside of the appeal costs regime.

Application A Reasons

42. Having reviewed the costs application made by the appellant, I am of the view that despite some activity with consultees and unsolicited amendments made by the appellant, the progression on the application following its submission was limited. In my view, it does not appear that the Council was undertaking a comprehensive review of the application prior to the period around February – March, by which time 5 or 6 months had passed since its submission.
43. It is clear that the appeal was unavoidable, at least for the reason that the principle of development was not considered to accord with the development plan. However, having received notification of the submission of the non-determination appeal, it appears that the Council still opted to avoid engaging with the submitted documents until the later stages of the appeal, or on occasion, when prompted, and on being given an extended deadline to do so.

44. I note that the Council did not opt to define putative reasons for refusal as is customary for non-determination cases. In the absence of such, and despite the detailed SoC, defining the Council's case was made more difficult.
45. In respect of 5YHLS, the Council's SoC provides a very limited response and evidence to the appellant's challenge. The Council admits that its case could have been better presented and will change its approach to defence of 5YHLS challenges going forward. Whilst helpful to note, it has left me no alternative but to find a deficient supply in this particular case. Attempting to remedy the situation by introducing evidence after the event only highlighted the lack of preparation and evidence collation at the appropriate time in the proceedings.
46. In respect of the Habitats Regs information, whilst I note that a 'generous' extension of time was sought by the Council with a view to working through this matter (amongst others), the appellant's decision not to submit such related information to the Council at that stage is understandable. The Council's request and offer to consider such information was not framed in such a way that the appellant could be confident it would be received and handled proactively or efficiently given the Council's handling of the application to then.
47. I do not find evidence of any of my colleagues having criticised the Council for considering Habitats Regs matters as part of other appeals where the role of competent authority has transferred under the appeal process. Having reviewed the decisions² referenced by the Council, and irrespective of the view of the appellant in that case, it appears that my colleague found the submission of Habitats Regs evidence by the Council was in fact helpful, "*as it may well have become evidence pertinent to [the] undertaking of an AA as the competent authority*". The Council accepts that its review of the Habitats Regs information may have also been helpful in this case, again prevented to an extent by staffing issues, but also highlights the late submission of the Shadow AA as a reason why it was unable to do so fully.
48. The lack of analysis of the Habitats Regs information presented at appeal stage has complicated the handling of the case and, amongst other things, resulted in more time spent undertaking the EIA screening process. Whilst I do not consider the Council unreasonable for not having reviewed the Shadow AA or prepared its own updated version of the same, the lack of timely review of the documentation it had in its possession between April and October was concerning and was partly the reason for prompting such through the Pre-Hearing Note issued in early November. The Council ultimately opted to present its view orally at the event, which prolonged the discussion as much of the evidence offered was new.
49. Ultimately, it appears that much of the Council's untimeliness and the lack of substance to some areas of its evidence stems from significant staffing problems which it was facing at the time. In light of this, and notwithstanding that the Council was well represented at the event itself, my decision to award partial costs has not been taken lightly. I consider that the appeal process has been made more difficult by the Council for the above reasons, and that the appellant, and representatives, experienced as they are in such processes, will be aware of their entitlement to some recompense from this difficult encounter. I am therefore awarding partial costs to the appellant in relation to the

² Appeal decision ref and associated costs decision: APP/P1133/W/21/3267189

following procedural and substantive areas of unreasonable behaviour of the Council:

- All aspects of the appeal relating to the Habitats Regulations matter, including the 11-page document from Clarke Willmott Solicitors and the costs of defence of evidence introduced orally at the hearing by the Council in respect of the same, but with the exception of the production of the documents submitted with the appellant's SoC and the Shadow AA;
- Time spent by the appellant seeking co-operation from the Council to review the evidence and discuss agreement of a SoCG, including at meetings in person;
- All aspects of handling of the appeal in relation to the 5YHLS following on from the date of submission of the Council's SoC.

Application B Reasons

50. I accept the Council's point about how the appellant could have engaged with integrity during the pre-application process but ultimately, that was prior to the submission of the appeal application and did not prevent the Council engaging with the application as it was formally submitted. Whilst I note that the Council managed correspondence during the early stages, it appears that the appellant was left wondering what was happening with the appeal until around months 5 to 6. Similarly, that the Council missed opportunities to either refuse or revalidate the application when it could have done so does not redress the lack of substantive assessment of the application until the later stages.
51. The offers to continue dealing with the application beyond this point to narrow the scope of disagreement were not couched in positive terms, i.e. suggesting prolonged periods of consideration such as the 6 months that had passed prior, and which were ultimately with a view to a likely refusal in any event. As such, I do not agree that the appellant has acted unreasonably for not further extending the determination period of the application.
52. In respect of the 5YHLS matter raised by the Council, the appellant is not at fault for the Council including too little in its evidence base in defence of its case. The resistance of new late evidence that may have been prejudicial to the appellant's case, whilst denied, is understandable. I have accepted that the Council have learnt how to prepare a more robust case of this nature going forward, but do not consider that any expense it may have accrued in this process has been unnecessarily incurred by the appellant.
53. In relation to the Habitats Regs matter, I find that the Council's lack of analysis of the documents submitted with the appeal contributed to wasted expense. The time lag between the specific request of the 17.03.21 and its submission in mid-April with the appeal is not considered significant. The 11-page Habitats Regs document did nothing more than highlight that agreement on at least some matters could have been reached at a point prior, but had not been because of the Council's intransigent position.
54. In respect of legal costs accrued by the Council, I have found that the aspects that the Council sought to be included were not necessary to make the development acceptable in planning terms. Any charges for legal advice of this nature should have been made clear to the appellant at the appropriate juncture, or such service withheld, and cannot be claimed retrospectively.

55. Consequently, I do not find that the appellant has behaved in a manner that has resulted in unnecessary or wasted expense, as described in the PPG, and that an award of costs as sought under Application B is not justified.

Costs Order

56. 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 Teignbridge District Council shall pay to Baker Estates Ltd, the costs of the appeal proceedings described in paragraph 49 of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

57. The applicant is now invited to submit to Teignbridge District 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.

Hollie Nicholls

INSPECTOR