
Costs Decisions

Site visit made on 5 September 2022

by Thomas Bristow BA MSc MRTPI AssocRICS

an Inspector appointed by the Secretary of State

Decision date: 1st November 2022

Costs application in relation to Appeal A, Ref: APP/L3815/W/21/3285978 Bethwines Farm, Blackboy Lane, Fishbourne PO18 8BL

- 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 Anne Stephens for a full award of costs against Hybrid Planning & Development.
 - The appeal was against the failure of Chichester District Council to give notice within the prescribed period of a decision in respect of application Ref 21/02553/FUL, dated 20 August 2021, for development described on the application form as 'change of use of land to provide facility for 'doggy day care', including the provision of 3 no. portakabins and perimeter fence.'
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Costs application in relation to Appeal B, Ref: APP/L3815/W/22/3297859 Bethwines Farm, Blackboy Lane, Fishbourne PO18 8BL

- 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 Anne Stephens for a full award of costs against Fishbourne Housing Limited.
 - The appeal was against the refusal of Chichester District Council to grant approval required under a development order in respect of application Ref 22/00575/PA3R, dated 1 March 2022, via notice dated 22 April 2022, for development described on the application form as 'change of use of 501 sqm of the existing agricultural building to storage use.'
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Costs application in relation to Appeal C, Ref: APP/L3815/W/22/3299202 Bethwines Farm, Blackboy Lane, Fishbourne PO18 8BL

- 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 Chichester District Council for a full award of costs against Fishbourne Housing Limited.
 - The appeal was against the failure of the Council to give notice within the prescribed period of a decision in respect of application Ref 22/00142/FUL, dated 19 January 2022, for a proposal described on the application form as 're-grading of existing agricultural land to create natural grass and wetlands to reduce nitrogen load at Chichester Harbour.'
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Decisions

1. Costs applications in respect of appeals A and B are refused. The application for an award of costs in respect of appeal C is, however, allowed within the terms set out below.

Appeal A

2. The Planning Practice Guidance ('PPG') explains how costs may be awarded against a party who has behaved unreasonably, and thereby directly caused another party to incur unnecessary expense at appeal.¹ Costs applications may relate to events, but not to expenses incurred, before an appeal was brought.²
3. The application for costs is on two principal grounds. One is procedural, the other substantive. First, Anne Stephens, the freehold owner of Bethwines Farm, states that the proposal was made without her knowledge or prior consultation (and that, more broadly, the appellant failed to engage with her either amicably or substantively). Secondly, she avers that there were multiple shortcomings in the scheme such that 'it is difficult to believe that a professional consultancy would realistically expect it to succeed'.
4. The PPG gives as examples of behaviours that may give rise to a procedural award against an appellant resisting providing information, delays in that respect, or a lack of co-operation with other parties.³ The PPG also gives as an example of a type of behaviour that may give rise to a substantive award of costs against an appellant where the appeal 'had no reasonable prospect of succeeding...'.⁴ In that context Anne Stephens argues that the proposal 'caused her to incur the unnecessary costs of opposing the application and the appeal.'
5. The appellant argues that, notwithstanding that a different company advanced the proposal compared with earlier schemes, 'all the correct notices etc. were served to the landowner'. In correspondence of 17 April 2022 Anne Stephens maintains that she never received notice of the application. Setting aside whatever occurred procedurally, however, it is clear that Anne Stephens has had the opportunity to comment at application and at appeal.
6. Similarly, regardless of the relationship, or lack thereof, between the appellant and landowner, positive discussion or collaboration is not required (though it may be a very good idea). Whilst I note the points made by Anne Stephens in respect of the first ground, they also principally relate to the planning application or to circumstances beforehand. Costs cannot be claimed for expenses incurred before an appeal was brought. Based on all the information before me there is nothing to indicate that closer co-operation between the appellant and Anne Stephens would have achieved anything in terms of obviating the appeal.
7. I accept, as set out in associated appeal decision A, that certain objections raised by the Council to the scheme proposed via application Ref. 21/02553/FUL could potentially have been dealt with via condition (were the scheme acceptable as a whole). However, in short, appeal A had no reasonable prospect of succeeding. I set out in the appeal decision how there was clear conflict with policy 45 of the Chichester Local Plan: Key Policies, 2014-2029 (adopted July 2015, the 'Local Plan'), with the information submitted falling far

¹ Reference ID: 16-028-20140306.

² PPG Reference ID: 16-032-20140306.

³ Reference ID: 16-052-20140306.

⁴ Reference ID: 16-053-20140306.

short of that which would have been required to justify the location of the proposal.

8. I also reasoned that the proposal, a dog day care facility in an agricultural field, paid no regard to its rural setting in terms of design or mitigation (and thus would conflict with the relevant provisions of Local Plan policies 45 and 48, policy E1 of the Fishbourne Neighbourhood Plan, made March 2016, and paragraph 174 of the National Planning Policy Framework, 'NPPF').
9. In respect of the living conditions of those nearby I further reasoned that the proposal failed to engage in any meaningful way with relevant provisions of the development plan or NPPF. Noise is not, for example, mentioned once in the appellant's statement of case, nor is there any form of acoustic assessment.
10. I reached a similar finding in respect of highways effects where, without substantiation, the appellant asserted that the proposal would 'not have an impact on the local highway network'. Appeal A was made on 1 November 2021. That is a mere three days after an 8 week period from 3 September 2021; the PPG recommends that 'before making any appeal the applicant should first consider re-engaging with the local planning authority...'.⁵
11. There are also statements made on behalf of the appellant which go beyond arguable points of judgement. In respect of appeal A, for example, the appellant describes the site as 'previously developed land'.⁶ That is manifestly not the case of part of an agricultural field. Given the multiple shortcomings in the scheme and its supporting justification, it stood no reasonable prospect of success. That represents unreasonable (substantive) behaviour.
12. However, parties in planning appeals normally meet their own expenses.⁷ I understand why Anne Stephens would have sought to ensure her perspective on the proposal was effectively represented. However the Council, responsible for decision-taking in their administrative area, similarly opposed the scheme for various reasons. Anne Stephens elected to put her views forward in a similar manner to a significant number of others. I have also reasoned that the proposal had no reasonable prospect of success.
13. Moreover the PPG is clear that awards of costs in favour of 'third parties', which include Anne Stephens, will only be made in 'exceptional circumstances'.⁸ It further sets out that 'an award will not be made in favour of, or against interested parties, where a finding of unreasonable behaviour by one of the principal parties relates to the merits of the appeal. However an award may be made in favour of, or against, an interested party on procedural grounds...'.⁸
14. Notwithstanding my finding of unreasonable behaviour, in that context I am guided not to make an award of costs as that behaviour does not relate to procedural matters (but is rather substantive, or related to the merits of the scheme). Logically that position in the PPG aligns with my reasoning in paragraph 12, essentially that the unreasonable behaviour of the appellant did

⁵ Reference ID: 16-011-20140306.

⁶ Correspondence from Hybrid Planning & Development, Ref. HPD/DSP/HF/21/111, 11 April 2022.

⁷ Reference ID: 16-028-20140306.

⁸ Reference ID: 16-056-20161210.

not, in and of itself, directly result in Anne Stephens incurring wasted expense at appeal.

Appeal B

15. Appeal B also related to Bethwines Farm, to a barn close to the agricultural field in respect of appeal A. Highways and noise effects were in dispute in both cases, and there are parallels also in terms of costs. Anne Stephens similarly argues that the appellant failed to engage with her in respect of the appeal B scheme, and that it was supported by inadequate information.
16. As above, positive engagement between applicant and landowner is not required. Anne Stephens has had the opportunity to make representations in much the same manner as anyone else, including at appeal. Her concerns relate chiefly to events before the appeal, in respect of which costs cannot be claimed. Therefore whilst I appreciated Anne Stephen's motivation for applying for costs, procedurally there is nothing to substantiate an award.
17. As in respect of appeal A there were manifest shortcomings with the appellant's evidence and plans. The floorspace of the barn, for example, is uncertain. The change of use of 501 square metres of floorspace was originally applied for, whereas the barn is not of that size, nor do the relevant provisions Town and Country Planning (General Permitted Development) (England) Order 2015 ('GPDO') as amended enable that amount of floorspace to change use.
18. Both in respect of highways and noise there was no substantive evidence before me in terms of existing conditions or as to the effect of the proposal. That information could legitimately be requested via relevant provisions of the GPDO, and prior approval refused in the absence thereof. The appellant's case was, moreover, largely founded on theoretical propositions rather than evidence. Similarly Appeal B stood no reasonable prospect of success.
19. Nonetheless, my reasoning in paragraphs 12 to 14 of these costs decisions applies here. Notwithstanding a finding of unreasonable substantive behaviour, an award of costs, in that context, is not justified.

Appeal C

20. Appeal C was for the use of five fields at Bethwines Farm amounting to 28.48ha as a nutrient offsetting site. That was with the aim of mitigating the adverse effects of effluent associated with new housing on ecologically sensitive sites nearby. Against that background, the Council argue that procedurally the appellant failed to engage appropriately with them, and substantively that the proposal had no realistic prospect of success.
21. It is legitimate, and reasonable in principal, to dispute where a local planning authority has not validated an application. Provision is made for that eventuality under article 12 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 as amended ('DMPO'). The appellant notified the Council in that context on 15 February 2022. I found that the details requested by the Council in that context, from which the validation dispute arose, were necessary and reasonable. However it does not follow that

- the lack of provision of such details amounted to unreasonable behaviour; that may be a legitimate matter of judgement.
22. I am told by the appellant that the next correspondence from the Council after notice was given was on 1 April 2022. That is, I accept, a fair time since the notification of 15 February 2022. I understand that there was a site meeting on 17 May 2022, at which the Council advised that 'given the complexities of the site and the proposal, further pre-application advice and engagement should be sought'. The appellant evidently disagreed, irrespective of whether that may be termed 'constructive discussions',⁹ and an appeal was made on 18 May 2022.
23. In this instance the procedural and substantive arguments overlap. A central area of dispute at appeal and beforehand was whether the scheme required planning permission, i.e. whether it amounted to development under section 55(1) of the Town and Country Planning Act 1990 as amended (the '1990 Act'). I reasoned in the associated appeal decision that the proposal would, in my view, amount to development.
24. Given the gulf between the main parties on that point, however, and the time elapsed with the application, it is understandable for the appellant to have appealed to achieve some form of resolution (notwithstanding that appeal C was not in relation to a certificate of lawful use). To be fair to both main parties nutrient neutrality may be characterised as an evolving area of planning.
25. However, substantively, was there a reasonable prospect of appeal C succeeding? The answer to that must be no. Notwithstanding the Council's position as to whether permission was required, the appellant consistently argued that the proposal to which appeal C related was development, and that Local Plan policy 48 applied.¹⁰
26. Local Plan policy 48 sets out how it should be demonstrated that development of poorer quality agricultural land has been 'fully considered' in preference to the use of best and most versatile agricultural land ('BMV'). As set out in the NPPF, BMV land is that which is given an agricultural land classification ('ALC') of 1, 2 and 3a.
27. It is therefore difficult to rationalise why the appellant provided no substantive information on the ALC of the site, regardless of whether that was expressly requested. The only statement on that matter, integral to determining whether or not the scheme would benefit from in-principle support from the statutory development plan, is in the appellant's statement of case, paragraph 5.2. That sets out that the site is ALC 3B, i.e. not BMV: 'indicating a moderate yield based on a narrow range of crops. The land is not considered to be the 'best and most versatile' land available within Chichester...'.
28. Firstly nutrient issues in this location are not confined to Chichester District Council's administrative area alone, and BMV is not judged with reference to a particular District (although the wording quoted above is ambiguous). Secondly, Natural England mapping indicates that the site, or parts thereof,

⁹ As referenced in paragraph 1.3.1 of the Planning Inspectorate's Procedural Guide to planning appeals in England.

¹⁰ Including at paragraph 1.3 of their appeal statement, and in response to the Council's application for costs in correspondence of 25 August 2022.

may be ALC grade 2, and therefore BMV.¹¹ Thirdly, there is no indication Natural England guidance in respect of assessing ALC was followed, noting that recommends a field survey in the absence of insufficient pre-existing data. Given the criticality of that point, I cannot agree with the appellant's argument that 'the appellant considers that an agricultural land classification report was not requested for validation, nor should it be required for a change of use.'¹²

29. Moreover, as explained in the associated appeal decision, the arguments advanced by the appellant in favour of appeal C were unsubstantiated in three respects (irrespective of whether the site was BMV or not in whole or part). Firstly, taking any land out of agricultural use may theoretically reduce nutrients entering the local ecosystem, rather than applying specifically to the scheme proposed. Secondly, there was no indication as to how the scheme would relate to others or to overall housing delivery pressures. Thirdly, although the scheme was supported by various studies, none substantiated that the site would naturally turn into grass or wetlands as was applied for.
30. In that context based on the inadequacies of the supporting evidence the proposal had no reasonable prospect of succeeding. There would have been clear conflict with relevant provisions of the development plan, and no other material considerations were presented with anything approaching adequate justification to outweigh that harm.
31. For the above reasons, in respect of appeal C unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated. A full award of costs is therefore justified. Whilst the Council has not precisely enumerated the costs that they have incurred at appeal, the PPG specifies that may include the time spent preparing for an appeal, and clearly some time has been expended in that regard.¹³

Costs Order

32. 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 Fishbourne Housing Limited shall pay to Chichester District Council the costs of the appeal proceedings described in the heading of this decision related to appeal C (Ref: APP/L3815/W/22/3299202); such costs to be assessed in the Senior Courts Costs Office if not agreed. Chichester District Council are now invited to submit to Fishbourne Housing Limited, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Thomas Bristow

INSPECTOR

¹¹ Council statement of case, paragraph 4.12.

¹² With regard to the provisions of section 62(3) and 62(4A) of the Town and Country Planning Act 1990.

¹³ Reference ID: 16-032-20140306.