
Costs Decision

Inquiry Held on 19-23 October and 9 November 2021

Site visit made on 21 October and 23 October 2021

by L Gibbons BA (Hons) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 7th July 2022

Costs application in relation to Appeal Ref: APP/A2280/W/21/3276864 Gibraltar Farm, Ham Lane, Hempstead, Gillingham, Kent ME7 3JJ

- 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 F D Attwood and Partners for a full award of costs against The Medway Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for outline application (with all matters reserved except access) for the erection of up to 450 market and affordable dwellings, nursery and supporting retail space up to 85sqm, with provision of main access to Ham Lane; estate roads; cycle and pedestrian routes; residential and community open space and landscaping; new junction for Lidsing Road/Hempstead Road and realignment and widening of Lidsing Road. Off site related highway works to Westfield Sole Road, Shawstead Road, Hempstead Road, Chapel Lane, Hempstead Valley Drive, Hoath Way roundabout, Hoath Way and M2 Junction 4.
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Decision

1. The application for a full and partial award of costs is refused.

The submissions for the appellant

2. The application was made in writing.

The response by the Council

3. The response was made in writing.

Reasons

4. The Planning Practice Guidance (PPG) indicates that costs may be awarded against the party has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
5. Paragraph 49 of the PPG states that local planning authorities are at a risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal. Examples in this respect include preventing or delaying development which should be clearly permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failure to substantiate each reason for refusal; making vague, generalised or inaccurate assertions about a planning proposals impact, which are unsupported by any objective analysis; refusing 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; acting contrary to or not following, well-established case law; and not reviewing their case promptly following the lodging of an appeal, as part of sensible on-going case management.

6. The Appellants refer to the Council's approach to the tilted balance as contrary to established case law, in that the Council wrongly refer to the tilted balance only applying to development that has already been found to be sustainable. The Council's planning proof of evidence does acknowledge at paragraph 7.5 and 7.27 refers to paragraph 11(d) of the Framework being triggered. The Appellants' opening and closing statements refer to the Council's interpretation of the tilted balance and related case law. However, the Appellants' Planning proof of evidence covers this issue only very briefly, particularly at paragraph 6.4, and it was also not a detailed matter for the Inquiry. Taking these factors into account it has not been demonstrated that the Council's initial approach to the tilted balance resulted in unnecessary or wasted expense for the Appellants.
7. Reason for refusal 1 related to whether a safe and suitable access for pedestrians, cyclists and other users could be provided from the site to Lordswood, relating to a lighting scheme. As set out in my appeal decision I concluded that a brighter 'P4' level lighting scheme would be appropriate, the precise details of which could be secured by an appropriate condition.
8. The Appellants' proof of evidence for Lighting at paragraph 2.3 refers to producing a P4 lighting assessment in April 2021. The Council's Planning proof of evidence September 2021 on page 2 includes a section relating to reasons for refusal no longer pursued by the Council. At page 2 (paragraph 3.) It refers to the new lighting scheme being submitted and that it has the potential to provide a safe and secure route, 'so long as it is constantly lit at this level, and not dimmed' and that this could be secured by a suitable condition.
9. At paragraph 1.10-1.12 of the Planning proof of evidence the Council confirm that if a suitable condition can be agreed and the lights are not dimmed, it would no longer pursue reason for refusal 1 'in its own right' (paragraph 1.10). However, this is qualified as being dependent on whether the ecological impacts of a brighter lit scheme would be acceptable particularly in relation to whether the scheme would be dimmed or not.
10. The Statement of Common Ground (dated 2 July 2021) refers to areas of disagreement relating to the proposed 'P6' and 'P4' schemes for the access to/from Lordswood – Lighting (point 3 in 'Areas not Agreed'). The areas of continued disagreement necessitated detailed discussion of the relevant guidance and implications for a lighting scheme and subsequent safety of users for the proposed access route at the Inquiry, from the Appellants' and Council's expert lighting witnesses. I am satisfied that the Council produced evidence to substantiate their concerns and were not unreasonable in refusing permission in respect of reason for refusal 1.
11. Reason for refusal 3 related to the connection to and from Lordswood, lighting and the assessment of the impact on known ecology interests. As set out in my appeal decision, I concluded that it was not demonstrated satisfactorily whether any bats which may be present would be adequately protected and the extent to which they may be affected by the proposed development.

12. Reason for refusal 3 refers to the lack of details supplied of an acceptable lighting scheme and not being able to fully understand and assess the impact on known ecology interests. In respect of whether sufficient information was provided on which the Council could make a decision, I note the Council did not raise any concerns in relation to the adequacy of the information contained within the submitted Environmental Statement (ES). However, it is also necessary in this case to have regard to Regulation 9(2) of the Conservation of Habitats and Species Regulations 2017 and whether sufficient information was provided to determine risk of disturbance to bats in line with this requirement and development plan policy, including Policy BNE39 of the Medway Local Plan.
13. The applicant refers to the Council being unreasonable in requiring that further survey work was carried out. The Kent County Council Ecological Advice Service (EAS) did not raise similar concerns in respect of a duplicate planning application 21/502751/OUT when they were consulted on that application in July 2021. The EAS also recommended conditions for the reserved matters stage for that application in respect of a bat sensitive lighting plan. Nevertheless, the Council's Ecology proof of evidence at paragraph 2.14 does refer to the assessment on the duplicate application being made before comments from the Council's lighting expert witness on the vertical illumination measurements provided by the Applicant, which would have higher lux levels than previously indicated.
14. An additional survey was undertaken by the Appellants in October 2021. The Appellants refers to the original survey recording bat movements along the byway although the Statement of Common Ground – Ecology produced at the Inquiry acknowledges there were not specific surveys of woodland through which the byway passes or the existing byway by the park to North Dane Way. The Council's references to the need for further survey work of bats using the byway based on the illuminance levels were adequately explained in the Inquiry.
15. In respect of the Council's evidence in relation to population level harm to any bat species, the Council's Ecology rebuttal proof of evidence provides detail on impacts on specific species. Potential impacts on the local bat populations were covered in examination at the Inquiry in some detail by both Ecology expert witnesses. I am satisfied that the Council produced evidence to demonstrate that it had a respectable basis for its reason for refusal and conclude it did not act unreasonably in relation to reason for refusal 3.
16. Reason for refusal 4 in relation to ancient woodland refers to the application being without details of an acceptable lighting scheme and a full tree survey and tree protection details. The Council withdrew this reason for refusal shortly before the exchange of evidence. The Council's Statement of Case dated August 2021 confirms that insufficient information was still a matter for concern. The Council's planning proof of evidence and ecology proof of evidence refer to the tree survey within the AMS as being inaccurate.
17. This is clarified in a note produced by the Council's independent arboricultural expert dated 20 September 2021 (CD12.7 Appendix 8). This includes details of a new tree survey undertaken by the Appellant on 16 September 2021, which provides more accurate dimensions of the Root Protection Areas and crown extents. This data was notably different when compared to the submitted AMS data table. The conclusions in the note provided by the Council's independent

aboricultural expert led to the Council withdrawing reason for refusal 4. The contents of this note were not challenged by the Appellant, and the Appellants' proof of evidence in respect of aboricultural matters (dated 20 September 2021) at paragraph 3.8 refers to the submitted Aboricultural Method Statement as not assessing the installation of the lighting columns and associated cabling.

18. The Council explained their reasoning for withdrawing reason for refusal 4 in the planning proof of evidence, and they withdrew it promptly on receipt of this information. The effect of the proposal on the ancient woodland was not a matter discussed in detail at the Inquiry. Taking all the above into account, including the timing of the re-survey of the trees, the Council did not behave unreasonably in this respect.
19. Considering the evidence overall, I conclude that unreasonable behaviour has not been demonstrated and it follows that unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been incurred.

L Gibbons

INSPECTOR