
Costs Decision

Inquiry Held on 28-31 March 2023

Site visit made on 13 April 2023

by H Butcher BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30th August 2023

Costs application in relation to Appeal Ref: APP/R1038/W/22/3310461 Land between Green Lane and Upperthorpe Road, Westthorpe, Killamarsh

- 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 Harworth Group for a full award of costs against North-East Derbyshire District Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for the erection of up to 397 dwellings and associated access.
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Decision

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

The submissions for Harworth Group

2. The appellant raised the following matters in respect of their application for an award of costs:

The Council withdrawing reasons for refusal 1, 3, 4, 5, 6 and 7

3. The application was refused for seven reasons. However, The Council latterly withdrew six of these on 14 December 2022. The Planning Practice Guidance (PPG) includes the withdrawal of any reason for refusal as a ground for an award of costs. By the time these reasons were withdrawn the appellant had been put to cost and expense in addressing them in preparation for the appeal to be submitted.
4. Furthermore, the appellant was compelled to defend the withdrawn reasons for refusal because the nature of an appeal is that it is to the Secretary of State as though a new application to be determined.
5. The appellant therefore seeks cost for work carried out up to the withdrawal of the six reasons for refusal as this was a clear error on the Council's part in refusing the application for these reasons. The appellant also seeks costs for the work carried out latterly in defending the withdrawn topics.

Council's approach to reason for refusal 2

6. Reason for refusal 2 sets out that, due to a lack of detail of the nature or scale of works necessary to form the attenuation ponds and ancillary development in the Green Belt, the proposal would constitute inappropriate development in the

Green Belt. The reason for refusal is framed as a consequence of the lack of information.

7. It was unreasonable of the Council to simply assume the development would not meet Green Belt policy. The submitted information was sufficient to enable the Council to conclude as to whether it was inappropriate development in the Green Belt, and, if not, they should have said so.
8. In addition to this the premise for reason for refusal 2 shifted during the course of the Inquiry from being a lack of information about the attenuation ponds resulting in the Council concluding they would be inappropriate development in the Green Belt, to the proposed attenuation ponds being considered inappropriate development in the Green Belt in spite of the evidence.

The approach taken to the test of 'preserving' the openness of the Green Belt

9. The Council's approach to preserving openness by not at all negatively affecting it, even to the smallest degree, is contrary to well established case law that openness does not mean freedom from development. This constitutes unreasonable behaviour.

The Council's approach to paragraph 148 of the National Planning Policy Framework

10. The Council's case was that substantial weight is given to any Green Belt harm either as part of determining the tests in the National Planning Policy Framework (the Framework) para 150 or as an additional matter, even if the outcome of applying the Framework para 150 is that the development is not inappropriate.
11. The Council's barrister, did, however, later confirm that once development is deemed acceptable in terms of impact on the Green Belt "then the assessment process ends there". Nevertheless, the Council acted unreasonably by defending reason for refusal 2 based on this error.

The Council's late introduction of arguments as to conflict with several Local Plan policies, that were not in the reasons for refusal, in setting out its position in the Statement of Common Ground, but which policies were not subsequently pursued.

12. The Council raised various policies in the agreed Statement of Common Ground which they considered to be in dispute. However, a number of these policies, were not advanced through evidence at the Inquiry. The appellant therefore spent considerable time reviewing these policies and addressing them in evidence.

The Council's unreasonable approach to not dealing with matters through planning conditions

13. The Council had the opportunity to grant planning permission subject to a condition dictating the scope and/or requirements that the attenuation scheme would need to comply with and what it could or could not contain. They did not, and this was unreasonable behaviour.
14. The Council were also unreasonable in contesting and seeking to negotiate conditions in relation to highway matters in spite of these conditions having been agreed between the appellant and Derbyshire County Council in its capacity as the Highway Authority.

The response by North East Derbyshire District Council

15. The Council responded to each of the appellant's points verbally as follows:
16. The Council acted reasonably by withdrawing reasons for refusal the day after the Council's meeting on 13 December 2023. It would have been a much longer Inquiry if they had not done so, and they therefore saved unnecessary expense in doing so. The appellant provided a lot of evidence on matters which were no longer in dispute with the Council.
17. In respect of reason for refusal 2, it is accepted it is not a well worded reason for refusal but in substance there was no change to the Council's position during the course of the Inquiry.
18. Getting something wrong is not necessarily unreasonable behaviour. Interpretation of planning law relies on planning judgement.
19. The Council accept that they did not advance an argument on certain policies in the Statement of Common Ground. However, there was no wasted time or expense as a result of the Council simply referring to those policies. No work would have been carried out which would not otherwise have been done.
20. Whilst conditions might have made the development acceptable the Council's actions were not unreasonable in determining that in their view, they would not. Furthermore, a County Council is not the planning authority. Conditions will generally require some amendments and it is not unreasonable to have re-drafted conditions.

Reasons

21. The PPG advises that costs may be awarded where a party has behaved unreasonably and thereby caused another party to incur unnecessary or wasted expense in the appeal process.

The Council withdrawing reasons for refusal 1, 3, 4, 5, 6 and 7

22. The withdrawal of six of the seven reasons for refusal on 14 December 2022 was in good time before the Case Management Conference, held 16 January 2023, and therefore well in advance of the timetable for submission of proofs, timetabled for the end of February 2023. The Council clearly reviewed their case promptly as part of sensible on-going case management as set out in the PPG following the lodging of the appeal and did not act unreasonably in doing so.
23. Nevertheless, the appellant was entitled to present their evidence on the withdrawn reasons for refusal. It is also normal practice for the appellant to respond to third-party objections.
24. I therefore find no unreasonable behaviour on the part of the Council in respect of their withdrawal of reasons for refusal 1, 3, 4, 5, 6 and 7.

Council's approach to reason for refusal 2

25. Reason for refusal 2 cites a lack of information regarding the proposed attenuation ponds and ancillary equipment such that the Council were unable to be satisfied that it would not be inappropriate development in the Green Belt. During the course of the Inquiry further information was submitted by the

appellant in this respect. Whilst having regard to this the Council nevertheless retained its position that the attenuation ponds and ancillary equipment would constitute inappropriate development in the Green Belt.

26. These were not unreasonable positions for the Council to take and irrespective of whether the Council had requested additional information at application stage, the Council's position would have remained the same. Furthermore, the main matter in dispute, i.e. whether the development would be inappropriate development in the Green Belt, did not fundamentally change throughout the course of the Inquiry. I therefore find no unreasonable behaviour on the part of the Council in respect of their approach to reason for refusal 2.

The approach taken to the test of 'preserving' the openness of the Green Belt

27. Whilst openness does not mean freedom from any form of development, openness cannot be preserved if there is a finding that there would be an adverse impact on it of any kind. The latter is essentially the Council's position that to preserve openness means not having an adverse impact on it. I therefore find no unreasonable behaviour on the part of the Council in their approach to the test of 'preserving' the openness of the Green Belt.

The Council's approach to paragraph 148 of the Framework

28. The Council's witness was not a professional planning witness. Consequently, there was some confusion in his evidence over the application of para 148 of the Framework. If you appear as a professional planning witness it is reasonable to expect that you would be familiar with planning law. Nevertheless, this matter did not take up excessive Inquiry time or necessitate an adjournment to accommodate additional preparatory work. Therefore, although the Council did behave unreasonably in terms of their approach to paragraph 148 of the Framework this did not cause any unnecessary or wasted expense in the appeal process.

The Council's late introduction of arguments as to conflict with several Local Plan policies, that were not in the reasons for refusal, in setting out its position in the Statement of Common Ground, but which policies were not subsequently pursued

29. In preparing a case for an Inquiry it is generally standard practice for a main party to consider compliance with the development plan as a whole. Therefore, whilst the Council's erroneous reference to policies not later relied upon in their evidence may have been frustrating, it would not have resulted in unnecessary work or wasted expense on the part of the appellant.

The Council's unreasonable approach to not dealing with matters through planning conditions

30. Based on their evidence the Council clearly did not feel they were in a position to grant planning permission subject to a condition. That is not an unreasonable position for them to take.
31. The planning authority is required to provide a list of suggested conditions and they did so having regard to comments from statutory consultees such as the Highway Authority and in accordance with the time scale of the Inquiry. They are also at liberty to comment on other main parties' conditions, within reason. In this case I find no unreasonable behaviour in this regard.

Conclusion

32. 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 is not justified.

Hayley Butcher

INSPECTOR