

Costs Decision

Inquiry Held on 22-24 November 2022 and 5-8 December 2022

Site visit made on 5 December 2022

by Stephen Normington BSc DipTP MRICS MRTPI FIQ FIHE

an Inspector appointed by the Secretary of State

Decision date: 21 February 2023

**Costs application in relation to Appeal Ref: APP/Y3940/W/22/3302008
Northacre Energy from Waste Facility, Stephenson Road, Northacre
Trading Estate, Westbury, Wiltshire BA13 4WD**

- 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 Northacre Renewable Energy Limited for a full award of costs against Wiltshire Council.
 - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for an amended energy from waste facility to that consented under planning permission 18/09473/WCM.
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Decision

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

Procedural matters

2. The Inquiry was in respect of an appeal against the failure of the Council to give notice within the prescribed period of a decision on the application described in the banner heading above. On 27 July 2022, the Strategic Planning Committee (SPC) of the Council resolved that, had it been in a position to determine the application, it would have refused planning permission¹.
3. The Planning Practice Guidance (PPG) advises that all parties are expected to behave reasonably to support an efficient and timely process. Where a party has behaved unreasonably and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs irrespective of the outcome of the appeal.
4. The aim of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case. A further aim 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 to development costs through avoidable delay.

¹ CD3.10

5. Local planning authorities are at risk of an award of costs if they behave unreasonably with relation to:
- 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;
 - making 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, where it is concluded that suitable conditions would enable that proposed development to go ahead;
 - not determining similar cases in a consistent manner; and
 - failing to grant a further planning permission for a scheme that is the subject of an extant or recently expired permission where there has been no material change in circumstances.

The submissions for Northacre Renewable Energy Limited²

6. The Appellant has identified two substantive grounds to support an application for a full award of costs. Firstly, the alleged unreasonable conduct by the Council prior to the appeal. Secondly, unreasonable conduct during the appeal.
7. The Appellant has set out the chronology of the consideration of the planning application by the Council and the reasons why unreasonable conduct prior to the appeal occurred. The application was first considered by the Council's SPC on 22 June 2021. The Officer Report (OR) recommended that the planning application be approved. SPC resolved that: "Having taken into account the environmental information, the decision is to grant planning permission subject to the following conditions. However, the planning permission will not be issued until the application has been referred to the Secretary of State for his consideration as to whether it should be called-in for his determination".
8. The application was then referred to the Secretary of State who confirmed on 31 March 2022 that he did not intend to call the application in. The application was again referred back to SPC on 20 April 2022. The OR³ provided an update and relevance of various Government policy documents that had been published since the application was last considered by SPC, including the updated version of the National Planning Policy Framework (the Framework). It concluded that none of these gave rise to matters or considerations which had not already been addressed in the previous OR or could lead to a different conclusion being reached. Consequently, the OR recommended that planning permission should be granted. The SPC resolved to defer the application to be considered again by the end of July 2022.
9. Whilst the Appellant contends that the reasons to defer consideration of the application were not clear, the stated reasons for deferral (as reported in the OR dated 27 July 2022) were "to allow additional information to be provided in the report, and so as to allow further consideration of" (i) the Environment Act consultation (ii) the need for the facility in the context of the consultation and (iii) the traffic impacts of the development.

² ID37 and ID39

³ CD2.03

10. The Appellant contends that this was unreasonable and that there was no proper basis on which to defer consideration of the application or to depart from the original resolution to grant in June 2021. Members did not adequately explain why they did not have sufficient information to determine the application or why it was appropriate to hold up the grant of permission for an application which had already been judged to be acceptable.
11. The appeal against the Council's failure to determine the planning application was dated 28 June 2022 and the appeal start date was confirmed as 19 July 2022. When the matter came back before the SPC on 27 July 2022, the officers' advice was that the matters identified as reasons for deferral could be given little, if any, weight and did not move the position on from that considered in June 2021. The OR was also accompanied by an Opinion from leading counsel at Appendix 5 which advised that, on the basis of the OR, there were no defensible reasons for maintaining a refusal and that the Council would be at risk of a costs award if it resolved that it would have refused permission.
12. Despite this advice, the SPC resolved that "That having taken into account all relevant new material considerations together with the environmental information previously considered, to delegate authority to the Head of Development Management to inform the Planning Inspectorate that had Wiltshire Council still been the decision-making authority that it would have refused planning permission." The Appellant contends that this was manifestly unreasonable and that there were no new material considerations of any significant weight which would justify departure from SPC's resolution to grant in June 2021.
13. The Appellant sets out the case with regard to the second substantive ground to support an application for a full award of costs relating to the Council's alleged unreasonable conduct on the appeal. The Appellant contends that, following the putative reason for refusal, the Council pursued a case at the Inquiry which was itself unreasonable for three reasons. Firstly, it advanced an argument that the most important policies of the development plan were out of date. It is contended that this approach was inconsistent with the professional advice of the Council's officers and which was not supported by any explicit statement in the putative reason for refusal nor statement of case, nor other record of the Members of the SPC's concerns. Secondly, that this was based solely on the evidence of the Council's witness in the Inquiry, Mr Potter, who appeared to be unaware of the key national policy in the Framework. Finally, it relied in on a bogus 3-part test said to arise from national policy which could not be supported by the witness, is contrary to the usual approach that cases are determine on their merits and ignored Mr Potter's own view (obtained through cross-examination) that the proposals complied with allocation policy W3.
14. The Appellant contends that the Council entirely failed to engage with the statutory question of whether the proposal was in accordance with the Development Plan taken as a whole (whether up to date or not) and, despite claims that the tilted balance applied, did not approach that coherently or logically. The argument that the Development Plan was out of date did not appear in the putative reason for refusal or the Council's statement of case. Consequently, the Appellant considers that it is implausible to claim that the final sentence of the reason for refusal demonstrates that the tilted balance

applies. Although the language of the final sentence reflects that in paragraph 11(d)(ii) of the Framework, this cannot be taken to mean that the tilted balance applies. The Appellant considers that the mere coincidence of language is insufficient to make good all that is sought to be derived from it, was absent of any support in the three ORs, nor in the members' debate nor in the statement of case relating either to the status of the Development Plan or paragraph 11 of the Framework.

15. The Appellant refers to the transcript of the SPC meeting on 22 July 2022⁴ which reveals that the only references by members to the tilted balance was in the context of considerations simply tilting the planning balance one way or another (i.e. weight of material considerations) and not in the context of the Development Plan and the special sense referred to in paragraph 11 of the Framework. A similar reference was made by the Chair on 20 April 2022 again being simply to the weighing of considerations against each other⁵. Moreover, the Head of Legal Services said "The tilted balance doesn't apply"⁶.
16. The Appellant suggests that it is implausible that the language of the reason for refusal was sufficient to indicate that members had taken the view that the Development Plan Documents were out of date where there is no other evidence to support that suggestion. Such view did not feature in the members' decision to change their resolution from grant to oppose the appeal proposals.
17. In relation to climate change evidence, the Appellant contends that the counterfactuals provided in the evidence of the Council's witness, Mr Norton, were beyond a reasonable range of theoretical comparison since they assumed (contrary to the evidence of Mr Othen on behalf of the Appellant in the revised Carbon Plan) a constant reduction of emissions being claimed, by the sending of all 243,000 tpa of residual waste to a plant in Hamburg. Wiltshire waste is not sent to such plant, nor is it available to take such waste. This, therefore, exaggerated the carbon benefits of such (due to heat offtake), ignored likely German decarbonisation of waste and energy whilst assuming it for the plant in the UK.
18. It is the Appellant's view that it was not plausible, even with the original Carbon Assessment, to assume a steady continuous reduction in annual emissions given the statements that circumstances would change. Furthermore, it was untenable to do so following the exchange of proofs and Mr Othen's revised Carbon Assessment specifically undertook an illustrative, though conservative, lifetime assessment. The Appellant considers that it is notable that officers, in the OR, with the assistance of leading counsel's advice, did not consider it necessary to accept Mr Norton's approach.
19. Finally, the Appellant considers that Members, at the SPC meeting on 27 July 2022, did not take into account the decision of their own Environment Select Committee (ESC), some two weeks earlier in July 2022, which accepted the strategic need for EfW in Wiltshire. It is considered that this might be characterised as perverse, given that members of the SPC were rejecting an EfW on a Council allocated site.

⁴ NRE8 Appendix LK4

⁵ NRE8 Appendix LK3

⁶ NRE8 Appendix LK4 page 137

20. For the above reasons, the Appellant considers that the Council's conduct has been both procedurally and substantively unreasonable and an application for a full award of costs or, if considered more appropriate, a partial award in respect either of the planning/need evidence or carbon/climate change evidence is requested.

The response by Wiltshire Council⁷

21. The Council has responded to the Appellant's application for a full award under two similar broad headings. Firstly, the alleged unreasonable conduct in reaching a decision that it would have refused planning permission. Secondly, the alleged unreasonableness as to the substance of the Council's case.
22. In considering the first matter, the Council contends that, as a matter of law, it is perfectly open to Members to make a decision contrary to their officers' recommendation. It is suggested that the Council speaks by resolution and it is Members who make the decision, not officers, whose task is to offer advice. The Council therefore consider that it cannot be a ground of 'unreasonableness', therefore, that the planning judgement reached by the Committee in refusing the application was contrary to officers' recommendation.
23. The Council is further of the view that it is established by High Court authority that in the circumstances of granting or refusing planning permission, where a number of factors may, as a matter of planning judgement, reasonably be accorded different weights in coming to an overall conclusion on the acceptability of a proposal, a local planning authority committee can reach differing conclusions to one reached by that committee earlier, even where there are no material changes of circumstances⁸. Accordingly, it is contended that there would be nothing inherently unreasonable in the Committee decision in 2022 differing from that reached by the Committee in 2021, even were there no material change in circumstances. Members are entitled to weigh the competing factors afresh and come to a different planning judgement.
24. The Council considers that Members in July 2022 were unconvinced by the stated need for this development and were concerned about its implications for carbon generation and proper waste planning in Wiltshire, as they were entitled to be. These are 'good planning reasons' for concluding permission should be refused. The putative reason for refusal expressed those concerns and its drafting was authorised by delegation from the Committee to be formulated by the Head of Development Management in consultation with the committee chairman. It is contended that there is nothing unreasonable in that conduct.
25. Turning to the second matter, the alleged unreasonableness as to the substance of the Council's case, the Council considers that had it been in a position to refuse permission, it would have done so, for three reasons which together took the scheme outside the test for sustainable development in paragraph 11(d)(ii) of the Framework. In this regard, the Council contends that it led expert evidence in support of those three factors, and the overall planning balance that stems from them.

⁷ ID38

⁸ See per Sullivan J in *King's Cross Railway Lands Group v London Borough of Camden and Ors* [2007] EWHC 1515 (Admin), at para's 18-20

26. Furthermore, the Council considers that for the Appellant to seek an award of costs on this head, it must allege that there was no substance to that evidence. In this regard, the Council contends that, despite two weeks of Inquiry with cross-examination by Leading Counsel and the counter-case put by its own witnesses, the Appellant did not establish that the Council's evidence was without substance. On no proper basis can it be said that the putative reason for refusal was not supported by evidence of substance.

Reasons

27. In considering the first substantive ground, I accept the Council's view that it is perfectly open to Members to make a decision contrary to their officer's recommendation. In my view, key considerations whether this constitutes unreasonable behaviour are whether the Council's actions were ill-founded and unsubstantiated.
28. The Government's consultation on the Environment Act 2021 targets ran from 16 March 2022 to 27 June 2022. The consultation period had therefore commenced before the application was considered by SPC on 20 April 2022. The consultation included targets that would result in future reductions in the amount of residual household waste which was part of the feedstock proposed in the appeal application.
29. In my view, it was understandable that Members may have been concerned at the impact of the targets proposed in the consultation and the effect of these on the need for the proposed facility. I do not consider that the actions of the Council's SPC were ill-founded. The targets proposed in the 'live' consultation were relevant to the longer-term availability of some of the feedstock. Notwithstanding the subsequent arguments regarding the planning weight to be attached to the draft targets, in my view, there was a justifiable basis for Members concerns.
30. When the matter came back to SPC on 27 July 2022, there was clear advice to Members that the matters identified as reasons for the deferral could be given little weight. However, the OR to that meeting clearly set out in Section 9.3.3 that the submitted carbon assessment had been independently examined by the University of Exeter on behalf of the Council and had resulted in a number of areas of disagreement with the applicant on a number of variables. This resulted in the University finding higher CO₂e emissions than the applicant.
31. In view of the outcome of this independent examination, the Council's Climate Team raised objections to the planning application on climate change grounds. In my view, the OR does not identify the extent or implication of these 'disagreements' or the extent to which they can be considered to present a robust argument that may undermine some of the content of the submitted carbon assessment.
32. Notwithstanding the advice provided by officers, the OR contained clear evidence that the Council's own external consultants disagreed with parts of the carbon assessment resulting in a clear objection by the Council's Climate Team. As a consequence, I find that there was a substantiated basis contained in the OR for Members to have some concerns regarding the extent to which the proposed development would generate carbon emissions.

33. Against the above background, I do not consider that the Members acted unreasonably in, contrary to officer advice, deferring consideration of the application on 20 April 2022 or in deciding that planning permission would have been refused at the SPC meeting on 27 July 2022. In my view, Members in July 2022 were unconvinced by the stated need for the proposed development and were concerned about its implications for carbon generation and proper waste planning in Wiltshire, as they were entitled to be. The putative reason for refusal, in part, expressed those concerns.
34. Taking the above matters into account, I have found that the Council had reasonable concerns about the impact of the proposed development which led to the decision that it would have refused planning permission had it been in a position to do so. Just because I have found differently from the Council in my determination of the appeal does not mean to say that the concerns of the SPC had no basis.
35. With regard to the Appellant's first substantive ground for an award of costs, relating to the alleged unreasonable conduct by the Council prior to the appeal, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. Having regard to all other matters raised, an award of costs on this aspect of the costs application is not justified.
36. Turning to the second substantive ground of the Appellant's application for an award of cost, it appears that there are two distinct elements to this. Firstly, the Council's stance in the Inquiry regarding the extent to which the Development Plan may be considered to be out of date. Secondly, whether the evidence provided by the Council's carbon/climate change witness was robust, realistic and plausible.
37. On the first element, it is clear from the three OR's, the evidence provided by Mr Kendall in relation to the transcripts of proceedings at the SPC meetings and the Council's Statement of Case that there was no suggestion that the Development Plan was considered to be out of date. In my determination of the appeal, I also found that there was no substantive basis to conclude that the Development Plan may be out of date.
38. On the basis of the evidence provided, it seems entirely plausible that the coincidence of language used in the final sentence of the reason for refusal was in relation to consideration of the planning balance and tilting this one way or another in determining the application. I do not consider that this can reasonably be interpreted to suggest that the Development Plan was considered to be out of date in the context of paragraph 11 of the Framework, particularly as the advice from the Council's Head of Legal Services was absolutely clear in stating that "the tilted balance does not apply".
39. Against the above background, it does seem illogical for the Council to pursue an argument in the Inquiry that the Development Plan was considered to be out of date. This approach seems to be totally at odds with the view of the Council leading up to the Inquiry, notwithstanding the ramifications that such approach would potentially cause for the determination of future planning applications in Wiltshire. It seems to me that there was a degree of disconnect between the views of the Council Officers who prepared the OR's and the statement of case and that of the planning witness at the Inquiry.

40. On this first element, I therefore find that there was no justifiable and reasonable basis on which to pursue an argument that the Development Plan was out of date in the Inquiry. Accordingly, I find that the Council behaved unreasonably by pursuing this issue in the case presented in the Inquiry. Consequently, I consider that a partial award of costs is justified to cover the expense incurred by the Appellant in contesting this aspect of the Council's case in the Inquiry.
41. I now turn to the second element, and the evidence provided by the Council's climate change/carbon witness. On the whole, I found that the structure taken in the evidence provided by Mr Norton was soundly based with the exception of the use of the Hamburg counterfactual. In my view, the subsequent use of this counterfactual influenced the Council's consideration of the carbon benefits/disbenefits of the proposed development in the Inquiry and it does not represent a realistic scenario. .
42. I consider it entirely appropriate that the Appellant should expect that the evidence provided by an expert witness should be sound. In this case, it was clear that the prospect of sending all of 243,000 tonnes of waste per annum to a plant in Hamburg was an entirely theoretical exercise. Such plant was not available. Furthermore, the carbon benefits of the use of this plant were exaggerated due to the extent that heat offtake could be secured and the potential for Germany to decarbonise waste and energy whilst assuming such decarbonisation for the plant in the UK. The Council's evidence did not qualify the fact that the Hamburg counterfactual was, in fact, theoretical and therefore the extent to which the evidence relating to use can be considered as a reliable and realistic counterfactual.
43. In my view, the approach adopted by the Council in using the Hamburg comparator had the effect of producing a theoretical and thus unrealistic outcome in the relevant parts of the climate change/carbon evidence provided by Mr Norton.
44. Although the Appellant raised many other issues with regard to the Council's climate change/carbon evidence, the application for an award of costs in respect of climate change/carbon matters predominantly focusses on the use of the Hamburg counterfactual. In this regard, I find that the Council's reliance on the use of this in those subsequent relevant parts of the Council's case was unreasonable. Consequently, I consider that a partial award of costs is justified to cover the expense incurred by the Appellant in contesting those aspects of the Council's case in the Inquiry that were derived from, and related to, the unreasonable use of the Hamburg counterfactual in the carbon assessment and the subsequent extent to which this affected the reliability of the Council's climate change evidence.
45. I have also considered the Appellant's view that the Council, at the July meeting of the SPC, did not take into account the decisions of the ESC, some two weeks earlier, that accepted the need for EfW in Wiltshire. I recognise that there may be a perception that there should have been a degree of 'joined-up thinking between the two Council Committees which sat only two weeks apart. However, I do not consider that any endorsement of the use of EfW as part of the Household Waste Management Strategy by the ESC can be taken to mean that the planning application for EfW on the appeal site should be granted.

46. It is a fundamental planning principle that each application should be considered on its own individual merits. The fact that the Council, as a matter of principle, sees a need for EfW as part of its strategy to manage household waste in the future does not suggest that the planning considerations on the appeal site, or any other site, should be unduly influenced by this. I accept that the Household Waste Management Strategy could have been a material consideration in the Council's determination of the planning application. However, this is not a land use planning document. Although supportive of the principle of EfW, I do not find that it should have been afforded such weight to have been materially determinative in my consideration of the appeal proposal.
47. For the above reasons, I do not find that the Council's failure to take into account the decision of the ESC at the meeting of the SPC in July 2022 to constitute unreasonable behaviour.

Conclusion

48. As set out above, the Appellant has identified two substantive grounds to support an application for a full award of costs. Firstly, the alleged unreasonable conduct by the Council prior to the appeal and secondly, unreasonable conduct during the appeal.
49. With regard to the first substantive matter, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated and that an award of costs on this aspect of the costs application is not justified.
50. With regard to the second substantive matter, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated with regard to the unreasonable conduct during the appeal with regard to contesting those aspects of the Council's case relating to the Development Plan being considered to be out of date and the use of an unreasonable and theoretical counterfactual in the carbon assessment. With regard to these matters, a partial award of costs is justified.

Costs Order

51. 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 Wiltshire Council shall pay Northacre Renewable Energy Limited the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in contesting those aspects of the Council's case in the Inquiry that related to the Development Plan being considered to be out of date and the unreasonable use of the Hamburg counterfactual in the carbon assessment and the subsequent extent to which this affected the reliability of the Council's climate change evidence.
52. The Appellant is now invited to submit to the 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. In the event that parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Stephen Normington
INSPECTOR