



Costs Decision

Inquiry Held on 6 and 7 June 2023

Site visits made on 5, 6 and 8 June 2023

by Richard Aston BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th August 2023

Costs application in relation to Appeal Ref: APP/A3010/W/23/3315919 Land forming part of North End of Gateford Road, Worksop S81 8AE

- 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 Tungsten Worksop Ltd, Hallam Land Management and Mr Paul Blagg for a full award of costs against Bassetlaw District Council.
 - The Inquiry was in connection with an appeal against the refusal of planning permission for the construction of two buildings for employment purposes (B8), along with a gatehouse, associated infrastructure and soft landscaping
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Decision

1. The application for a full award of costs is refused but a partial award is allowed.

The submissions for Tungsten Worksop Ltd, Hallam Land Management and Mr Paul Blagg

2. The application is made on the basis that the Council's decision to refuse the application was unreasonable; further or alternatively that the Council has failed to provide any substantive evidence to support its reason for refusal. The Appellant has incurred unnecessary costs in pursuing the appeal.
3. The National Planning Practice Guidance ('NPPG') gives examples of unreasonable behaviour on the part of LPAs, including failure to produce evidence to substantiate each reason for refusal on appeal; [making] vague, generalised, or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.
4. It was patently unreasonable for the Council to refuse the scheme on highways and noise grounds when (a) the Council has already granted permission for the B1/B2/B8 development of the wider site; (b) the Council does not suggest that the appeal scheme would have a materially greater impact in respect of highways or noise than the approved scheme; (c) the relevant expert consultees (National Highways, the Highways Authority and the Council's EHO) have no objection to the scheme; (d) the Council accepts the methodology and outputs of the Transport Assessment and Noise Assessment, both of which demonstrate there is no issue; and (e) there was no technical evidence before the Committee that could justify reaching a contrary view. On the evidence before the Inquiry, it is clear that the Council acted unreasonably in refusing the scheme.

5. In any event, the Council has plainly failed to provide any substantive evidence to support its position. In particular, it has provided no objective analysis to support its assertion that the scheme would have a materially harmful highways or noise impact. Rather, it seeks to rely solely on the non-expert evidence of Cllrs Sanders and Pressley, whose evidence contains nothing more vague and generalised assertions. Both witnesses suggested that they brought local knowledge, the inference being that this somehow equipped them to gainsay the evidence of the Appellant's experts.
6. Highways and noise are technical issues, the Council has accepted the methodology and outputs of the Transport Assessment and the Noise Assessment, and the Council has presented no evidence that could possibly support the conclusion that the scheme would have a materially harmful impact in respect of either highways or noise. Cllr Sanders accepted under cross examination that judged objectively there would not be a severe impact on the highways network; and Cllr Pressley's opposition to the scheme was based on the flawed assertion that the extant scheme is subject to an hours of operation condition.
7. In any event he accepted that there would be a "low impact," as defined in BS4142-2014 on all relevant receptors, i.e., "+0dB or below measured background". Entirely correctly in the light of Cllr Pressley's evidence, Mr Robson confined his cross examination of Mr McCordick to questions as to the need for conditions to ensure a satisfactory noise environment.
8. Ms Chan's assertion in her written evidence that the evidence of Cllrs Sanders and Pressley demonstrates that the scheme would be harmful, and that this harm justifies the refusal of permission demonstrates, was simply indefensible. Ms Chan accepted as much, rightly accepting under cross examination subject to the s.106 and the conditions proposed by the Council the scheme would be policy compliant. It follows of course that rather than refuse permission the Council should have granted planning permission subject to conditions. Had it done so, the Appellant would not have had to appeal.

The response by Bassetlaw District Council

9. The application for costs was made in opening on the first day of the inquiry – not after oral evidence, or after exchange of proofs. It is questionable whether this means that it was made as soon as possible as directed by the PPG.
10. A main purpose of the direction from the PPG is to give the other party as much time as possible to review its position with all relevant people. An opportunity not afforded to the Council, placing the two members of the 12-member planning committee in a difficult position.
11. Cllr Sanders' evidence was based upon his experience, that the network was already congested. Cllr Sanders expressed his concern that the Appellant's TA did not consider all the recent development, and this was agreed. This evidence included reference to specific development not included – the evidence being neither vague nor unsubstantiated. Given the incomplete nature of the appellant's baseline assessment, it was impossible for Cllr Sanders to assess whether the proposed mitigation will be effective.

12. On noise, the appellant's own expert recommended a condition limiting the noise from plant and machinery to 29LAeq daytime and 22 LAeq night-time. Without this mitigation, Mr McCordick agreed that development would not be acceptable in noise terms. The appellant only notified the Inspector that it would agree to such a condition in the oral evidence of Mrs Overton. Up to the point of Mrs Overton's evidence, the development was unacceptable in noise terms. It is agreed, that with the appropriate condition attached the noise RfR falls away. However, this position was only reached on the final day of the Inquiry. This part of the Inquiry could have been avoided had the appellant agreed to the proposed condition at an earlier stage.
13. Cllr Pressley provided evidence of the effect the noise would have on local residents and so the Council did not act unreasonably with regard to the noise/amenity RfR. The appellant's submission in effect is that the Council has acted unreasonably by not producing expert evidence. This is not the test of unreasonable behaviour.

Reasons

14. Dealing with the timing of the application first, whilst perhaps not given as much time as the Council would have liked, all costs applications must be made formally before the Inquiry closes, and at a relevant point. Such an application was indicated, made and the Council were afforded adequate time to respond. I am therefore satisfied the application was appropriately made.
15. Parties in planning appeals normally meet their own expenses. However, the NPPG 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 expense in the appeal process.
16. The planning application was reported to the Council's Planning Committee with a recommendation to grant planning permission, subject to conditions and a legal agreement. Unfortunately, I do not have the benefit of being party to the meeting and the discussions that took place, but the minutes show clear concerns with the 'no objection' consultation responses and members expressed their own concerns as to the impacts they considered would occur. The committee is clearly not obliged to accept the officer's recommendation, but in doing so it must be able to provide sound reasons for refusal and substantiate them.

Highways

17. The Council's witness had undertaken an additional manual traffic count and the evidence included this data and further dates of accidents from an online resource to seek to substantiate the highways concerns. The evidence also included photographs of certain locations. Despite a concession from the Council's planning witness that judged objectively there would not be a severe impact on the highways network, an important point in their evidence was that the baseline of the associated Transport Assessment (TA) did not include a number of additional dwellings, a material consideration which was reasonably capable of having a bearing on my appeal decision.

18. Whilst not the evidence of an expert in the field, these were local concerns supported by a significant number of representations from local residents. My experience is that local knowledge can often provide an important insight into the realities of a situation which must then be considered alongside the plethora of objective data and statistics that are often involved in such assessments, which are also based on a snapshot in time.
19. Objective analysis is important but the absence of those dwellings from the baseline assessment led to unanswered questions regarding the highway's effects. As the decision maker this uncertainty was sufficient to lead me to have to request further clarification in the form of an additional highways note on trip generation, completions, and the details of the layouts of those schemes.
20. Throughout the Inquiry I was referred by both parties to the need to form my own view, based on my own observations, albeit having regard to the objective analysis before me. Assessment of the impacts therefore also required a degree of subjectivity. Ultimately, and partly due to the doubt generated I did not find the evidence of the Council in this regard to be vague, generalised, or unsubstantiated. It was based on a reasonable concern over the effects that the appellant had not considered it necessary to assess. Notwithstanding the appellant considered the effects to not be materially harmful and despite confirmation that it was not required by the relevant consultees, this information was clearly an important material consideration in my determination of the highways impacts.
21. Whilst I have ultimately disagreed with the Council's views the manner in which the associated reason for refusal was reached and the evidence provided to the Inquiry does not amount to unreasonable behaviour. I appreciate that the applicant does not agree with the Council's consideration and opinions relating to the effect of the appeal proposal in such terms but given their conclusions, which I am satisfied were properly reached overall and substantiated, the dispute over this matter meant an appeal to resolve it was inevitable.

Noise and disturbance

22. S70(1)(a)¹ empowers a planning authority, subject to s62D(5), s91 and s92, to grant planning permission on application unconditionally or 'subject to such conditions as they think fit'. Section 72(1) describes particular types of conditions which may be imposed under s70(1) 'without prejudice to the generality of' that section: (a) for regulating the development or use of any land under the control of the applicant...or requiring the carrying out of works on any such land, so far as appears...to be expedient for the purposes of or in connection with the development authorised by the permission.
23. Used properly, conditions can enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects. Since conditions may only be imposed where doing so is necessary to avoid a refusal of planning permission, it follows that you should be able to show why permission would be refused if the condition could not be imposed.

¹ Town and Country Planning Act 1990 (As Amended).

24. I was told in evidence that appropriate training had been given to the members of the committee and it is reasonable to expect that this would have included training on the use of planning conditions, including where conditions can address concerns and overcome potential reasons for refusal.
25. When read as a whole the uncontested evidence in the Noise Assessment (NA), comments from the Environmental Health Officer (EHO) and the officer's report to the committee set out the acceptability of the proposed noise mitigation measures. Whether details should have been submitted to show the plant or simply confirm the noise level restrictions is unclear as the EHO response refers to such plant to 'be assessed'. On my reading the submission of further details was not something the EHO explicitly requested².
26. The NA is clear however that mechanical services installations were not known at the time³ but that noise limit criteria could be determined from the measured background sound levels. This concluded with the 29 and 22 LAeq figures for the day and night-time that are required to avoid unacceptable effects. Consequently, the selection of any plant or indeed subsequent plant would only be on the basis of compliance with these limits. Any deviation from these could then be assessed and monitored as necessary and appropriate action taken, as necessary. The NA also refers to these as cumulative levels for all plant and limits at any dwelling.
27. Ultimately the Council's case is that this part of the Inquiry could have been avoided had the appellant agreed to the proposed condition at an earlier stage. Despite the appellant not agreeing to the noise condition restricting noise levels until the final day of the Inquiry this was a matter that did not require further details to be agreed or the agreement of the appellant as a pre-commencement condition. The committee report also confirmed a condition requiring proposed mechanical plant to achieve the noise limit criteria set out in the NA but recommended that details shall be submitted and approved.
28. The committee therefore had two options for such a condition, and I see no reason why the committee, with their planning training in mind and on the advice and recommendations before them, should not have considered whether a condition would address the concerns at the time of determination and duly imposed one, as they had the power to do. Refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs⁴, where it is concluded that suitable conditions would enable the proposed development to go ahead, or concerns resolved. That is the case here, regardless of any dispute as to the exact wording.
29. I have considered the matter of the intended use of the link between the residential and commercial areas in my main decision. On the evidence before me it is apparent that in reaching their conclusions and decision on this matter the committee failed to have regard to the earlier considerations and decisions of the Council for both of the outline schemes, schemes that were granted planning permission. The Council have not determined similar issues in a consistent manner, particularly where in this case they accept there is an extant permission that overall would have generated more traffic, including

² CD 9.20

³ Paragraph 7.3.

⁴ NPPG Paragraph: 049 Reference ID: 16-049-20140306.

from Heavy Goods Vehicles and therefore with no material change in circumstances to warrant such an objection.

30. Further, at the Inquiry I found the evidence and responses to my questions regarding the likely future use of Blackstone Drive/Aveling Way by vehicular traffic to be vague, generalised, and unsupported by any objective analysis or otherwise of the likely effects. I was referred by the Council's witness to a restriction on the previous extant permission in terms of hours of operation, but it transpired that no such restriction was ever imposed. If there was a genuine concern or doubt about this or the use of the vehicular link at the time of determination, it was entirely capable of straightforward resolution.
31. In terms of the issue of reversing vehicle beepers, I was also unconvinced by the reasons given by the Council's witness relating to the effects, not least given the location of the service yard areas, and technical evidence in the form of the assessed noise levels within the NA. The fact that the EHO considered a restriction to be 'prudent' does not automatically mean such a condition should be regarded as meeting the relevant tests for conditions, especially when considered in the context of the findings of the NA.
32. Overall, I found the evidence on this reason for refusal to be vague, generalised, and inaccurate, unsupported by any objective analysis. The evidence failed to substantiate this reason for refusal or provide a reasonable and respectable basis for the Council's stance that the impact of the scheme before me would be more harmful than the extant scheme and would cause harm to the living conditions of neighbouring occupiers.
33. For these reasons, the Council's refusal of permission on the grounds of the effect on living conditions in terms of noise and disturbance amounted to unreasonable behaviour that resulted in unnecessary and wasted expense at the appeal in having to present and examine evidence on this issue. A partial award of costs is therefore justified in relation to this reason for refusal.

Costs Order

34. 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 Bassetlaw District Council shall pay to Tungsten Worksop Ltd, Hallam Land Management and Mr Paul Blagg, the costs of the appeal proceedings limited to those costs incurred in the preparation, submission and presentation of evidence relating to the third reason for refusal only; such costs to be assessed in the Senior Courts Costs Office if not agreed.
35. The applicant is now invited to submit to Bassetlaw District 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.

Richard Aston

INSPECTOR