



Costs Decision

Site visit made on 22 September 2022

by C Jack BSc(Hons) MA MA(TP) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 November 2022

Costs application in relation to Appeal Ref: APP/J0405/W/22/3297056

121 Wendover Road, Stoke Mandeville, Aylesbury HP22 5TD

- 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 Ground Construction Limited for a full award of costs against Buckinghamshire Council.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for the development proposed is demolition of the existing dwelling on site, and the erection of nine dwellings, associated access and landscaping.
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Decision

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

Reasons

2. Parties in planning appeals are normally expected to meet their own expenses. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party that has behaved unreasonably and thereby directly caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. Further, it states that costs can only be awarded in relation to unnecessary or wasted expense in the appeal, albeit behaviour and actions at the time of the planning application can be taken into account.
3. The application for costs essentially relied on behaviour by the Council in processing and failing to determine the planning application. In particular, the applicant cited two examples of unreasonable behaviour by local planning authorities, as set out in the PPG: that the Council behaved unreasonably in failing to produce evidence to substantiate each reason for refusal on appeal; and in refusing planning permission on a planning ground capable of being dealt with by condition(s).
4. In summary, this alleged unreasonable behaviour included failing to raise the potential reasons for refusal with the applicant and denying opportunity to overcome those reasons through amendments to the proposal; delays meaning a new local plan was adopted during consideration of the application; failure to advise of Natural England's advice in a timely manner; failure to afford opportunity to prepare a Unilateral Undertaking at an earlier stage; raising issues in the appeal not previously outlined; and failure to take account of more recent engagement in relation to drainage.

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5. The application was submitted to the Council in March 2021 and the appeal against non-determination was lodged in April 2022. In taking over a year to consider the planning application, yet still failing to determine it, the Council clearly provided an unsatisfactory service to the applicant. The Council has given reasons for the delays in processing the application and failure to determine within the statutory timescale, including increased numbers of planning applications, the impacts of the Covid19 pandemic, and high staff vacancies. While this is all regrettable, the Council advises that the appellant was made aware of the situation and agreed an Extension of Time to 18 October 2021.
 6. While the Council still failed to determine the application, and it is not clear whether any explanation was given or further extension was sought at that time, it would have been open to the applicant to lodge an appeal when the Council had not decided after 8 weeks had elapsed. After the agreed extension of time also elapsed the applicant still did not use the appeal route as the prescribed remedy for the Council's failure to determine the application. Later, the applicant offered another extension of time to the end of March 2022, but it is not clear whether this was put in place given the Council's unwillingness to negotiate amendments.
 7. Despite resource pressures, after months had elapsed, the Council should have been more helpful in explaining its concerns about the application in a timely way, which would have enabled the applicant to consider their options in an informed way. I note the applicant had been advised by email of the Council's published policies on accepting amended plans during consideration of a planning application, which its website states are limited to "very minor amendments", albeit this may not have been in place in October 2021 at the end of the Extension of Time.
 8. Indeed, other limited communications from the Council and extracts taken by the applicant from the Council's website appear to indicate that it was still taking a flexible approach to enable negotiations on changes to schemes 'where possible'. It is easy to see how the applicant would have felt misled and frustrated by apparent mixed messages and lack of meaningful communication by the Council. In this regard, the Council's behaviour tipped beyond unsatisfactory to unreasonable, particularly given the number of times the applicant reasonably requested updates and advice to no significant avail.
 9. However, the Council maintains that its concerns with the application could not have been addressed by very minor amendments. In dismissing the appeal on various grounds, I accept that this would have been the case. Nevertheless, it was highly unsatisfactory to leave the applicant without clear reasons for refusal for so long – albeit the option to appeal remained open to them.
 10. I note that the Council adopted the Vale of Aylesbury Local Plan (VALP) in September 2021 and that it included policy requirements relevant to the proposed development that were not part of the previous development plan, notably in relation to the requirements for affordable housing. Local Plans are not adopted out of the blue. The applicant, or their representatives, would have been aware that a new plan was being prepared and that it would have been undergoing examination in public, at a relatively advanced stage, at the time the application was submitted to the Council. Indeed, the Council advises

that it was giving weight to emerging VALP policies as a material consideration for decision-making purposes at the time.

11. The failure to determine the application within 8 weeks was highly unsatisfactory, but it seems to me the applicant would have agreed the Extension of Time to 18 October 2021 in the knowledge the VALP examination was at an advanced stage and therefore adoption may be imminent. Indeed, adoption took place during the Extension of Time. Planning decisions must be taken in accordance with the development plan in force at the time of the decision unless material considerations indicate otherwise. Given the appeal was lodged in April 2022, it was not unreasonable of the Council to raise matters arising from the VALP in its appeal statement, including in the putative reasons for refusal. Notwithstanding that, it should have provided more effective communications with the applicant at an earlier stage about the likely concerns, including in light of then emerging / recently adopted policies, and whether an amended scheme would be considered.
12. For similar reasons, I am not persuaded that the applicant, or their representatives, were not afforded opportunity to prepare a Section 106 agreement or undertaking early enough. Given the Extension of Time and the lengthy delays in progressing a decision on the application, and the advanced stage of the VALP, there was ample opportunity to draft planning obligations. Moreover, this could have been done ready to submit with the appeal but a signed Unilateral Undertaking was not provided to the Planning Inspectorate until September 2022.
13. In my appeal decision, I did not agree with the Council on all reasons for refusal. Nevertheless, it did substantiate its position for each one in its statement of case. While this does not justify failing to determine the application in reasonable time it does not amount to unreasonable behaviour in the terms of the PPG. The Council's unreasonableness in failing to communicate its key concerns with the scheme to the applicant in a more-timely way has also therefore not directly resulted in unnecessary or wasted expense in the appeal, other than regarding net gains in biodiversity. Given the Council's statement advises that this matter could be addressed by conditions, and the applicant is willing to accept such conditions, this matter could potentially and reasonably have been resolved at the application stage.
14. Therefore, by pursuing its putative reason for refusal 8, the Council was unreasonable in the terms of the PPG relating to refusing planning permission on a planning ground capable of being dealt with by condition(s). The applicant therefore had some unnecessary expense in dealing with this matter in the appeal. While I also found that surface water drainage could have been dealt with by condition, had I allowed the appeal, the circumstances for this issue were different, with the evidence having evolved significantly after the Council's jurisdiction over the application had ceased with additional information being submitted to the appeal.
15. Despite the highly unsatisfactory length of delay and shortcomings in communication by the Council, an initial Extension of Time was agreed, and the applicant's statutory right to appeal – as the principal recourse for such delays and failure to determine – was not exercised when it could have been in the circumstances. Given the nature of the planning issues involved, and my findings on the appeal, I am not persuaded that the appeal could have been

entirely avoided. However, a more helpful approach may have resulted in the issues to be considered being narrowed. While there has been unreasonable behaviour by the Council, it has not been demonstrated that this directly resulted in unnecessary or wasted expense in the appeal, other than in relation to the applicant's response in the appeal relating to net gains in biodiversity.

16. In all the circumstances described, I am satisfied that a partial award of costs is justified.

Costs Order

17. 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 Buckinghamshire Council shall pay to Ground Construction Limited the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in responding to Reason 8 of the Council's reasons for refusal as set out in its appeal Statement of Case only, and such costs shall be assessed in the Senior Courts Costs Office if not agreed.
18. The applicant is now invited to submit to Buckinghamshire Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

C Jack

INSPECTOR