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## Costs Decision

Hearing Held on 14 September 2022

Site visit made on 14 September 2022

**by David Wyborn BSc(Hons) MPhil MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 11 October 2022**

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### **Costs application in relation to Appeal Ref: APP/C1625/W/22/3295851 The Berryfield Sports Field, Bristol Road Old, Stonehouse GL10 2BQ**

- 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 Wycliffe College and The Guinness Partnership for a partial award of costs against Stroud District Council.
  - The hearing was in connection with an appeal against the refusal planning permission for the erection of 52 dwellings with associated access, parking and landscaping, together with a new sports pavilion with associated facilities.
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### **Decision**

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

#### **The submissions for Wycliffe College and The Guinness Partnership**

2. The applicants seek a partial award of costs, on substantive grounds, in respect of unreasonable behaviour in relation to the third reason for refusal, concerning biodiversity. The applicants have highlighted that one of the key aims of the costs regime, as set out in the Planning Practice Guidance (PPG), is to encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, and not to add development costs through avoidable delay.
3. The applicants highlight that the Council's unreasonable behaviour go beyond the control of the costs regime. In particular, the Council's refusal without substantive justification has resulted in a delay of nearly one year in a period of major building cost inflation, worsening affordability and increasing affordable housing need.
4. In terms of the biodiversity issue, the applicants explain that this was the subject of pre-application discussions and liaison with the Council's Biodiversity Officer. This resulted in a recommendation to permit including because it was considered that the biodiversity issue was addressed and biodiversity gain would be delivered. The applicants believe that in reaching the decision to disagree with this conclusion Members of the Committee must have considered that the biodiversity gain was not sufficient. The Committee did not conclude that it was absent and the reason for refusal reflects this. In the applicants' view this introduces a vague assertion which lacks clarity.
5. At the point of submitting the planning appeal, it was unclear how the Council may respond and substantiate this issue, but it was expected at least the

Council would prepare an assessment of their own or, at the absolute least, reviewed and disputed the inputs into the applicants' own assessment. The applicants believe that neither have materialised.

6. The applicants refer to the Town and Country Planning (Development Management Procedure)(England) Order 2015 which sets out that when refusing applications for planning permission the notice must state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision. The applicants believe that with reason for refusal 3 that has not been the case.
7. The applicants refer to the PPG and the types of behaviour that may give rise to a substantive award of costs against the Local Planning Authority. Examples which have been highlighted include:
  - preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations
  - 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 planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded the suitable conditions would enable the proposed development to go ahead.
8. The applicants believe that in the light of the detailed assessment for the planning application and supporting information, and the subsequent decision of Members to depart from the advice of their officers, it was incumbent on the Council to prepare evidence to defend the vague and generalised assertions set out in the reason for refusal relating to both sufficiency of biodiversity gain and the extent of impact pertaining to the proposal.
9. The applicants believe that the statement submitted in respect of the appeal on behalf of the Council does neither. It is argued that the statement does not:
  - identify what sufficient biodiversity gain comprises;
  - dispute the survey effort undertaken by the applicants' consultants;
  - set out what mitigation is disputed;
  - contest the inclusion of conditions to address matters over and above those recommended in a statement of common ground; or
  - contest the use of Biodiversity Metric 2.0.
10. The applicants make the case that the ecology statement submitted on behalf of the Council draws no reference to planning policy or consideration of the policy set out in reason for refusal 3. The only offer of contesting matters assessed by the applicants is in respect of the description of the habitat within the redline boundary because of a dispute relating to the management regime of the area. The applicants believe that this is a matter which the Council's own evidence contradicts with the position taken within the statement prepared by the Council's planning consultant at the appeal.

11. The applicants consider that this misplaced assumption leads the ecology statement to conclude that, in summary, that there are lacklustre and insufficient descriptions which cast doubt on the baseline conditions and the biodiversity gain appears reliant on enhancement of grassland at the peripheries of the site where features, such as trees and underlying soil conditions are likely to inhibit success of establishment.
12. The applicants believe that this is an astonishing conclusion, in the absence of any primary assessment whatsoever and it results in a bizarre approach to presenting evidence. The applicants consider that in adopting this approach, notwithstanding the merits of the case dealt with in the applicants' comprehensive evidence submitted as part of the planning application in this appeal, it is hard to see how it could be concluded that it was not unreasonable behaviour.
13. The applicants believe that much greater weight should be placed on the advice and conclusion of the Council's Biodiversity Officer because they did visit the site, agreed that there would be a biodiversity net gain and that the impacts on biodiversity were acceptable.
14. The applicants make the point that it is not for the Local Planning Authority to critique the applicants evidence but to substantiate the reason for refusal. There is no evidence on sufficiency and what this means in this context against the policy tests, no alternative assessment on biodiversity net gain and the Council's ecology consultant did not seek access to the site.
15. To conclude, the applicants consider that in dealing with the third reason for refusal, which is vague and generalised, the appellant has occurred unnecessary expense as a result of the Council's unreasonable position and that a partial award of costs is justified.

### **The response by Stroud District Council**

16. In response, the Council have explained that planning permission was refused for three reasons and irrespective of the outcome of this partial award of costs application, delay was inevitable given the separate reasons for refusal. The Council comment that the applicants make commentary on the adequacy of debate and reasoning of Members at the Committee, but it is explained like any Member overturn of the recommendation there will inevitably be less written evidence at the point of a decision being made and that costs can only apply to matters post decision.
17. The Council believe that the Committee Members' concern on the inadequate biodiversity net gain has been fully substantiated through the exchange of evidence and at the hearing itself. The Council believe that it is demonstrated that the baseline position for the calculation of biodiversity net gain has altered. What was categorised as amenity grassland is now neutral grassland.
18. The Council believe that the applicants' calculations on biodiversity net gain need to be recalculated in the light of the changed baseline position. This was a point clearly made by the Council's ecology consultant at the exchange of evidence so the applicants have been aware of the position for some time.
19. Furthermore the Council set out its case that the Local Wildlife Site (Court View Ponds) would be harmed were the appeal to be allowed because of the loss of commuting space for Great Crested Newts (GCNs) and the areas for badger

foraging would be curtailed by the development and also by the fencing proposed around the pitches.

20. The Council comment on the criticism of it for not undertaking its own ecological assessment of the site and the point is made that it is the responsibility of the applicants to present their case and for the Council to consider this. The Council argued that through the evidence of its ecological consultant the inadequacy and failings of the applicants' evidence have been highlighted.
21. In terms of survey work the Council make the point that without a right of access to the site it was not possible to do more than critique the applicants' evidence. It is argued but this is no different to the way in which any council would consider the ecological implications of any development.
22. The Council argue that in these circumstances it has not been unreasonable in its approach, nor prevented or delayed development that should clearly have been permitted. It sets out a case that a number of conflicts with the development plan have been evidenced and the Council's objections could not be overcome by condition. It is the Council's position that the National Planning Policy Framework (the Framework) is clear that biodiversity net gain should be sought and based on the evidence this is not possible. Furthermore, detailed landscaping plans against which the applicants agree should be secured by condition will not deliver biodiversity net gain if the baseline survey is wrong.
23. The evidence of the Council's planning witness at his paragraph 3.15 has been misrepresented, and he does not accept that the land has been managed in recent times as amenity grassland.
24. In summary, the Council believe that none of the grounds for unreasonable behaviour as identified in the PPG and put forward by the applicants have been made out and the Council urge the Inspector to dismiss the claim for an award of costs.

## **Reasons**

25. The PPG 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.
26. The third reason for refusal, sets out, in summary, that the development would fail to provide sufficient biodiversity gain to offset the impacts of the proposed development in respect of existing habitat on the site and nearby ecological sensitive areas (Court View Ponds). This seems to me to conflate the issue of biodiversity net gain and the impact of the development on protected species and habitats.
27. As I have explained in the decision in respect of biodiversity enhancement, in summary, the approach of the relevant policies and the Framework is that there should be a net gain from a development to biodiversity. The policies do not specify a minimum percentage requirement for the net gain, simply it should be positive in terms of biodiversity.
28. The reason for refusal says that the development would fail to provide sufficient biodiversity gain. Using the word "sufficient" indicates, on a straight forward reading, that the Council consider that there would be a net gain in

biodiversity from the development but it would not be large enough. This is also how the applicants understood the wording and the implications of the reason for refusal. The use of the word “sufficient” is somewhat vague and imprecise in itself in this context. Furthermore, by using the word sufficient, the Council appears to accept that there would be a biodiversity net gain and on that basis it should have realised that this met the development plan and Framework policy tests in this respect.

29. In terms of the assessment of the site itself, the ecological consultant on behalf of the applicants had surveyed the site<sup>1</sup> prior to the submission and the grass within the appeal site area was mown and the survey indicates that it was low-cut, species poor sward typical of playing pitches. The biodiversity net gain was calculated on that basis with that part of the site as amenity grassland.
30. I have referenced in the decision that the commentary of the Council’s planning consultant in his evidence appears to support the baseline position of the applicant’s approach as it comments that the appellants have allowed the appeal site to become overgrown in recent months but aerial photography demonstrates that it has always been maintained, in common with the land to the east, in a manner akin to a playing field with a regular cutting regime to a short sward. The grass was also cut at the time of my visit, albeit with a finish that was not to a playing pitch standard, and the evidence I heard at the hearing was that this section of the Berryfield was cut more infrequently than the main pitches but about a couple of times a year of recent.
31. The section of the PPG that I have referenced in the appeal decision provides information on the approach to assessing biodiversity net gain and, in particular, the baseline for the assessment which was consistent with the applicants’ approach.
32. The Council’s ecological consultant viewed the grassland from the footpath when the grass was longer and identified a range of grass species indicating to him that the land should be classified as neutral grassland rather than amenity grassland. However, this assessment and the implications of the longer grass, at that time, did not appear to take fully into account the regular cutting regime to a short sward which had been noted by the planning consultant on behalf of the Council. This seems to have been a feature of its management and which the applicants’ consultant considered would suppress the opportunity for a wider species mix to be of value within the sward.
33. The applicants also make the point that the Council’s ecological consultant did not ask to enter the land and undertook the survey work of the grassland from the footpath and in terms of the land to the south including from aerial photographs. At the hearing it was explained that he had undertaken some calculations of net gain and depending on the inputs this ranged from a positive to a fairly substantial negative effect on biodiversity. However, there are no detailed calculations included within the statement from the Council’s ecological consultant and the statement mainly seeks to cast doubt regarding the detail and analysis of the applicant’s ecological consultant to calculating net gain based on the survey work.

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<sup>1</sup> For some species such as bats and badgers on several occasions.

34. I am also conscious that the applicants' ecological consultant had liaised with the Council's Biodiversity Officer, who had visited the site, and they had raised no issue in respect of biodiversity net gain.
35. Drawing these matters together on the issue of biodiversity net gain, I consider there are, in particular, weaknesses, because of the lack of an on-site visit at the appeal stage, in the way that the ecological survey information was collected by the Council to dispute the applicants' position, apparent inconsistency in fully understanding and acknowledging the sward management regime for the grassland and the related biodiversity implications, and vagueness and imprecision with the wording of the reason for refusal regarding the sufficiency of net gain and the effect of this in terms of compliance with the policy tests. When examined as a whole, fairly generalised assertions about the proposal's impact in respect of biodiversity net gain were made which were not satisfactorily supported by objective analysis. Consequently, I find that unreasonable behaviour has been demonstrated that led to the applicant to having deal with the issue of biodiversity net gain in the appeal process.
36. The other element of this reason for refusal refers to the impact of the proposed development on the existing habitat on the site and nearby ecological sensitive areas (Court View Ponds). In this regard, the statement from the Council's ecological consultant predominantly raises concerns with the effect of the development on badgers within the land to the south of the proposed housing and with the colony of GCNs at Court View Ponds.
37. The effect of the development would be to reduce the potential foraging area for badgers. This was clearly explained by the Council's ecological consultant and it is a matter of judgement whether this effect would be so harmful such as to be unacceptable. I appreciate that this had not been raised by the Council's Biodiversity Officer as an issue, but the consideration of a protected species that had been identified close to the site is clearly a planning consideration.
38. While I have come to the conclusion that the badger clan should not be materially affected, the evidence from the Council's ecological consultant was satisfactory to identify this as a valid ecological issue and to make an arguable case why the scheme could be harmful. In this respect this element of the reason for refusal was supported by evidence at the appeal stage which had merit and was not vague or imprecise.
39. The reason for refusal also raises the issue of the effect of the development on Court View Ponds. The evidence from the Council's ecological consultant, particularly at the hearing itself, raised concerns with the loss of an area of the buffer zone to this Local Wildlife Site which it was considered would degrade the commuting space and further isolate this colony.
40. The view of the Council's ecological consultant was that for these reasons the proposal would harm and certainly do little to conserve or enhance the biodiversity value of the Court View Ponds site itself, where the impacts were taking place. It was acknowledged that District Licensing would be an acceptable approach to protecting GCNs overall but the point was made that this did not necessarily protect the Court View Ponds colony itself. This position was adequately articulated at the hearing and was not without some merit. While I have come to the view that there would not be unacceptable harm in this respect, the evidence from the Council raised a matter of ecological judgement which was clear and precise, albeit limited in extent, and was

therefore adequate to make the case that there could be harm to the Court View Ponds Local Wildlife Site. This evidence supported this element of the reason for refusal and was reasonable.

41. In conclusion, the element of the reason for refusal which raised concerns with the impact on the effect of the development on the existing habitat and the Court View Ponds site was adequately evidenced by the Council at the appeal stage. This related to parts of the third reason for refusal and was not without some merit. This does not constitute unreasonable behaviour.
42. However, the element of the reason for refusal concerning a failure to provide sufficient biodiversity gain was, for the reasons I have explained above, not satisfactory to make an adequate case to defend this element of the reason for refusal. This constitutes unreasonable behaviour in the appeal process and this required the applicants having to address this matter in their appeal statements and at the hearing, when they should not otherwise have needed to do so. This led to unnecessary and wasted expense in the appeal process. A partial award of costs is merited in this respect.

### **Conclusion**

43. In the light of the above analysis, I have found that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated in respect of the need for the applicants to address issues concerning biodiversity net gain and that a partial award of costs is justified.

### **Costs Order**

44. 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 Stroud District Council shall pay to Wycliffe College and The Guinness Partnership, 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 biodiversity net gain issues in the third reason for refusal, such costs to be assessed in the Senior Courts Costs Office if not agreed.
45. The applicants are now invited to submit to Stroud 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