



Costs Decision

Inquiry held on 17 & 18 October 2023

Site visit made on 16, 18 & 19 October 2023

by D J Board BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6th February 2024

Costs application in relation to Appeal Ref: APP/H2265/W/23/3321880 Land at Eccles, East and West of Bull Lane, Eccles, Kent, ME20 7EH

- 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 Trenport Investments Ltd for a full award of costs against Tonbridge and Malling Borough Council.
 - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for described as 'Residential development of up to 950 dwellings (to be delivered in a phased and severable manner), provision of a mixed-use local centre (including Class E, F and C3 with potential for retirement homes) provision of land to accommodate a new primary school, replacement sports pitches with changing facilities; associated green infrastructure including landscaping, public open space, allotments, sustainable urban drainage systems, biodiversity enhancements; new accesses from Bull Lane; new access and road/cycleway/footpath link to New Court Road'.
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Decision

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

The submissions for Trenport Investments Ltd¹

2. The costs application was made in writing. The applicant considered that the appeal was caused by the failure of the Council to consult with National Highways in a timely manner. This was made worse by lack of action to remedy the matter.

The response by Tonbridge and Malling Borough Council²

3. The response was made in writing. Fundamentally the Council's position is that it did not behave unreasonably and even if its handling of the application is found to be unreasonable it did not directly cause an unnecessary appeal.

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.

¹ ID20

² ID20

5. The nub of the applicant's case for costs centres on what they consider to be a failure by the Council to consult National Highways (NH) in a timely manner following receipt of the application which became the subject of the appeal.
6. There are various exchanges about the conduct of specific officers surrounding the consultation and at subsequent meetings. My view is these are not matters for me and I will not engage with matters that could be construed as defamatory. My decision on whether costs should be awarded focusses on the procedural aspects of the application and appeal and ultimately whether the appropriate procedure was followed and, if was not, did it lead to the need for an appeal which could have been avoided.
7. The requirements for consultation prior to the determination of a planning application are set out in the Development Management Procedure Order (DMPO)³. I do not agree with the Council's suggestion that these are 'loosely' framed. The schedule is clear what the requirements are for the Local Planning Authority when a development is 'in their opinion' within a category set out in the table in schedule 4. If the view is taken that a scheme is within one of the categories, then the requirement is that they must consult prior to the grant of planning permission. These requirements are placed on the Local Planning Authority not the developer or any other body/party. To this end I have carefully considered what the reasonable expectation of the applicant should be in this case regarding the Council seeking the views from NH.
8. In this regard I do not take the Council's suggestion that the applicant should have taken this on to be a reasonable proposition. It would be fair to suggest that the applicant should seek pre application advice from relevant consultees. However, it is probable that, as is established practice, this would be non-binding. As such it is understandable that the applicant wanted the formal response of the relevant highway consultee on this scheme at an early stage in the application process.
9. There is no dispute that consultation was not undertaken when the application was submitted, and that NH learned of the scheme in February 2023⁴. The application was lodged with the Council in January 2022, and it was supported by a Transport Assessment (TA). This was also dated January 2022 and contained clear references to the Strategic Road Network (SRN) (M2 and M20). It also included the pre application advice from Kent County Council which also makes reference to the SRN and the need to undertake an assessment of the scheme of it as part of the TA. Therefore the scheme as applied for is clearly in a category that would potentially impact on the SRN. As such it would be reasonable to expect that the Local Planning Authority would act in a responsible and precautionary manner and undertake the requisite consultation with 'the highway authority for the trunk road' as set out in the DMPO.
10. The extent of the negotiations, detail and time taken are somewhat academic after this as to my mind it is this in principle omission that is an issue. Matters evolved following this and indeed during the appeal. Nevertheless, it was known from the outset that the scheme could impact on the SRN and that this issue would be part of assessment of the scheme. Once engagement with NH began in the lead in to the appeal it appears that over a period of about five months the parties were able to resolve the issues to the satisfaction of the

³ Para 3 applicants costs submission and provided in Annex 1 to the Council's rebuttal referred to at para 5

⁴ Para 2 National Highways opening statement to the Inquiry

NH. This is evidenced by the fact that in opening of the Inquiry the Council confirmed that its position was that it withdrew its objection to planning permission being granted⁵.

11. The Council has made much of whether it is its responsibility to get such advice, time taken on discussions and the fact that amendments were made to the application. However, they cannot have it both ways. The Council's planning committee relied upon the holding objection from NH in making its resolution⁶ in June 2023 following the appeal against non-determination. This is a clear indication that it considered this advice significant enough to be a barrier to the grant of planning permission. Amendments were made to the scheme but again these may have come forward earlier had NH been involved earlier in the process.
12. To my mind it necessarily follows that had NH been consulted at the outset then it is possible that some time in 2022 the applicant and NH would have been able to resolve highway issues associated with the SRN. Even if matters were not fully resolved immediately the applicant would have known the direction of travel and a non-determination appeal could have been avoided.
13. Given that there was a gap of about thirteen months from the application being lodged to the formal consultation it is clear from the eventual timescales involved that had NH been consulted from the outset those months could have accommodated the time period for discussion with NH. If that had happened, given that matters were resolved, it seems to me the need for the appeal could have been avoided altogether. This does not reflect the spirit of the National Planning Policy Framework which is clear that local planning authorities should approach decisions on proposed development in a positive way and that the right information is crucial to good decision making.
14. The Council refer to other issues associated with the scheme which would have led to an appeal in any event. In particular affordable housing which at the point the appeal was lodged they state remained unresolved. However, the view set out in the committee report, after the appeal was lodged is that agreement had been reached⁷. It is clear that engagement on this issue had been ongoing. This was reflected in the committee report⁸ and ultimately the main issues before the Inquiry.
15. In terms of the PPG I consider that, due to the absence of NH involvement, subsequently the Council has not properly justified not reaching a decision within the relevant time limit which ultimately led directly to the non-determination appeal centred on matters of highway. They have thereby delayed development which should have been permitted. The applicant has sought full costs. The Council in response rightly pointed out that the evidence presented at the inquiry was not just on highway matters. This evidence provided information about the design of the scheme and addressed matters raised by interested parties to the appeal. However, fundamentally, none of this would have been necessary had the scheme been determined locally, not at appeal. As such full costs are justified in this case.

⁵ Para 16 of ID2, Opening statement of the Council

⁶ CD 6-3, 6-4, 6-5, 6-6

⁷ Appendix 2 to Councils planning proof of evidence

⁸ CD 6-3 para 6.120

Costs Order

16. 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 Tonbridge and Malling Borough Council shall pay to Trenport Investments Ltd, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Tonbridge and Malling Borough 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.

D J Board

INSPECTOR