



Costs Decision

Hearing Held on 24 May 2022

Site visit made on 24 May 2022

by David Wyborn BSc(Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 June 2022

Costs application in relation to Appeal Ref: APP/P1133/W/19/3223657 Land opposite Chapel Lane, off Old Liverton Road, Newton Abbot TQ12 6YY

- 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 Mr Thomas Packman for a full award of costs against Teignbridge District Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for the use of land for the stationing of caravans for residential purposes, together with the formation of hardstanding and utility/day rooms ancillary to that use and the erection of a stable.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

The submissions for Mr Thomas Packman

2. The applicant seeks a full award of costs on the substantive grounds that the appeal was unnecessary and, if a full award were not to be merited, then a partial award is sought for the work of the various consultants and their attendance at the hearing.
3. The applicant makes reference to the Planning Practice Guidance and the examples of unreasonable behaviour. In particular, it is said that the Council has:
 - prevented or delayed development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.
 - failed to produce evidence to substantiate each reason for refusal on appeal.
 - made vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.
 - refused planning permission on a planning ground capable of being dealt with by conditions, where it is concluded that suitable conditions would enable the proposed development to go ahead.
4. In relation to the first reason for refusal, and in particular whether the Council could demonstrate a five year supply of pitches, it is argued that this involved lots of substantive work calculating the supply. The Council were unreasonable including in calculating the supply based on the 2012 Gypsy and Traveller

Accommodation Assessment¹ (GTAA) and ignoring the more up-to-date assessment from the 2015 GTAA². The unreasonable behaviour starts at the application stage where it was not reasonable to conclude that the five year supply requirement had been met.

5. The applicant sets out the case that the Council has never sought to engage with the figures regarding supply or acknowledge the inadequacy of the 2012 GTAA as the basis for the calculations. It is argued that the Council has not contradicted the applicant's assessment on what the figures should be and that the Council was and is still not able to demonstrate an adequate supply. It is explained that the Council has withdrawn this reason for refusal at the last minute and overall its approach to supply has been unreasonable.
6. With the second reason for refusal concerning highways, the applicant considers the Council had before it, at the application stage, detailed information on the access, the speed and quantity of traffic and the achievable visibility splays. This was sufficient to conclude that a safe access could be formed. It should not have taken The Hurlstone Partnership Access Review Report (November 2018) to have shown that the reason for refusal could not be substantiated.
7. However, the applicant makes the case that if it were to be decided that this was not unreasonable behaviour during the application stage and a full award is not merited in this respect, then the Council should have provided the Highway Authority with the Access Review Report much earlier. The Highway Authority could then have confirmed their agreement earlier and furthermore, and, in particular, there would have been no need for Mr Hurlstone and the Highway Authority to attend the hearing. In these circumstances, a partial award of costs on this issue would be merited.
8. The applicant makes the case that the third and fourth reasons for refusal concerning drainage should have been avoided. The applicant argues that the Council has failed to demonstrate throughout the process why surface and foul water drainage could not have been conditioned in any approval. The case made has been vague and generalised as to the impacts. The Council has not undertaken any calculations or detailed analysis. The water would run away from the road and the Council has sought certainty on drainage matters rather than taking a sensible approach acknowledging that an engineering solution would be possible. It is said that the Council was looking for certainty on drainage matters, and this is not the correct test to judge whether a condition would be appropriate to deal with an outstanding matter such as the drainage.
9. The applicant further believes that it is routine for such drainage matters to be conditioned for future consideration and approval. Even if the Inspector considers that unreasonable behaviour has not been shown at the application stage, the Council should have realised based on the report from Mr Stephen Fryer in March 2020 that its position was unreasonable and withdrawn the reason for refusal. Its continued stance without detailed evidence constitutes unreasonable behaviour.

¹ Teignbridge District Council – Report of assessed housing need, potential site opportunities and plan provision for the Travelling Community in Teignbridge (2012).

² Devon Partnership Gypsy and Traveller Accommodation Assessment 2015 Final Report – RRR Consultancy Ltd

10. In relation to the fifth reason for refusal, the applicant argues that the Council had all the information before it to satisfy itself with respect to the impact on dormice and could have conditioned this matter at the application stage. The Council should have realised that it had two options before it at the application stage, one of which included that the dormouse boxes could be positioned in the front hedge and the new Devon Hedges within the application site and that there was a viable alternative that did not rely on third party land.
11. The details on dormice mitigation and enhancement would need to be coordinated with the application for a European Protected Species Licence to Natural England and it is entirely sensible and reasonable that the details be worked up together at that stage. The applicant makes the point that Natural England is the potent authority in this case, and has powers of prosecution in relation to criminal offences if the procedures are not followed. The planning report acknowledges a licence is needed and the Council has not substantiated or explained why a planning condition in any approval would not have safeguarded its position. In the applicant's view this also amounts to unreasonable behaviour and, taken together, the appeal could have been avoided.

The response by Teignbridge District Council

12. The Council consider that it has acted reasonably and that its approach to each reason for refusal has been justified by the evidence at each point in time. In terms of the first reason for refusal, when the Council calculated that there was not a five year supply of Gypsy and Traveller sites, at the beginning of April 2022, it swiftly let the main parties know and explained that in the light of these circumstances it did not now wish to defend that reason for refusal.
13. The Council explained that it is aware of the 2012 GTAA and 2015 GTAA figures, has described the differences in the various studies and on the monitoring data on its web site, and is realistic in how the supply calculations should be done.
14. In terms of the access, the Highway Authority explained that it was not possible to conclude on the information at the application stage that a safe access could be provided. Once the Access Review Report was received by the Highway Authority, which it considers to be a thorough document, it engaged with the consultants and was able to conclude that matters had been resolved. It withdrew its objections and the Council accepted this advice and indicated that it would not defend the highway reason for refusal in good time before the hearing. The Council indicated that the highway officers were only present because the Planning Inspectorate had indicated that the Inspector had wished to examine this matter at the hearing.
15. With respect to the drainage reasons for refusal, at the time of the application, there was very limited information submitted with the application. The professional advice of the Council's Drainage Engineer and the local knowledge of the difficult drainage conditions on this clay soil justified the decision of the Council to request the further drainage information at the application stage. The Council did not consider it was clear whether the proposed surface would be sufficiently permeable and that the reed bed would function appropriately. The Council say they have responded in a timely way to Mr Fryer's report and that this information is before the hearing. Given the ground conditions, the Council consider that it was and still is justified to refuse the application on

drainage grounds because, including based on the local knowledge of the ground conditions, there is insufficient evidence that a viable scheme is workable.

16. In relation to biodiversity and the fifth reason for refusal, the Council reiterate that it had been concerned that to provide the necessary dormice mitigation the scheme relied on third party land and there was also uncertainty with how much of the front hedge would be translocated. The Council say that it was only during the hearing that this latter issue became clarified. The Council explain that it did not have confidence that the scheme could be delivered and that while a Natural England licence may be required, the Council also need to be satisfied that a scheme would be deliverable and that based on the information it did not have that confidence. Therefore a planning condition was not an appropriate course of action to take and the refusal of the application on this ground was therefore justified.

Reasons

17. The Planning Practice Guidance advises, regardless of the outcome, costs may be awarded against a party who has behaved unreasonably and caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
18. In terms of the first reason for refusal and the calculations with regard to the supply figures, the applicant has undertaken a detailed analysis including of past permissions and the pitches that are available, and raised a series of concerns with the methodology and results of the GTAAs. It is said that the result of all these matters, the need and supply have been under estimated and that the Council should not have refused planning permission on supply grounds in 2018.
19. The criticisms levelled at the GTAAs by the applicant, as part of the appeal evidence, are understood. Nevertheless, the Council do appear to disagree and the GTAAs are published and detailed documents. Furthermore, the figure in Policy WE6 of the Teignbridge Local Plan 2013-2033 (adopted 6 May 2014), which is derived from earlier assessments, including the 2012 GTAA, would, I assume, have been subject of consideration at the Local Plan examination and forms part of an adopted policy. In these circumstances, I do not believe that it was unreasonable for the Council to generally rely on the GTAAs as part of their considerations and conclusions.
20. The subsequent criticism that the Council's calculations are based on meeting the 70 pitches in Policy WE6 of the Local Plan, and do not take account of the 2015 GTAA, has some merit. However, when the planning application was determined in August 2018, the Council calculated that it had an eight year supply of pitches³. It seems to me, even if the 2015 GTAA figures had clearly formed part of the calculations, the Council would still have argued that that it had at least a five year supply. Consequently, the Council would have found conflict with Policy WE6 of the Local Plan and the application would still have been refused on that basis.
21. When the Council calculated the supply figures at the start of April 2022, and identified that it could not demonstrate the necessary supply, it acted quickly

³ As at 1 April 2018

informing the main parties that it did not wish to defend this reason for refusal. This shows good case management in the appeal process and it minimised the hearing time spent on this matter. Given all the background I do not consider that the reason for refusal was avoidable based on the information available to the Council at that time and taken as a whole the actions of the Council were not unreasonable in respect of this reason for refusal.

22. The second reason for refusal concerns the highway implications of the development. As I have explained in my decision, I do not consider that the details at the application stage were sufficient, clear and unambiguous to demonstrate that a safe and suitable access could be provided. I consider that the reason for refusal, which highlighted that insufficient information had been submitted at that stage, was understandable and demonstrated reasonable behaviour.
23. At the appeal stage, the Access Review Report was submitted. It seems to have taken some time before the document was presented to the Highway Authority by the Council. However, once the Highway Authority examined the document, and there was engagement with the applicant's highway consultant, the Highway Authority fairly swiftly confirmed that it accepted the findings. The Council subsequently confirmed that they did not wish to contest the second reason for refusal. The Council's consideration of this matter, supported by the professional guidance of the Highway Authority, does not constitute unreasonable behaviour.
24. Nevertheless, as I have explained in my decision, I had prior to the hearing indicated to the main parties that I wished to understand in more detail the highway elements of the scheme. The Regulations⁴ allow the Inspector, at the start of the hearing and in addition to the main issues, to identify any matters on which he requires further explanation from any person entitled or permitted to appear. While the main parties did not need to send their highway engineers, I found the discussion particularly helpful and it aided my understanding of the proposal. It also enabled the visibility splays to be agreed and identified on a plan which subsequently formed part of the approval. The attendance at the hearing of the applicant's highway consultant was not due to the actions of the Council and therefore there was no unreasonable behaviour in this respect.
25. With the drainage issues the Council made requests at the application stage for detailed information which, it seems to me, was effectively equivalent to a fully worked up drainage scheme. This level of information was not supplied as the Council had wished and therefore no material level of extra cost was expended in this respect. Nevertheless, I do consider that additional reassurance on drainage matters at the application stage was required because of the known ground conditions and the related knowledge and experience of the Council's Drainage Engineer of the area, and the other background information, such as the Ruddlesden Geotechnical Report. There was sufficient uncertainty on drainage matters that the drainage reasons for refusal were justified.
26. At the appeal stage, the report from Mr Stephen Fryer provided detailed analysis and recommendations. A layer of the permeable surface and the size of the reed bed were changed and updated. The Council responded to the Report and still maintained its objections. The Council seemed to require a level

⁴ Regulation 11(4) of The Town and Country Planning (Hearing Procedure) (England) Rules 2000

of certainty on drainage that was perhaps unrealistic. Nevertheless, the submissions of the Council's Drainage Engineer was based on the ground conditions and his knowledge of the area and the objections raised had some basis and merit. He did not consider that a scheme would be viable and in these circumstances it was reasonable to conclude that a condition attached to a permission would not be an appropriate course of action. While I have come to the conclusion that the balance falls in favour of a workable solution being found for the drainage of the site, I consider that sufficient technical and objective analysis was presented such that the Council's case did not reach the bar to be considered as unreasonable behaviour in this respect.

27. In regard to the biodiversity issues, in particular dormice, this appears to have been clarified to a large extent at the application stage. I agree that there was uncertainty as to whether the woodland could be used for the dormouse boxes, but the applicant's ecological consultant addressed this and made a proposal which would have enabled the boxes to be sited wholly within the application site. The Council's Biodiversity Officer noted this information and recommended that, subject to conditions, no objection be raised on ecological grounds. However, the Council refused the application. It gave some consideration to this matter in the planning report, but did not appear to give sufficient weight to the suggested approach of the dormouse boxes being sited, as an option, wholly within the site and that details pursuant to a condition would enable the positioning and other details to be resolved at a subsequent stage.
28. There appears to be no material disagreement between the applicant's ecological consultant and the Council's Biodiversity Officer. The uncertainty as to whether a satisfactory scheme could be implemented appears minor and could be resolved through the submissions and discussion as part of details to be submitted pursuant to a planning condition. The Council does not appear to have undertaken sufficient detailed analysis and consideration as to whether it's concerns could have been addressed by planning conditions. If it had, I believe it should have come to the conclusion that this would have been an appropriate way to address the outstanding biodiversity issues. In these circumstances, in respect of this issue, the Council refused planning permission on a ground capable of being dealt with by conditions. This constitutes unreasonable behaviour. In this respect the applicant incurred additional costs at the appeal stage, including consultants preparing for and attending the hearing.
29. It is important to note that the original ecological surveys and related reports are now of some age. I would have found the reports and conclusions out-of-date if they were considered in isolation. In these circumstances I would not have been able to support their conclusions. I would have had to raise this at the hearing even if there had not been a related reason for refusal.
30. However, the recent Preliminary Ecological Appraisal Report (April 2022), which included a site visit, reaffirmed the original survey work and conclusions. On this basis, I was able to be reassured on the biodiversity matters and conclude that a condition attached to an approval was appropriate. The need for the Preliminary Ecological Appraisal Report was not because of the actions of the Council but reflects the time the appeal had been within the system. The need for this report is, therefore, not associated with the unreasonable behaviour of the Council in relation to this reason for refusal.

Conclusion

31. Drawing all these matters together, I conclude that the Council's first two reasons for refusal were reasonable at the time it determined the application. The Council responded in an appropriate manner to the subsequent change in supply figures and highway information. The Council did not act unreasonably in these respects.
32. With the drainage reasons for refusal, I have highlighted some issues with the way that the Council approached these matters. However, on balance, I consider that sufficient technical and objective analysis was presented so that these reasons for refusal and their subsequent defence at appeal does not constitute unreasonable behaviour.
33. However, the Council could have addressed its biodiversity concerns with suitably worded planning conditions and this reason for refusal could have been avoided. This was unreasonable behaviour and led to unnecessary and wasted expense in the appeal process. However, this unnecessary and wasted expense does not extend to the work associated with the production of the Preliminary Ecological Appraisal Report (April 2022). This was necessary work and did not result from the Council's unreasonable behaviour. The costs associated with this document should be excluded from the award of costs.
34. In the light of the above analysis, I conclude that unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process, as described in the Planning Practice Guidance, has been demonstrated in the way I have described above. A partial award of costs is justified in respect of the applicant having to address the fifth reason for refusal concerning biodiversity but excluding the costs associated with the production of the Preliminary Ecological Appraisal Report (April 2022).

Costs Order

35. 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 Mr Thomas Packman, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the appeal process in addressing the Council's fifth reason for refusal concerning biodiversity, with the exception of the costs associated with the production of the Preliminary Ecological Appraisal Report (April 2022), such costs to be assessed in the Senior Courts Costs Office if not agreed.
36. 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 an agreement as to the amount.

David Wyborn

INSPECTOR