
Costs Decision

Inquiry Held on 20,21,22, 23,26 June 2023 and 10 July 2023

Site visit made on 20 and 27 June 2023

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date 25 August 2023

Costs application in relation to Appeal Ref: APP/H1705/C/20/3262226 Land at South of Berry Court Farm, Bramley Road, Little London, Hampshire

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr David Snook and Mr Philip Snook for a partial award of costs against Basingstoke & Deane Borough Council.
 - The Inquiry was in connection with an appeal against an enforcement notice alleging, without planning permission, the change of use of the Land from agricultural use to use for the storage of caravans and motorhomes and associated operational development to facilitate the change of use.
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Decision: the application is refused

The submissions for Mr David Snook and Mr Philip Snook

1. Ecology remained a live issue at appeal because the Council:
 - (a) did not accept *in-principle* that compensation was available to the appellants;
 - (b) did not believe that the appellants might secure a 10% BNG; and
 - (c) at no point turned its mind to framing an ecology condition (or any other condition) in an enforcement format, whereby details be submitted in a set timetable with the use terminating if certain events transpire.
2. Mr Sibbett's evidence was replete with references to how compensation was not applicable because of the absence of overriding public need, the inappropriate gatekeeper applied by Policy EM4 of the Local Plan and which conflicts with national policy. For that reason, he refused to discuss details of compensation schemes with the appellants' ecologist.
3. It was then accepted by Ms Logie that ecology matters could be dealt with by condition. It appeared not to have occurred to Ms Logie, or the Council, that an enforcement-worded condition could require submission of a scheme and if not approved then the permission would end. It was also accepted by Ms Logie that Policy EM4 in its wording is not consistent with national policy: she maintaining that it is 'in the spirit' of national policy.
4. The Council accepted there is no basis in policy for requiring 10% BNG and appeared surprised at Inquiry that it was not a statutory requirement. The Council appeared unaware that the relevant provisions of the Environment Act

2021 are not in force. The Council accepted their Interim Guidance is not policy, is not a Supplementary Planning Document (SPD) and, even if it were, could not introduce new policy. No basis has been provided by the Council for resisting the development on the basis of requiring a 10% BNG. It is unreasonable to persist in refusing permission on the basis that 10% BNG cannot be achieved when no such requirement exists in law or policy.

5. The remaining point for the Council is that they 'are not sure' that a scheme could be designed which fully compensates and secures a degree of BNG. That the Council 'might not be sure' something can be achieved through a detailed scheme is not a proper basis to resist the imposition of a condition. Conditions are regularly used in scenarios where it is unclear whether an appellant can discharge them because of various issues that might arise in the technical details of the matter, but this is not a bar to a condition being imposed. Only where there is clearly no prospect at all of the condition being discharged should a condition not be used. Ms Colebourn's evidence was clear that a compensation scheme which also secures BNG can be designed here. Mr Sibbett accepted that a baseline, using Metric 4.0, can be identified and the necessary resultant gain calculated. The only issue was the Council being 'unsure' whether it could be achieved. That is an improper basis to resist a condition being imposed, and an unreasonable basis to pursue ecology as a reason to refuse permission at appeal.
6. Had the LPA acted reasonably in relation to ecology matters and accepted that ecology was in-principle available and could be secured by conditioning an appropriate scheme, Ms Colebourn's involvement would have been limited to her attendance on-site and her discussions with Mr Sibbett. Her attendance at Inquiry was unnecessary, her production of a proof of evidence was unnecessary, and no Inquiry time should have been spent on ecology.

The response by Basingstoke & Deane Borough Council

7. The appellant's application is fundamentally misconceived as it completely ignores the scope of Ms Colebourn's evidence, submitted after the discussion with the appellant's ecologist which itself only took place on 4 May 2023. That evidence clearly went well beyond the question of compensation and dealt with the question of harm.
8. The points made in Ms Colebourn's evidence related to the question of whether harm was avoided and mitigated in the first place by this unlawful development. This issue, contrary to the mischaracterisation of the oral evidence of both Ms Logie and Mr Sibbett in the appellant's costs application, was never accepted by those witnesses and was the key reason why the Council maintained, rightly, that the policy is not compliant with Policy EM4.
9. In particular, Ms Colebourn's evidence contained an entire section on the question of the need for a buffer zone. Her evidence went well beyond mere reliance on the AIA submitted by the appellants and contained her own substantive analysis as to why she claimed that there was no adverse impact on the Gypsy Lane woodland. Her failure to specify the degree of such harm in her written evidence clearly required testing under cross-examination, which elicited her contention, for the first time, that the harm was at "site level".
10. It was the appellants that chose to submit that ecology evidence on those extensive matters, fully aware of what the Council's position was and what Mr

Sibbett's evidence was, and which clearly needed to be tested under cross-examination. At no stage had the appellants conceded (whether in her proof or in writing) that there were significant adverse impacts caused by the development as set out in Mr Sibbett's proof but that the only issue was whether a condition securing compensation would be satisfactory.

11. In light of the above, the Council has not acted unreasonably in relation to ecology matters at all. It was entirely justified in refusing to accept that "*in-principle compensation was not available to the Appellants*", it rightly submitted substantive evidence on the ecological impact of this proposal, and rightly challenged the evidence of Ms Colebourn as it was entitled to do.
12. The above is a complete answer to the appellant's costs application, which is clearly misconceived. For that reason, the further substantive contentions by the appellants in relation to the suitability of a condition in this instance and in relation to BNG, are not addressed in detail but for the avoidance of doubt are not accepted, not least because they rest on the misguided assumption that a compensation package here would be necessary solely to secure net gain (i.e to deliver a benefit). That self-evidently was not the purpose of the compensation package put forward in Ms Colebourn's evidence, which on any analysis was being proposed primarily to seek to address the harm caused by this development for which retrospective permission was being sought. In those instances, it was entirely reasonable for the Council to question the sufficiency of such a package in its ecological evidence. In any event, the suggestion of 10% BNG by the Council only arose in the course of discussions regarding conditions and did not form the basis of the Council's substantive case on ecology, and was not the reason why the Appellant decided to submit Ms Colebourn's proof of evidence or call her as a witness.

Reasons

13. The 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 indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The PPG states that the right of appeal should be exercised in a reasonable manner and goes on to provide example of unreasonable behaviour which may result in an award of costs against a local planning authority. These examples include refusing planning permission on a planning ground capable of being dealt with by conditions, where it is concluded that suitable conditions would enable the proposed development to go ahead.
14. This application for costs must be viewed in its proper context. The appeals to which this application relates are, in part, against the issue of an enforcement notice. A total of three reasons were stated for issuing that notice. In summary, those reasons related to the suitability of the site in locational terms; the effect of the development on the character and appearance of the area; and ecology. Furthermore, these appeals follow the dismissal of a planning appeal against for a similar development on the same site some two years previously. Ecology remained a live issue at appeal for more reasons than those specified in the costs application.

15. The appellant's evidence on ecology was submitted very late in the day. As I understand it, the appellant's proposals for a suitable compensation package were first raised with the Council's ecologist on 4 May 2023. In the event, Mr Sibbett considered that such a compensation package would not be compliant with development plan policy and did not discuss the scheme further.
16. It is clear that at no point did the Council turn its mind to dealing with the harm to ecology that it had identified through the imposition of an 'enforcement-type' condition, whereby the notice takes effect if it transpires that a compensation package that overcame the harm could not be devised. It was only later, at the Inquiry itself, did Ms Logie accept that ecology matters could be dealt with by condition. As I understood it, Ms Logie's acceptance was one of principle and not a comment on the acceptability or otherwise of the compensation package advanced by the appellants.
17. The PPG indicates that a local planning authority is at risk of an award of costs if it refuses planning permission on a planning ground capable of being dealt with by conditions, *where it is concluded that suitable conditions would enable the proposed development to go ahead* (emphasis added). In this case, it was the Council's view that the development was unacceptable for reasons other than ecology.
18. It follows that from the Council's perspective there was never any prospect that imposing a condition to deal with the ecology harm would enable the proposed development to go ahead, even if it had turned its mind to that as a possibility. In the Council's view, those other harms would have still required that permission was refused. It therefore also follows that the Council would still have defended the other reasons for issuing the enforcement notice, even if it had conceded early on (i.e from 4 May 2023) that the harm to ecology could have been addressed by the imposition of an enforcement-type condition. Accordingly, the Council did not act unreasonably in the terms expressed in the PPG.
19. In any event, the appellants' evidence on ecology went well beyond the Council's failure to consider imposing an 'enforcement-type' condition. I recognise that some elements of the Council's position could be considered to be unreasonable: for example, it would have been unreasonable for the Council to persist in refusing permission on the basis that 10% BNG cannot be achieved when no such requirement exists in law or policy. But that was not the sole reason, or even the prime reason, why the Council resisted the development on ecology grounds. The main reasons related to the harm caused (in the Council's view) and the mitigation of that harm.
20. The vast majority of the appellant's evidence was in relation to the fundamental issues of whether there was harm to biodiversity and, if so, could that harm be mitigated. The matters in which the Council could be said to have acted unreasonably (if pursued) were at the margins of those fundamental issues and took up very little Inquiry time. By way of example, I concluded on the basis of the evidence before me that the compensation package advanced by the appellants would not compensate for the harm caused by the development subject to the enforcement notice. The compensation package advanced by the appellant therefore fell at the first policy hurdle. Having reached that conclusion, whether the compensation package failed to deliver a 10% BNG was neither here nor there.

21. It is clear that Ms Colebourn's attendance at the Inquiry was necessary to present the appellants' case on harm to biodiversity and mitigation of that harm. That required the production of a proof of evidence. It was necessary that Inquiry time was spent on ecology and Ms Colebourn's involvement could not have been limited to her attendance on-site and her discussions with Mr Sibbett. The appellant did not incur any water or unnecessary costs in presenting its case on ecology.
22. The PPG sets out two conditions for an award of costs: the party must have behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. Both conditions must be met. In this case, neither of the tests set out in the PPG are met. Accordingly, an award of costs is not justified.

Paul Freer
INSPECTOR