



Costs Decision

Hearing Held on 9 June 2022

Site visit made on 9 June 2022

by Mr R Walker BA HONS DIPTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 July 2022

Costs application in relation to Appeal Ref: APP/W1715/W/21/3283337 Land south of Snakemoor Lane, east of Winchester Road (Denhams Corner), Eastleigh

- 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 Jaci Properties Ltd for a partial award of costs against Eastleigh Borough Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for the construction of five adaptable dwellings for disabled persons/inter-generational families with widened vehicular access from Snakemoor Lane, new pedestrian access from Winchester Road, with land available for strategic Denhams Corner roundabout improvement scheme.
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Decision

1. The application for an award of costs is refused.

The submissions

2. The appellant's case was made in writing and presented at the hearing. The Council's response was made orally at the hearing, and the appellant made further points orally as well. Details of the oral submissions are set out in the Annexe at the end of this decision.

Reasons

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. Claims can be procedural – relating to the process; or substantive – relating to the issues arising from the merits of the appeal. In this case the appellant states that the application is procedural.
4. It is argued that it was unreasonable for the Council to consistently deny access to its nitrate mitigation scheme until late in proceedings and after having advised the Council that the appellant would be seeking a legal opinion. It is the appellant's position that this repeated denial with no valid reason given, other than that access was discretionary, constitutes unreasonable behaviour. This led to the appellant seeking a legal opinion which was subsequently wasted expense once the Council allowed access to the scheme.
5. The Council has defended its position. Examples of unreasonable behaviour given within the PPG which may result in an award of costs include a lack of co-operation with the other party or parties. In this instance, it strikes me from

the number of emails between the appellant and Council that there was co-operation through the appeal process.

6. During the appeal process, Natural England (NE) updated its guidance in relation to nutrient level pollution in several existing and new river basin catchments, including the Solent. Moreover, it updated its advice in relation to recreational disturbance from new residential development on the New Forest. These are both European designated sites. Finally, the Council adopted the Eastleigh Borough Local Plan (LP) (2022) which replaced the saved policies of the Eastleigh Borough Local Plan Review (2001 - 2011). All of this resulted in both parties working to update their positions, including liaisons with NE and seeking to reach agreement to a Statement of Common Ground and a Planning Obligation.
7. From the correspondence and the timeframes for the Hearing this was a fast-paced process. The appellant had not copied in the Council to an email sent to the Planning Inspectorate in February, which included background evidence to the proposed Package Treatment Plant. As such, the Council were not working to the same information as the appellant. The Council cannot therefore be penalised for arriving at markedly different calculations regarding the nutrient budget.
8. The Council initially denied access to their mitigation scheme in email correspondence dated 3rd May 2022, following the Council's completion of its calculations. This email stipulated that this conclusion had been reached saying *'Following the consideration of the updated nitrogen calculator from NE, which has increased the amount of credits required to offset development in the Borough, the Council hereby confirm that we are not in a position to provide nitrate credits for this development.'*
9. The Council went on, in that email, to stress that they had a finite source of nitrate credits, and the onus was put back on the appellant to mitigate. Whilst the email was not explicit and did not indicate that the Council would review its position, it did indicate that the Council had concerns regarding the amount of credits and, ultimately, what implications that might have for the availability of the strategic mitigation scheme for allocated sites. Given the recency of the advice from NE and the potential for changes to nutrient budgets elsewhere it is not unreasonable for the Council to have such reservations, irrespective of any legal position surrounding access to the mitigation scheme on a discretionary basis.
10. Subsequent emails between the Council and the appellant on the 6th and 11th May 2022 were focussed on working together to agree a nutrient budget. The appellant sought at this point to better understand the Council's position and specifically asked if it was on the basis of the Council's original calculation and the extent of nitrate mitigation and, if this was reduced, would the Council allow access. No reply was received, and the appellant sought a response again with a follow up email on the 18th May 2022 and advised that they would be seeking a legal opinion if a response was not received.
11. On the 23rd May 2022 the Council replied and advised that they would review the updated nutrient budget. However, the Council advised that the strategic mitigation scheme was not available still, due to the new NE advice which increased the number of credits required to offset development. This, the Council advised at the Hearing, was calculated to be a circa 40% increase.

12. These are unusual circumstances and I recognise that the Council will have been exploring the implications for increased nutrient budgets across the Borough having only just adopted its LP. On the 23rd May 2022 in response, the appellant advised the Council, that after taking legal advice, a legal opinion would be provided.
13. The Council subsequently confirmed on the 6th June 2022, that it would allow access to its strategic mitigation scheme following the agreement of the revised budget and its reduction. I accept that the Council did not confirm that it would consider altering its position. Equally it did advise that it would review the nutrient neutrality information and advise where necessary. Having done so, and ultimately changed its position by allowing entry, I do not consider that in the circumstances of this appeal this amounted to unreasonable behaviour.
14. I accept that this will have meant that the legal opinion sought by the appellant was wasted expense, as ultimately the matter of the Council's discretionary position was not tested in the appeal. However, I cannot accept that the Council behaved unreasonably on a procedural matter in changing its position, having previously provided reasons for its concerns on the 3rd and 23rd May 2022 and given the evolving nature of the calculations and discussions.

Conclusion

15. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Mr R Walker

INSPECTOR

Annexe: Submissions made orally at the Hearing

Council

16. The Local Planning Authority (LPA) has no statutory obligation to provide mitigation to developers. The onus is on the applicant to mitigate the impacts of development to comply with the Habitat Regulations. The LPA has an adopted mitigation scheme in place. That is based on Eastleigh Borough Council's Land Holdings so is, in effect, administered by the landowner and not a function of the LPA. They relate to a number of credits available to mitigate development. This is a finite resource and there are a limited number of credits available. The Council's Land Holding maintains they have discretion as to who can access it.
17. There was a change in NE guidance which on average has increased nutrient budgets by 40%. The initial calculation undertaken by the LPA indicated a significant budget which was based on information available at that time. That would result in a notable number of credits available to the development at this site which was considered and therefore under the Council's discretion. Given it wasn't a site supported for development the Council, as landholder, resolved not to supply credits in the first instance.
18. Subsequent to that and bear in mind up until recently the appellant was seeking onsite mitigation, additional information was supplied in the appeal process on efficiency of the Package Treatment Plant as well as from NE in respect of the existing land use input to be used in the calculator. That resulted in a significant reduction in the budget for the development and thereby the number of credits to offset it. That was then agreed as common ground between the parties and the day after confirmation from NE, the Council agreed access to the scheme.
19. Finally, in respect of the legal opinion, that was the appellant's decision and was not determinative to allow access to the scheme. The Council agreed access to the scheme prior to the appellant's legal opinion. The LPA position is therefore that it was not necessary for the appellant to seek the opinion and it was the reduction in the budget which was the reason to allow access as it was now less credits. Therefore, the Council refute that they acted unreasonably and request to dismiss the award.

Appellant

20. We will see in the timelines and emails that it was never clear that it was the size of the scheme. Even after the nitrate calculations were provided the Council still said that access was denied. So, the basis for the request to consider access has nothing to do with the calculation as we weren't aware of the problem, it was only to do with the principle and copies of the correspondence say that.
21. Only in the Council's email on the 6th June was it raised about the size of the scheme. All along it was only to do with the principle and not the size. The Council has allowed other schemes, including in Winchester, and never made clear that it was the size of the budget. So, it would have been a novel issue to grapple with and on that basis a legal opinion was sought. The Council is right that it was the appellant that initiated the legal opinion, but without it, the appellants rights would have been harmed.