



Costs Decision

Inquiry held on 17 & 18 October 2023

Site visit made on 18 October 2023

by Sarah Housden BA (Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28/11/2023

**Costs application in relation to Appeal Ref: APP/F3545/W/23/3324114
The Plough Inn, 62 The Street, Icklingham, Bury St Edmunds, Suffolk,
IP28 6PL**

- 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 Elveden Farms Limited for a full award of costs against West Suffolk Council.
 - The Inquiry was in connection with an appeal against the refusal of planning permission for outline Planning Application (means of access to be considered) - (i) Conversion works to public house (class A4) to create 2 no. dwellings (class C3) (following demolition of existing extensions); (ii) construction of 7 no. dwellings and (iii) associated landscaping and car parking (previous application DC/17/0630/OUT).
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Decision

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

Procedural Matters

2. In the alternative to a full award of costs, the appellant seeks a partial award relating to the production of ecological evidence in relation to the effect of the proposed development on the Breckland Special Protection Area (SPA).
3. The appellant's initial costs application, dated 13 June 2023, was submitted in writing with the appeal. Leading up to the Inquiry, a more detailed submission was made on 16 October 2023. Matters relating to the appellant's rebuttal statement submitted on 9 October 2023 had been referenced in the 16 October 2023 version. Due to the withdrawal of that rebuttal statement, at the Inquiry I accepted the submission of an amended written costs application dated 17 October 2023.

Reasons

4. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) 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.
5. The basis of the appellant's application is that the Council's refusal of planning permission is unreasonable and is based on a flawed legal interpretation of the appellant's proposed measures to offset any potential harm to stone-curlew as

a qualifying feature of the Breckland SPA. The appellant's case falls within two broad points.

6. Firstly, the appellant contends that the reference in the reason for refusal to the proposed offsetting measures being compensation rather than mitigation is legally flawed. It is argued that had the Council taken an accurate approach to the proposed offsetting measures, taking into account the legal advice supplied by the appellant in July 2022, planning permission could have been granted with appropriate planning conditions and/or a s106 planning obligation should the latter have been deemed to be necessary. It is also argued that the Council failed to share its own legal advice on the proposed offsetting measures.
7. Secondly, it is argued that the Council's Advice Note and Natural England's guidance was not applied to the determination of the planning application, whereas it was used in conjunction with the determination of, and approval of, other planning applications for residential development where the effect on the Breckland SPA was a relevant issue. It is argued that had the Advice Note's reference to fractional displacement of stone-curlew nests being likely to indicate tolerance of disturbance, rather than of nest displacement, been applied to the proposal, it would have resulted in a different conclusion in relation to the assessment of likely significant effect on the SPA, and therefore to the outcome of the planning application.

Legal interpretation

8. It is Natural England's role, as the nature conservation body under Regulation 63(3) of the Habitats Regulations 2017, to provide advice about the ecological impacts of development proposals on designated sites. The Council's assessment of the effectiveness of the appellant's proposed offsetting measures as part of the planning application, and whether or not they amounted to mitigation or compensation, are clearly set out in the officer report. They were arrived at taking into account the offsetting proposals as submitted in the Information for Habitats Regulations Assessment and Natural England's consultation responses and advice. The officer report also confirms that the appellant's legal opinion was considered.
9. The officer report concludes that the proposed offsetting measures would have amounted to compensation rather than mitigation, and therefore that following an appropriate assessment, reasonable scientific doubt of an adverse effect on the site's integrity could not be ruled out. In these circumstances, development proposals should be refused, and it was not incumbent on the Council to consider whether the matter could be resolved by the imposition of a condition or a planning obligation, thereby enabling planning permission to be granted.
10. I consider that the Council acted reasonably in relying on Natural England's advice in relation to the effectiveness of the proposed offsetting measures, and there is nothing in the evidence to demonstrate that they misunderstood or misinterpreted the legal advice supplied by the appellant. That the Council did not share its own legal advice on the matter is unhelpful given the appellant's willingness to do the same. It does not, however, amount to unreasonable behaviour.
11. The geographical extent of the area that would need to be covered by any in-combination assessment to establish whether there would be a likely significant effect on the SPA has been a key issue for the appeal. However, there is

nothing in the evidence which leads me to conclude that the Council misinterpreted Natural England's advice as meaning that there actually would be such an in-combination effect, and that it refused planning permission on that basis. The Council did not seek from the appellant, nor put forward any information about residential permissions or applications within the SPA and its buffer zone, to enable the appellant to make an in-combination assessment of effects. However, it is not incumbent on the Council to elicit further information to overcome the objection of a statutory consultee.

12. Overall, I conclude that the Council did not behave unreasonably in its approach to the interpretation of the appellant's legal advice, and to the advice of Natural England.

Advice Note

13. The Council's 'internal' guidance note¹ and its published Advice Note²) have been submitted in evidence to the Inquiry. Whilst they are set within the context of the need for a strategic approach to deal with proposals affecting the SPA, they set out interim arrangements to 'screen out' specific types of development from further assessment.
14. Based on the latest version of the Advice Note³, proposals of one dwelling or more in Icklingham require further, bespoke, consultation with Natural England. However, it is clear that the appellant was not made aware of the Advice Note during the determination of the planning application. Despite being used for the assessment of other planning applications in 2022, the Advice Note is not referred to in the officer report for the appeal proposal. Its existence only became apparent following an email exchange in which the appellant enquired about reference to it in Natural England's advice for planning application reference DC/22/1386/FUL dated 19 August 2022. Notwithstanding that the Advice Note was still a 'work in progress', no satisfactory explanation has been given for why it was not made available to the appellant before February 2023.
15. The Council's explanation of why the Advice Note was not, and could not, have been determinative in respect of the appellant's appeal proposal is, with respect, unsatisfactory. Had the Advice Note been made publicly available, the areas of difference could at least have been further narrowed down. In the event, that interaction has taken place following the refusal of planning permission, during the appeal process and leading up to the Inquiry, culminating in the Council's decision through two officer decision records⁴ that it no longer intended to defend the reason for refusal.
16. Overall, I conclude that in relation to procedural matters, the Council behaved unreasonably in not disclosing and applying the contents of the Advice Note during the determination of the planning application. However, I consider it likely that its availability would only have enabled the issues to be narrowed down, rather than rectified in their entirety. As such, an appeal could not have been avoided and the appellant has not incurred unnecessary expense during

¹ CD11.1 Annex 2 pages 1031 - 1032

² 'Advice to applicants where a development site is located within Breckland SPA, or the 1500 metre buffer zone' and its Annex A and Annex B

³ CD11.2 Appendix 5

⁴ CD6.1 & 6.2

the appeal process. A full award of costs is not justified and the application for a full award of costs is refused.

17. I have also considered whether a partial award of costs is justified. However, even if the areas of difference between the main parties could have been narrowed down, it is unlikely that an appeal could have been avoided altogether. In these circumstances, the appellant has not incurred unnecessary expense relating to the production of ecological evidence during the appeal process and a partial award of costs is not justified. The application for a partial award of costs is therefore refused.

Conclusion

18. Overall, therefore, I find that whilst unreasonable behaviour has occurred, it has not resulted in unnecessary or wasted expense as described in the PPG and neither a full nor a partial award of costs is justified in this case.

Sarah Housden

INSPECTOR