The Planning Inspectorate

Costs Decisions

Inquiry opened on 18 October 2022

Site visit made on 2 November 2022

by Paul Jackson B Arch (Hons) RIBA

an Inspector appointed by the Secretary of State

Decision date: 5 December 2022

Costs application A in relation to Appeal Ref: APP/M1005/W/22/3299953
Land north west of Hall Farm, Church Street, Alfreton DE55 7AH

- 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 Amber Valley Borough Council for a full award of costs against KS SPV 61 Ltd and Kronos Solar Projects GmbH.
- The inquiry was in connection with an appeal against the refusal of planning permission for a photovoltaic solar park and associated infrastructure

Costs application B in relation to Appeal Ref: APP/M1005/W/22/3299953
Land north west of Hall Farm, Church Street, Alfreton DE55 7AH

- 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 Save Alfreton Countryside for a partial award of costs against KS SPV 61 Ltd and Kronos Solar Projects GmbH.
- The inquiry was in connection with an appeal against the refusal of planning permission for a photovoltaic solar park and associated infrastructure.

Preliminary notes

1. The applications were made in writing and responded to in writing.

Costs Application A

Decision

2. The application for an award of costs is refused.

The submissions for Amber Valley Borough Council

3. The application for a full award of costs is on the basis of unreasonable behaviour by the appellant in pursuing an appeal where the development is clearly not in accordance with the development plan and other material considerations relied upon are manifestly inadequate to justify the scale or location of the development sought. The appellant unreasonably prioritised grid connection and the maximisation of development within the legal limits of the Town and Country Planning Act 1990 (49.9 MW (DC)) at the expense of adequate advance consideration of the potential impacts of the development.

4. The appellant missed impacts on Wingfield Manor and seriously downplayed the impacts on Alfreton Park and the settings of Alfreton Hall and the Church of St. Martin. The LVIA was clearly defective and contrary to guidance in a number of respects, in particular on account of the lack of any visualisations of what the

development would actually look like. It appears that the appellant in fact procured at least three TGN 06/19-compliant sets of photomontage visualisations as early as September 2020 (although a greater number were apparently requested) but failed to provide these to their landscape consultant – and failed to refer to these in its evidence before the inquiry. Those images (that were updated by the appellant on the Friday before day 1 of the inquiry) show greater impacts than recognised in the LVIA. It was at best unjustifiably sloppy of the appellant to withhold them from its own landscape consultant). This was rightly recognised as a "shortcoming" by Mr Bohne for the appellant in cross-examination. It meant that evidence showing the true extent of the impacts was left out of consideration at the application stage and only appeared late in the appellant's case at the appeal stage.

5. Despite the obvious unsuitability of the site in landscape and heritage terms, the appellant unreasonably did not revisit or reconsider the proposal, either in terms of its scale or location. It was suggested that the appeal site is the only location on which renewable energy benefits of the scheme may be delivered, but no evidence was provided to support that contention. No viability evidence was provided.

6. The layout plan is in a basic form, apparently following an approach (or "philosophy") used by the appellant in other cases. So, for example, it was clarified that the panels will be 2 metres apart, regardless of gradient or aspect. The schematic form is consistent with a lack of proper care or thought as to how the development can be made most efficiently to work in its landscape context.

7. With particular regard to noise, the appellant unreasonably failed properly to explain or assess what it actually proposed (central inverters – as opposed to string inverters) in its submission to the Council of 28 April 2021. Whether or not that was advertent, it was misleading.

8. For these reasons, the Council submits that this is an appeal that should simply not have been pursued. It was unreasonable in planning terms for it to do so and it has put the Council to substantial expense in having to respond to the appeal and to organise the planning inquiry to ensure that it is heard. The aim of the costs regime is that parties provide "all the required evidence", that they "behave in a reasonable way and follow good practice" and "the presentation of full and detailed evidence to support their case". The appellant simply failed in these regards.

The response by KS SPV 61 Ltd and Kronos Solar Projects GmbH

9. The 8 aspects of the evidence set out above and the Council's assertions about them do not come remotely close to being 'unreasonable behaviour' and are simply a re-run of the Council's case. It is frankly absurd to suggest that in the case of this renewable energy scheme, where the significant public benefits of which are supported UK wide as well as on a local basis and which were accepted by the Council, that these considerations are somehow 'manifestly inadequate' as sufficient consideration to outweigh the harm identified by the Council.

10. The grid connection is fundamental to the prospects of and indeed location of all solar PV schemes. The appellant followed consultants' advice but as with any large development schemes there are always checks and balances and

constraints. The Pegasus photomontages were carried out and provided to the Council. The landscape consultant did not need them to carry out his professional assessment and they do not show greater impacts than recognised in the LVIA. It is not clear why this is unreasonable conduct and how it led to unnecessary expense. The assertion that the site is obviously unsuitable in landscape and heritage terms is contested and it is not clear why this could be unreasonable conduct and how it led to unnecessary expense. The appellant is not required to show that the appeal site is "the only location on which renewable energy benefits of the scheme may be delivered" as suggested by the Council, nor is it required to demonstrate viability. The Council complains about the layout plan but it does not explain why it is not good evidence of the approach required in these circumstances. It is clearly important for it to be correct and to show where the 'hard lines' are as well as to assess on a worst case scenario. There is nothing unreasonable at all about such an approach. Finally, the noise evidence provided by the appellant was to deal with the Rule 6 party issues. The Council asked Ms Miller about potential impacts on users of the footpath. Ms Miller reminded the Council that it can impose a condition (like the one it suggested should be imposed at the application stage) which allows for further noise mitigation measures to be provided if necessary to the transformer/inverter boxes. It is almost as if the Council 'conveniently' forgets its powers and the assessment that its own officer gave to the question of noise. There is no unreasonable behaviour in any event.

Reasons

11. Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only 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. The PPG says that appellants are at risk of an award of costs against them if the appeal or ground of appeal had no reasonable prospect of succeeding. This may occur when the development is clearly not in accordance with the development plan, and no other material considerations such as national planning policy are advanced that indicate the decision should have been made otherwise, or where other material considerations are advanced, there is inadequate supporting evidence.

12. The availability of a suitable grid connection for a solar project is clearly a major, indeed a well known consideration before further detail design work is carried out and the evidence by Mr Bohne bears this out. The proximity of a major substation nearby was a factor in siting the Meadow Lane scheme and that at Delves farm (now withdrawn). No unreasonable behaviour can be attributed here.

13. The heritage impacts are a matter of judgement and I have found in favour of the Council's arguments in some respects and agree with the appellant's point of view on others. The LVIA was comprehensive and whilst more detailed photomontages were later provided, they did not add a great deal that would not have been obvious from the other plans provided and at the site visit. The Derbyshire County Council landscape architect advised that the LVIA 'has been prepared in accordance with the appropriate guidelines and does adequately reflect the landscape context within which the development would take place and should be considered'. That there was disagreement about the sensitivity of the landscape and the significance of effect was not unexpected and was fully explored at the Inquiry. The Council were in no doubt about the true

extent of the impacts when they decided to refuse planning permission. No unreasonable behaviour can be attributed here.

14. That the appellant considered the benefits of the proposal to outweigh the disadvantages is not unreasonable in itself and that view was sincerely held. It has not been shown how that position justifies an award of costs when an element of judgement is necessary.

15. The appellant is under no obligation to demonstrate that the chosen location where the benefits may be delivered is the best one, nor to show that one site may be more viable than another. It is not unreasonable, in fact it is in principle desirable, to seek to maximise output in terms of MW by retaining the ability to select a different solar panel manufacturer, inverter manufacturer or adjusting the layout up to the date of installation. The important point was that the worst case solution was put before the Inquiry in terms of panel density. I do not consider the lack of precise detail in the layout of panels, whilst perplexing, to represent unreasonable behaviour. Whilst it was difficult to assess the exact relationship between fencing and hedges, for instance, due to the diagrammatic approach adopted, the basic arrangement in each field was clear to see. A more detailed and thoughtful layout was produced during the Inquiry at the Inspector's request. This was helpful in clarifying the appellant's intentions but did not make the lack of further detail in the original layout unreasonable in terms of considering a costs award. The Council could have requested this additional information at the application stage if it was in any doubt.

16. As noted above in respect of panels, the final choice of inverter is left to commercial considerations at the appropriate time. Having received numerous detailed objections on noise grounds, the Council's Environment Unit had no complaint about noise impact and suggested suitable conditions. The Council does not claim costs on these grounds. The more general point that it is symptomatic of a sloppy approach to all the items in contention is not borne out. It is the purpose of the planning Inquiry to draw out points of difference.

Conclusion

17. I conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG has not been demonstrated. For the above reasons, the application fails.

Costs application B

Decision

18. The application for a partial award of costs is allowed in the terms set out below.

The submissions for Save Alfreton Countryside

19. Approximately ten minutes before the Appellant called its noise witness, Jo Miller, to give evidence on Friday 21st October 2022, it served upon the Rule 6 Party (SAC) evidence which the latter had called for as early as its Statement of Case in July 2022. Specifically, the appellant provided an addendum noise note from Ms Miller which, for the very first time, provided data on the

frequency of the likely noise output from the inverter/transformers to be used on the appeal site and an analysis of their possible effects on receptors at Alfreton Park Community Special School. This was highly technical information requiring a degree of expertise to understand, analyse and interpret. KS must have known that SAC did not itself have that expertise and, moreover, that it would be unlikely to have the resources to engage a noise or acoustic expert to sit behind counsel and provide input on the hoof at the Inquiry. To that extent, SAC was put to an instant disadvantage in cross-examination. The appellant therefore put SAC in the invidious position of having to deal in cross-examination and on the spur of the moment with technical information presented as late as it possibly could have been.

20. SAC did seek the assistance of an acoustic expert, Mr Graham Parry, to help understand and interpret its contents as well as to provide guidance on any shortcomings. This he did, which included criticism of the failure of Ms Miller's evidence to provide any frequency data or analysis of perceptible levels of noise depending upon the frequency emitted. In fact, SAC were alive to that shortcoming in any event and the point was made in Ms O'Donnell's proof of evidence that the original noise assessment did not address frequency variables. The same remained true when Ms Miller's evidence was received.

21. It is striking that, given noise was expressly canvassed as a key concern in SAC's Statement of Case, the appellant did not engage Ms Miller until extremely late on in the process, on her evidence in or around mid-August 2022, and the noise assessment was ultimately produced on 26 September 2022, only one week before proofs of evidence were due to be exchanged.

22. Indeed (assuming the appellant read the Planning Officer's Report as Ms Miller did), a specific point was made in the objections to the original application concerning pure tone noise and that particular frequencies have adverse effects on the School's children. The appellant knew, or ought to have known, that this data was central to addressing SAC's concerns as to noise. It is unfathomable, against that background, that the appellant failed to produce any frequency data or analysis at all until the day arrived for it to call its noise witness. That was, on any view, an ambush.

23. It was only by chance that Ms Miller had provided Mr Parry with details of her proposed addendum note earlier in the week (as a professional courtesy) and that he had sent a copy in draft to SAC on the morning of the opening of the Inquiry. He was under no obligation to do so. It is accepted therefore that SAC knew something was coming. That said, it was a rough draft and the frequency data provided therein was different from that ultimately provided in the final addendum. Further, Appendix C was entirely new.

24. As was made clear in cross-examination, no criticism is made of Ms Miller for this. She could only provide the data at the point it was provided to her and she made the point that it takes time to obtain this information from manufacturers. That may be right, but the lateness of the disclosure can only be explained by a failure by KS to ask for this information in a timely fashion in the first place.

25. Had it done so at the point the issue was first raised, either upon the original objections or following receipt of SAC's statement of case, or even by the time it received SAC's proofs of evidence, it is inconceivable that such information would have been disclosed so late. Its failure to produce this evidence until the

moment came for noise to be addressed in evidence at the Inquiry was, plainly, unreasonable behaviour. That behaviour has resulted in SAC going to the additional and unnecessary expense of re-engaging Mr Parry and incurring his further fees to review the addendum noise note and, specifically, the frequency data belatedly provided on 21 October 2022 (itself amended). It would not have been necessary to seek his further assistance had this information been provided at the appropriate time viz. upon exchange of proofs of evidence. For those reasons, SAC seeks its additional costs of consulting with Mr Parry in the sum of £342 inclusive of VAT.

26. While SAC does not comment on the substantive merits of the Council's claim for a full award of costs, if the Inspector makes such a finding, it must follow that SAC has also been put to substantial and needless expenditure in having to respond to the appeal. In such circumstances, SAC also requests a full award of costs for the reasons advanced by the Council.

The response by KS SPV 61 Ltd and Kronos Solar Projects GmbH

27. The application is on the basis that SAC states it needed to consult with its own noise expert. This is despite the fact that Ms Miller, the appellant's noise expert, had quite rightly consulted with and provided information to Mr Parry the SAC noise expert and who never appeared or provided any further evidence to the inquiry. Ms Miller's understanding and that of the appellant was that there was no issue with her evidence, at least from Mr Parry the actual noise expert. Mr Parry of course, beyond the initial critique attached to the SAC Statement of Case which suggested a fuller noise assessment should be provided at this stage, did not provide any evidence and in particular did not provide any evidence which contradicted or challenged Ms Miller's evidence.

28. Ms Miller was in communication with Mr Parry and the SAC was not. To that end, despite the fact that Ms Miller had provided a draft of the Addendum note to Mr Parry (which contained the same information albeit in a rough draft) Mr Parry had not apparently discussed this with SAC or its representatives. That is not the fault of the appellant nor is there any good reason for it to have assumed that any party who seeks to rely upon expert evidence is only going to do so in part and/or that the appellant should not expect if it provides a response to that expert evidence, that the expert will not address that response.

29. Ms Miller had confirmed with Mr Parry not only that her assessment was appropriate and agreed but also, with regard to the frequency data in particular, Mr Parry had accepted there was little data available. What she was able to find to base her assessment on was subsequently not understood to have been questioned or challenged, following her provision of the rough draft to Mr Parry. Mr Parry did not at any point suggest that there was any missing information from the noise assessment. It was also in fact Ms Miller who raised the issue that frequency data had not been addressed and she was trying to obtain such data.

30. It was therefore a surprise to Ms Miller (and the appellant) that her evidence was challenged in cross examination in the way that it was. This appears from the questions however not to have been based upon Mr Parry's advice as a noise expert but on assumptions made by the members of the R6 party based upon research and experience of children with the sorts of issues reflected by

the pupils at Alfreton School. The suggestions put forward in cross examination were counter in fact to human physical biology (as explained by Ms Miller).

31. The appellant did not object to this line of questioning despite the fact that the SAC did not call any expert noise evidence or indeed any person with specific expertise in respect of the issues raised by them. The inquiry did hear from the teachers and family members. The appellant was clearly aware of the fears and concerns of the members of the SAC and indeed other interested or third parties and it is important that those concerns were expressed however these concerns were not based upon expert evidence. Ms Miller provided unchallenged evidence that the predictions showed that the noise emitted by the scheme would be below the level of audibility and below the existing background noise.

32. This is not to detract from the understanding that when those with a sensitive auditory condition such as autistic children or adults actually hear a noise they may react to it differently to others who are less sensitive but the point is that they must hear it first. The submissions of SAC are unfortunately not based upon that fundamental understanding. It is of course acknowledged that there is much more to understand about the human condition and those who are sensitive to noise let alone those who have autism, but in the absence of any actual expert evidence which contradicted Ms Miller's it is not clear how the SAC can reasonably complain about the evidence that the appellant put forward. It would have been wrong if Ms Miller had not consulted Mr Parry and indeed sent her draft assessment that led to the Addendum.

33. That hardly paints the picture that the appellant has acted unreasonably. To the contrary the appellant recognised the fear and concerns expressed and sought to address those fears and concerns by providing clear and comprehensive expert noise evidence. That the SAC was expected to deal with that even if it had decided not to properly engage its original expert further is clearly a reasonable approach for the appellant to have taken. It cannot have simply been the SAC's position that evidence put forward (especially expert evidence) would go unchallenged or unaddressed. The SAC cannot complain that the appellant was supposed to assume that the SAC had decided not to engage its expert further or be in communication with that expert.

34. This of course provides a clear context to the SAC’s overall stance which was in effect to object first and to try to find a way to support that position later whatever the evidence showed.

Reasons

35. PPG advises that, irrespective of the outcome of the appeal, costs may only 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. The PPG says appellants are at risk of a procedural award of costs against them if, for example, they delay in providing information or other failure to adhere to deadlines; only supply relevant information at appeal when it was requested but not provided at application stage; or they introduce fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.

36. The appellant’s noise witness Ms Miller provided a comprehensive proof of evidence addressing the SAC’s main points of concern including significant

mitigation measures which would have been necessary to discharge a noise condition. The proof also specifically addressed noise at Alfreton Park Community Special School with reference to Building Bulletin 93- Acoustic Design of Schools: Performance Standards (BB93) which includes guidance and acoustic criteria for children with special hearing or communication needs.

37. The note submitted to the Inquiry on Friday 21 October[1] addresses the issue of spectral noise from inverters/transformers which the appellant indicated would be suitable for the appeal development and the impact of noise from these sources on the school and Ufton Fields farm. It also summarises action taken to address Graham Parry's assessment for SAC of 29 November 2021 and summarises discussions with Mr Parry on tonal matters, one of the main points of contention. Appendix B suggests that all the predicted 1/3 octave band levels are very low, well below the background level and barely audible. All this information was intended to be helpful, but important parts were new. Given the clearly stated position of SAC in their statement of case and the written evidence of the headteacher and Mr Glasby, SAC would have wanted to obtain further specialist advice in response to this note and the appellant would have known that they would have been placed at a disadvantage receiving this additional information at such a late stage.

38. It is suggested that Mr Parry had sight of the draft note a day earlier but did not contact SAC, but the timings are unclear. The difficulties assessing the impact of noise and specifically tonal noise on children with special needs were well aired by witnesses well in advance of the Inquiry. Notwithstanding the uncertainties surrounding the actual level of harm caused, the appellant could not have been unaware that this was a central issue for the SAC which Ms Miller was there to address. Providing the addendum so late placed the SAC at a disadvantage. It cannot have come as a surprise that Ms Miller was directly addressed on this point in cross-examination. Whilst prepared with every good intention, it amounted to fresh and substantial evidence at a late stage necessitating extra expense, which is unreasonable behaviour.

Conclusion and costs order

39. I conclude that unreasonable behaviour resulting in unnecessary expense, as described in the PPG has been demonstrated.

40. 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 KS SPV 61 Ltd (Kronos Solar Projects GmbH) should pay to Save Alfreton Countryside the costs of the appeal proceedings described in the heading of this decision related to dealing with the Additional Noise Data addendum (ID11) with their consultant Mr Parry; in the amount of £342 including VAT.

41. The applicant is invited to submit to KS SPV 61 Ltd (Kronos Solar Projects GmbH) to whom a copy of this decision has been sent, details of those costs.

Paul Jackson

INSPECTOR

[1] Inquiry Document 11