



Costs Decision

Inquiry Opened on 6 December 2022

Site visit made on 5 December 2022¹

by David M H Rose BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5th May 2023

Costs application - Appeal Reference: APP/W0340/W/22/3292211 Land at Lawrences Lane, Thatcham, RG18 3LF²

- 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 West Berkshire Council for a partial award of costs against Ms C Gumble.
 - The Inquiry was in connection with an appeal against the refusal of planning permission for the change of use to 7 no. Gypsy/Traveller pitches comprising 7 no. static caravans, 7 no. day rooms, 7 no. touring caravans, and associated works.
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Decision

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

The submissions for the Council

2. Although the application was made in writing, the main points are set out for completeness and clarity.
3. The Council seeks a partial award of costs against the Appellant as a result of unreasonable behaviour from 7 December 2022 on procedural grounds. At each of the round table sessions, the Appellant was asked to provide more information.
4. Whilst most elements could be dealt with within the Inquiry timetable, the Appellant's drainage witness, at an early stage in the round table discussion, indicated that the greenfield runoff rates used were incorrect. However, it was clear from the Council's reasons for refusal and the Council's drainage proof as to what was required. Following the Council's objection to new 'evidence' being adduced, without supporting documentation, the Appellant sought an adjournment. This was the result of unreasonable behaviour directly leading to wasted costs.
5. The partial award of costs relates to:
 - (a) wasted costs incurred by a witness who was due to travel to the Inquiry on 7 December 2022;

¹ I made further unaccompanied site visits on 31 January and 7 March 2023

² Taken from the Application for Planning Permission (A subsequent unilateral undertaking identifies the postcode as RG18 9HS)

- (b) wasted costs of a witness who travelled to Newbury and stayed in Newbury unnecessarily;
- (c) wasted costs in instructing a new planning witness as the original witness would not have been available for the anticipated resumption date of the Inquiry;
- (d) wasted costs of Counsel who was instructed and due to stay in Newbury until 9 December 2022;
- (e) further wasted costs of Counsel: conference with new planning witness; preparing notes of evidence not heard by new planning witness; and preparation of costs application;
- (f) further wasted costs in reviewing three additional iterations of the drainage strategy;
- (g) work on the Drainage Statement of Common Ground; and
- (h) further wasted costs reviewing a new Biodiversity Net Gain metric.

The response by the Appellant

- 6. The response was made in writing and the main points are set out below.
- 7. The Appellant accepts that the Council is entitled to a partial award of costs in respect of those reasonable costs genuinely wasted following the adjournment of the Inquiry on 7 December 2022.
- 8. In this regard, the Appellant does not dispute that a partial award should be made limited to items (a), (b) and (d).
- 9. The claim in relation to (c) and (e) is resisted as the costs incurred were not as a direct result of the Appellant's conduct (or that of her expert). As to (f) and (g), the iterative process led to a position where the parties were able to reach agreement; and that process may have taken place in any event had there been no need for the adjournment. In terms of (h), those costs did not arise from the adjournment.

The gist of further oral submissions by the Council

- 10. The relevant test for an award of costs is whether costs were incurred as a result of unreasonable behaviour. The request for an adjournment of the Inquiry was of the Appellant's choice and the consequences flow from that. It presented difficulties insofar as the sabbatical absence of the Council's planning witness, and the availability of the appointed Inspector to complete the case in reasonable time, dictated the need for the Council to assign a new planning witness. His work, in consultation with Counsel, directly flows from the adjournment, (c) and (e).
- 11. In terms of drainage, two additional iterations failed to deal satisfactorily with the issue, resulting in abortive work and eventual incorporation of agreement into a Statement of Common Ground, (f) and (g). The revision to the Biodiversity Net Gain calculation involved additional work of an external expert, (h).

Reasons

12. 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.
13. By way of context, two of the reasons for refusing planning permission related to drainage matters with particular reference to the absence of a drainage strategy to indicate how surface water could be managed in a sustainable manner³. In May 2022, the Appellant produced a high-level Drainage Statement which through the Council's Statement of Case was found to be *'..... not sufficient to constitute as a drainage strategy or provide assurances that the proposal is feasible'*. A detailed list of points in relation to the deficiency of information followed.
14. In November 2022, the Appellant provided a formal Outline Sustainable Drainage Strategy (dated 14 November 2022) which *'..... confirms that there is a feasible, deliverable, option for the management of surface water runoff and foul drainage and as such there is no reason for WBC to maintain its objection on drainage grounds as these matters can be made subject to condition'*.
15. The Council's Drainage Proof of Evidence, dated 21 November 2022, stated: *'The applicant has still not provided Greenfield discharge rate calculations from the evidence it would be right to conclude that the Greenfield runoff rate is 3.3l/s'⁴.*
16. Further *'..... [the] Outline Drainage Strategy marks an improvement in the approach to deal with the SUDs matters, but unfortunately also raises fresh concerns. The language used with regards to the green field volume suggests the applicant has changed their drainage strategy (i.e. using long term storage and agreed discharge rates as opposed to greenfield runoff rates) but has not made it clear'⁵.*
17. At the drainage round table session on 7 December 2022⁶, at an early stage in the discussion, the Appellant's expert indicated that the greenfield runoff rate was a *"simple estimation"*, *"probably on the high side"* and *"should be 1.5l/s"*. It was recognised that this would reduce the runoff and increase the storage requirement. Nonetheless, he was confident that there were *"a variety of techniques available"* and acknowledged that *"maybe, further detail should have been provided"*.
18. At that juncture, Counsel for the Council, explained that the Authority had pointed out some time ago that the Appellant's initial basis was incorrect; there were no calculations to support the changed position on runoff and the implications for storage; there was no transparent evidence to satisfy the Council as to feasibility; and such little technical information could not be left to conditions as the drainage strategy had implications for other aspects of the site layout.
19. I expressed concerns about supposition rather than evidence, introducing new information and seeking to develop the case at the Inquiry. I alerted the Appellant to the costs regime and explained the implications of my not being satisfied on the evidence before me as to whether remedy by condition would satisfy the relevant tests and the potential for 'drainage' to represent a compelling reason to dismiss the appeal.

³ CD7.2 - Policy CS 16

⁴ Paragraphs 4.1 and 4.2

⁵ Paragraph 8.2

⁶ Commenced at approximately 10:40 hours

20. At approximately 11:10 hours King's Counsel for the Appellant requested a short adjournment to take instructions. Following a suitable break, I met with advocates for both parties, in the presence of the Town Council's representative, to discuss the implications of a long adjournment. At that meeting, it was made known that the Council's planning witness would not be available beyond Christmas and I indicated my own time constraints if the case were to remain with me.
21. I resumed the Inquiry at 12:15 hours to hear a formal request, on instructions, for an adjournment to a date to be fixed to give the Appellant's drainage expert sufficient time to submit further details for consideration by the Council and to reflect the availability of advocates and other parties. It was confirmed that other evidence was contingent on the drainage details and there was no advantage in proceeding with the Inquiry as subsequent evidence might need to be revised and updated.
22. Against this background, I adjourned the Inquiry at 12:30 hours and the round table session on landscape and visual impact, scheduled for the afternoon, was postponed. The wasted costs incurred in relation to matters (a), (b), and (d) are thus made out.
23. As to (c) and (e), the need for the Council to assign a new planning witness was a direct consequence of the adjournment. Although he adopted his colleague's earlier proof, he had to familiarise himself with the case as a whole and to submit his own up-date proof of evidence. Conference with Counsel would have been an integral part of his preparation. The drafting of the application for costs was a further component of the expenses incurred. These parts of the claim are also valid.
24. Turning to (f) and (g), the Drainage Statement of Common Ground records the events following the adjournment of the Inquiry. In particular, *'Mr Bacchus and Mr Walton discussed Issue 2 of the Strategy on 11 January 2023 and Mr Walton subsequently updated the Strategy to Issue 3 dated January 2023 to address the matters discussed. Issue 3 was submitted to Mr Bacchus on 16 January 2023. Mr Bacchus subsequently commented on Issue 3 of the Strategy in his email of 18 January 2023. Mr Walton updated the Strategy to Issue 4 dated January 2023 and resubmitted to Mr Bacchus on 20 January 2023. Mr Bacchus prepared a Technical Note in response to the latest Version of the Drainage Strategy Issue 4, which was appended to Mr Grigoropoulos' Update Planning Proof of Evidence dated 25 January 2023, as Appendix I'*.
25. It is clear from following the various iterations, that the Council had considerable involvement in the progression of the scheme to the point where common ground was reached. Whilst, it is claimed that *'that process may have taken place in any event had there been no need for the adjournment'*, the reality is that the eventual outcome was neither a consequence of discussions before the Inquiry or during the Inquiry but decisively as a product of the adjournment. This part of the Council's claim is also endorsed.
26. Finally, in relation to the Biodiversity Net Gain metric (h), criticism was made of the Appellant's Assessment Summary report⁷ in the Council's Statement of Case and Ecology proof of evidence and aired at the round table discussion on the afternoon preceding the adjournment of the Inquiry.

⁷ CD8.7 – February 2022

27. As a result, the Biodiversity Net Gain Assessment was recalculated by the Appellant. It sought to address the criticisms made at the round table discussion and took into account the revised soft landscaping/drainage scheme. This was in turn reviewed by the Council's expert.
28. To my mind, the additional information provided was, in essence, a direct response to the initial criticisms cited by the Council. Although the post-adjudgment revisions to the outline drainage strategy inevitably fed into that calculation, they were incidental, rather than directly instrumental, to the overall recalculation of the Biodiversity Net Gain and the Council's additional work. This did not contribute to the unreasonable behaviour leading to wasted expense.
29. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated in relation to items (a) – (g) inclusive and that a partial award of costs is justified.

Costs Order

30. 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 Ms C Gumble shall pay to West Berkshire Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to items (a) – (g) inclusive as described above; such costs to be assessed in the Senior Courts Costs Office if not agreed.
31. The Council is now invited to submit to Ms C Gumble, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

David MH Rose

Inspector