



Costs Decisions

Hearing Held on 5 July 2022

Site visit made on 14 July 2022

by Jonathon Parsons MSc BSc(Hons) DipTP Cert(Urb) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 October 2022

Appeal A: Costs application in relation to Appeal Ref:

APP/X0415/W/22/3297304

Land adjacent to Hampden Farm Barn, Greenlands Lane, Prestwood, Buckinghamshire HP16 9QX

- 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 and Mrs Kirby for a partial award of costs against Buckinghamshire Council (East Area - Chiltern)
 - The hearing was in connection with an appeal against the refusal of planning permission for "outline application with all matters reserved other than access for the erection of 10 dwellings including 4 affordable homes".
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Appeal B: Costs application in relation to Appeal Ref:

APP/X0415/W/22/3292251

Land adjacent to Hampden Farm Barn, Greenlands Lane, Prestwood, Buckinghamshire Hp16 9QX

- 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 and Mrs Kirby for a partial award of costs against Buckinghamshire Council (East Area - Chiltern).
 - The hearing was in connection with an appeal against the refusal of planning permission for "outline application with all matters reserved other than access for the erection of 12 dwellings including 5 affordable homes, and the conversion of the stables block to provide a further 1 dwelling."
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Decision

1. The applications for the award of costs in Appeals A and B are refused.

Procedural Matters

2. Each cost claim application has been considered on its merits but to avoid duplication, they have been dealt with together, unless otherwise indicated. For the sake of clarity, the cost documents have been summarised and any contents relating to the merits of the proposals excluded. Following the hearing, the applicant added to their original cost claim regarding landscape documents commented upon by the Council. A Council cost rebuttal and appellant's further comments were considered in relation to this.

The submissions for Mr and Mrs Kirby

3. Policies GB2 and LSQ1 of the Chiltern Local Plan (LP) (with Alterations and Consolidations 2001, 2007 and 2011) have not been found to be out of date.

Appeal decisions have found such policies to be inconsistent with the National Planning Policy Framework (the Framework) and the Council has failed to recognise the effect of that on the consideration of the cases. The now agreed Statement of Common Ground (SoCG) now establishes that these policies are out of date and the failure to have do so previously demonstrates a negative, unhelpful and unreasonable approach.

4. Throughout the determination process, the Council maintains that it considered that LP Policies GB2 and LSQ1 were not fully consistent with the Framework but that large parts of the policies were consistent. However, the fundamental reality does not reflect their position. In the Council's appeal statement, only LP Policy GB2 is accepted as being 'not entirely consistent'. Regardless, the policy references were included within the reason for refusal of both applications and no explanation or discussion was provided to explain the inconsistent nature of the policy within either officer report. It must therefore be assumed that, since the Council did not suggest otherwise at the time, the policy was given full weight.
5. The applicants have stressed the development plan being the starting point, with material considerations thereafter being taken into account. However, where the development plan is out of date, then the starting point shifts to the applicable policy which is given by the Framework in this context. Unfortunately, the Council's approach is to start and in effect end with the development plan, even where the policy relied upon is clearly not consistent with the Framework.
6. The Council suggestion that the weight to Green Belt harm should be very substantial weight is not consistent with the contents of the Framework because it indicates negative substantial weight. The applicants have relied on the very significant benefits which arise from the proposal as very special circumstances to justify permission being given, as indicated by previous decisions. In this regard, the simple reliance by the Council on out of date policy provisions and the failure to take into account the possibility of factors as amounting to very special circumstances is manifestly unreasonable.
7. No balancing exercise has been carried out and this amounts to an embargo on any potential development irrespective of the extent, nature and weight to be given to any favourable considerations that exist and are acknowledged to exist. The Council considers the harm to the Green Belt is sufficient reason to refuse an application proposal but that is not a balancing exercise and arises directly from the failure to have any regard to the fact the policy is out of date.
8. In Appeal B, the Council's reasons for refusal, relating to the conversion of the stables block, were not supported by evidence which is beyond argument now as the Council has withdrawn these reasons. The withdrawal was only communicated through the Council's appeal statement and cannot be justified from the presentation of a subsequent survey. The applicant's structural report from an expert has not been questioned by the presentation of any contrary view from a qualified person. As such, the planning requirement was met and there was no basis for presenting the associated reason for refusal. The subsequent criticism in respect of the structural report was not raised with the applicants prior to the refusal being issued which, if it had, would clearly have been capable of remedy.

9. The Council objected that the outline application could not be used as a vehicle to bring forward the stable conversion, but this was never raised with the applicants prior to the refusal reasons being issued. The Council validated and determined the conversion as an outline. It's appeal statement accepts that such a conclusion is wrong and that the outline application can therefore be used. If the Council had not misled itself in respect of the ability of the outline application to address the stables block conversion, greater attention would have been paid to remedying the issues with the original structural report. The applicants have had to submit two further applications with one related simply to the stables block. The Council's late concession of an error resulted in a wholly unnecessary additional application for which there was no justification with all the expense and effort required to do so.
10. The Council's consideration of the applications and its failure of the Council to raise matters with the applicants prior to the refusals being issued as well as the process related to the SoCG and legal agreement are examples of a failure to cooperate. An SoCG was uploaded onto the Council website and sent directly to the Inspectorate when clearly it was not agreed. During its preparation, the Council has provided an abject justification that it was unable to edit the draft.
11. For a considerable period of time, attempts have been made to prepare a legal obligation. Initially the applicants looked to the Council's website to see if a standard draft existed which was not the case, despite claims. The applicants had to use a version from a nearby authority as a template to deal with the affordable housing element and thereafter, the applicants sought the correct version from the Council. Although versions were sent to the applicants, they were not in the correct form. The process culminated in a communication on 30 June with an offer subject to payment that the Council would draft the document. That offer should not have been necessary as a pre-existing draft was meant to be in existence. The applicants were therefore forced to adopt a different course to supply the Inspector with the obligation.
12. Under the Framework, the Council must act in a positive way. It should seek solutions rather than looking for problems and it must work pro-actively with applicants to bring forward appropriate development. The Councils approach to this application has clearly failed to follow that required approach.
13. It has failed to consider the appropriate use of planning conditions in respect of ecological and drainage objections. A conditional approach to these outline applications provides the means to address all such matters, where the detail of the schemes is not yet certain. The Council had conceded drainage conditions could be applied, with the exception of current flooding activity. The flooding activity was based on purely anecdotal references and the Council failed to explain why it could not have been addressed through a drainage scheme.
14. In terms of Protected Species and biodiversity, it failed to explore the possibility of conditions to address the issues taking into account that final details of the schemes would not be known until the submission of reserved matters. The Council also refused to accept further updated ecological information during the determination of the application for Appeal B.
15. The officer's reports for Appeal A and B proposals differ in their conclusions as to whether the sites are in equestrian use. For Appeal B, the report concluded

that the site could not be considered as Previously Developed Land (PDL) and that the exception criterion at paragraph 149 (g) of the Framework cannot be applied for this site. The Council has fundamentally failed to apply the correct approach to the site. It has now acknowledged the sites to be in equestrian use and that equestrian uses can be considered as PDL.

16. Following the late presentation by the Council, in respect of the National Area Character Profile (NACP) and the Chilterns Historic Landscape Characterisation Project (CHLCP) 2009 documentation, an additional claim for costs has been made. The applicants indicate that these documents do not add anything further to the consideration of the case over and above those documents referred to in the agreed SoCG and give a misleading impression. Costs should be awarded in respect of the unnecessary work that had to be done in relation to those documents as a direct consequence of the late reliance on them by the Council and the work necessary to address them.

The response by Buckinghamshire Council (East Area -Chiltern)

17. The Council has referred to parts of LP Policies GB2 and LSQ1 as not fully consistent with the Framework but large parts of the policies are consistent. These include the overall objectives to resist inappropriate development in the Green Belt and to conserve and enhance the landscape and scenic beauty of the AONB respectively. In accordance with the Framework, it has been accepted that these policies cannot be attributed full weight, but they are not so inconsistent with the Framework as to be afforded no weight. Previous Inspectors have afforded them varying degrees of weight, depending on how consistent the relevant parts of the policies are with the specifics of the development proposed.
18. The Council identified policies not fully consistent with the Framework, afforded them the appropriate weight and gave full weight to the relevant parts of the Framework, as a material consideration. The Council determined the applications in accordance with the policies in the Framework, refused them, accordingly, specifying the relevant parts. The officer's report and appeal submissions have conducted a balancing exercise, taking benefits into account, and concluding that the harm outweighs the benefits.
19. For the proposed conversion of the stables block, these reasons for refusal were withdrawn on the receipt of further information from the applicants during the appeal process but the original refusals were perfectly sound. The Framework allows for, as an exception to inappropriate development in the Green Belt, the re-use of buildings provided amongst other matters, that the buildings are of permanent and substantial construction. A structural report is also required under Policy GB11 of the LP. Therefore, it is a fundamental part of this exception that a building must be shown as permanent and substantial through the submission of a satisfactory structural report.
20. Under Appeal B, the structural report had a number of specific failings in terms of whether its structure and foundations would be able to cope with the requirements of a residential use. It was only when a new, more detailed, structural report was submitted with the appeal that these concerns about these failings were addressed. None of this information had previously been submitted and the Council withdrew these concerns at the earliest opportunity as part of its appeal statement. In addition, regarding the ecology (bats) reason for refusal for the Appeal B scheme, insufficient survey work had been

- undertaken and this information was only submitted during the course of the appeal. These surveys would have been required anyway.
21. Connected to this issue is the matter of the outline application and the stables conversion. The applicants continue to insist that the conversion can be applied for in outline. Outline planning permission means a planning permission for the erection of a building. The applicants contend that, as the first planning application was validated, this means that it was a valid approach, but this is entirely incorrect, the Council can require further reserved matters details within a specified period. The Council did not do that, but it does not change the fact that outline planning permission cannot be granted for a change of use.
 22. The Council acknowledges that the initial draft SoCG was dealt with incorrectly, but this was quickly rectified. The SoCG was agreed within a week and the final version signed and submitted to the Inspectorate, well before the date of the hearing. Even if the sending of the initial version to Inspectorate in error constituted unreasonable behaviour, there has been no additional unnecessary or wasted expense because work on completing an acceptable SoCG would have been required in any case.
 23. It appears that that the applicants are expecting the Council to draw up a legal agreement for them because they do not want to pay a solicitor to do this work. The Council does not have a template agreement and, for all such legal matters, the Council's legal team will draft a document and it is expected that an undertaking for their costs is met by the applicants. This is not an unusual approach, particularly where physical affordable housing is being put forward which requires agreement on timescale for implementation, tenure split, management, etc.
 24. The Council wrote to the applicants' solicitor requesting an undertaking for costs and copies of the title documents. The applicants were not forthcoming and has refused to meet the Council's costs in this regard, or supply title documents. The applicants received communication from the Council on 20th June not 30th June. The applicants failed to respond to this correspondence regarding the legal agreement. It would be unreasonable for the Council to meet the applicants' costs for the legal undertakings.
 25. In terms of whether additional information should have been sought from the applicants during the course of the applications, the Council always seeks to be proactive and seek amendments, where solutions exist. It has provided a pre-application response. National advice sets out that early engagement at the pre-application stage has significant potential to improve the efficiency and effectiveness of the planning application system for all parties. In this case, the Council made it clear the development was fundamentally unacceptable. Despite this clear advice, the applicants pursued the proposals. Where the principle of a development is unacceptable, the Council will generally not accept amendments, as they would serve no purpose. If amendments would not make a development acceptable, requesting such changes during the course of an application is somewhat pointless for both parties, and indeed would entail additional costs for the applicants.
 26. In this case, with the planning applications for Appeals A and B, the applicants sought to provide additional flooding and ecology information, but at the same time, they realised their original scheme could not be accommodated on the

site without a significant change to the number of dwellings proposed. This is the reason why additional information was not accepted at that stage, as it would have significantly, and materially, altered the development applied for.

27. That said, even if the Council had acted unreasonably by not accepting certain information during the course of the applications, this has not directly caused the applicants to incur unnecessary or wasted expense in the appeal process. The Council maintains its objections to the schemes, and therefore, its actions would not have avoided the need for these appeals on ecological and drainage issues. Therefore, even if the additional information, had been submitted earlier, it would not have avoided the need for consideration of these issues at the appeal. The exception to that is the information relating to the stables conversion, which was only submitted by the applicants during the course of the appeal, whereupon the Council promptly withdrew its concerns.
28. To clarify, at no time has the Council agreed that this land is PDL. To be PDL, such land must meet the Framework definition and the equestrian land is not within the curtilage of a building. Although the Council agreed the site was in equestrian use, that is not the same as saying the site is PDL.
29. Based on the information submitted by the applicants to date, there are still concerns with regards to drainage and ecology that have not been overcome. In both areas, the Council considers that the harm could not necessarily be overcome/mitigated and so allowing the development, even subject to conditions, could lead to harm that it is not possible to overcome.

Reasons

30. The Planning Practice Guidance 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.
31. Both Appeals and B have been dismissed. Therefore, the Council has not 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. Although drainage is not a reason to dismiss these appeals, the Council has submitted evidence regarding flooding on the site which was not addressed by the submitted Flood Risk Assessment (FRA). They utilised evidence brought into the public domain by third parties, confirmed by the applicants, and questioned whether the drainage strategy would be able to cope given the absence of information on its origins and extent. Such an approach is not unreasonable.
32. With respect to the withdrawn reasons for refusal in Appeal B, the Council has comprehensively set out and reasoned its objections to the original structural report and a lack of acceptable bat survey. Further bat surveying work would be required in any case and the Council's withdrawal of reasons for refusal following the submission of further information on these matters is not unreasonable.
33. The Council's appeal statements, and officer reports set out Green Belt and Planning Balances where considerations in support are assessed. For example, this is undertaken at the end of the Council's appeal statements dealing with the Green Belt reason for refusal and conclusion. From my reading of its appeal statements, it has acknowledged LP Policies GB2 and LSQ1 are inconsistent with the Framework, with the latter through its statement that the proposals have not

been refused on the more stringent application of the policy. Under the conclusions on both statements, it also refers to evidence provided by the applicants on housing land supply and affordable housing. The Council's overall conclusions are mainly in accordance with mine and are not unreasonable.

34. The Council did not procedurally refuse the outline proposal for the conversion of stable block in Appeal B but the history of the proposals, including others not at appeal, would indicate that the appellants were aware of the issue. It also stands out as matter normally dealt with as a change of use or detailed application. Contrary to the appellant's statements, the Council did not accept that an outline proposal for the conversion can be made in its appeal statements because it indicated subject to information being submitted as part of the application to establish the principle of development. Ultimately, the main appeal decision confirmed that an outline planning application could not consider the stables block conversion.
35. In terms of the SoCG, there was an error made by the Council, but this was rectified within a reasonable period of time prior to the hearing and whilst the applicants had to enter into dialogue to get it corrected, the SoCG would have had to be amended anyway and consequently, there is no detailed evidence to indicate unnecessary expense of any substance. Pursuing the Council to aid preparation of the obligations for affordable housing has taken time but the applicants could have undertaken, as they did so eventually, unilateral undertaking preparation themselves for the appeals. Through their policy assessment, they would also have been aware of Council requirements.
36. The Council's position has been consistent that the sites are not PDL and accepting the sites as equestrian does not automatically equate to PDL. As the Council has done, consideration has to be given to the Framework's definition and appeal decisions. Although I have come to a different conclusion, it has substantiated its case on this issue with reasoning and evidence through an analysis of the sites and appeal decisions.
37. The applicants and Council's positions on the merits of the proposals vary markedly and therefore, there would be little or no benefit in the Council seeking to negotiate a positive solution on the proposals. The Council has clearly set out its position in its preapplication discussion and therefore, the Council has not failed in its duties to seek a satisfactory outcome. The Council referred to NACP and CHLCP documents which had not been commented upon before. However, such documents provide a commentary on the locality's characteristics and therefore, additional work and expense has not been justified as a result because such analysis should have been carried out in any case.
38. For all these reasons, I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated in both appeals.

Jonathon Parsons

INSPECTOR