
Costs Decision

Site visit made on 23 January 2024

by Stephen Normington BSc DipTP MRICS MRTPI FIQ FIHE

an Inspector appointed by the Secretary of State

Decision date: 19th February 2024

**Costs application by Enterprise Hangars Ltd in relation to Appeal Ref:
APP/A1720/W/23/3321682**

Land south of 16 and 17 Glenthorne Close, Fareham, Hampshire PO14 2NP

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Enterprise Hangars Ltd for a full award of costs against Fareham Borough Council.
 - The appeal was against the refusal of outline planning permission for proposed erection of nine live/work [research/development/industrial/residential - Class E and C3] hangar buildings for aviation sector and public open space, with matters relating to access, layout and scale sought (appearance and landscaping reserved).
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) advises that all parties are expected to behave reasonably to support an efficient and timely process. Where a party has behaved unreasonably and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs irrespective of the outcome of the appeal.
3. The basis of the Appellant's application for costs is that the Council acted unreasonably by denying access to the site for a survey relating to protected species that was requested by the Council's Planning Officer who allegedly knew that a number of other reports were being held back until access to the site had been granted. Nonetheless, the Council proceeded to determine the planning application without the Appellant having the opportunity to prepare the relevant reports.
4. The Council determined the planning application in advance of the outcome of a legal challenge through the High Court relating to the Council's stance in denying the Appellant access to the site. The Court found the Council's approach in denying access was unlawful.
5. Following the Court decision access was provided to the site and a walkover survey was conducted in August 2023. This survey found no evidence of occupation by the relevant protected species on the site itself, with the site being used for foraging and commuting only. On the basis of the site survey and the provision of an updated Appraisal, the Council has confirmed in its

Statement of Case that the relevant reason for the refusal of planning permission had been addressed.

6. The Appellant considers that the Council did not act fairly and impartially but instead were obstructive during the determination of the planning application which led to unnecessary and wasted expense being incurred as a consequence of the appeal process.
7. In considering this matter I have taken into account the differing roles of the Council in its capacity as landowner and that as local planning authority. I recognise that the relevant Planning Officer would not likely have the powers to authorise access to a site in circumstances where such responsibility likely rests with the Council's Estates/Property Department. However, I also recognise that the Appellant should be entitled to expect a homogenous approach in the actions of the Council.
8. I do not consider that there was any procedural irregularity in the Council proceeding to determine the planning application, in particular as there were other matters identified as reasons for the refusal of planning permission that were not inextricably linked to a need for site access. In this regard, the Appellant suggests that even if the other reports were produced, the planning application would have failed as a consequence of the lack of a protected species survey.
9. The Council indicate that the Appellant advised that progress on a number of other matters, where further information was necessary, was being withheld but would be progressed once the protected species survey had been undertaken. These matters related to a drainage report, securing nitrate mitigation, provision of financial contributions towards affordable housing and to offset the recreational pressure on Habitat Sites. It was also clear from my determination of the appeal that a noise survey was also necessary.
10. As site access was granted by the Court prior to my determination of the appeal, I am of the view that it was within the gift of the Appellant to address the matters identified in the reasons for refusal, where insufficient information had been provided, as part of the appeal process.
11. However, the Council's reasons for the refusal of planning permission which related to nitrate mitigation and financial contributions towards affordable housing and to offset the recreational pressure on Habitat Sites were not matters that were dependent on prior site access being granted. The Appellant sought to address these matters through the submission of a Deed of Undertaking, dated 5 May 2023, pursuant to Section 106 of the Town and Country Planning Act 1990. Whilst there is some suggestion that Council may have encouraged the submission of such obligation, it is a matter for the Appellant to ensure that any planning obligation submitted is in a form that is capable of being enforceable. In this case, both the Council and myself found the submitted Deed of Undertaking to be fundamentally flawed and incapable of serving any useful purpose to secure the financial contributions and nitrate mitigation matters that it purported to address.
12. The Appellant took his own legal advice regarding the suitability of the Deed of Undertaking which advised on 8 October 2023 that it was unlikely that an obligation under Section 106 of the 1990 Act could be entered into as the Appellant had no interest in the land. Although the advice suggested there are

- other possible alternatives it inferred that a Grampian Condition that development may not commence until an obligation is in place may be an alternative approach. However, the advice was silent on the planning position in respect of the use of a Grampian Condition in these circumstances.
13. The Appellant sought to rely on the use of a Grampian Condition to address the relevant matters in the appeal. However, I set out in my Decision Letter why the use of a Grampian Condition would not be appropriate taking into account the advice provided in the PPG. In these circumstances, any unnecessary expense incurred in trying to address these matters was not as a consequence of any unreasonable behaviour by the Council. To some extent this was due to a relatively unusual situation where the planning application and appeal were pursued in circumstances in which the Appellant had no interest in the land.
 14. The Council identified an alternative approach to use the powers under Section 111 of the Local Government Act 1973. Whilst the legal advice suggested that the Council may refuse to enter into any agreement pursuant to these powers, the fact remains that I have no evidence to suggest the Appellant pursued any further dialogue on this matter other than a reiteration of the reliance of the use of a Grampian Condition.
 15. Taking into account the above, I do not consider that the Council acted unreasonably during the determination of the planning application or during the appeal with regard to securing nitrate mitigation, provision of financial contributions towards affordable housing and to offset the recreational pressure on Habitat Sites. In the absence of any appropriate mechanism to provide the necessary financial contributions and mitigation, I have found that the Council had reasonable concerns about the harm relating to these matters which justified its decision. Therefore, in my view, the appeal could not have been avoided.
 16. I turn now to matters relating to drainage and noise. I recognise the Appellant's view that these matters could have been resolved had access to the site been granted. A desktop Flood Risk Assessment and Drainage Strategy was prepared dated 7 March 2023 and submitted as part of the appeal evidence. Whilst this identified the need for further investigations and dialogue which are set out below, I am not aware of any impediment to the submission of the Strategy prior to the determination of the planning application, particularly as this was based on a desktop assessment only.
 17. The Strategy identified that there are two alternative approaches to managing surface water from the site. The first is drainage by infiltration and the second is on site attenuation with a discharge to surface water sewer. It set out that geotechnical investigation would be necessary to prove that there is adequate ground permeability, if infiltration is to be used. However, no such testing was undertaken.
 18. With regard to discharge to sewer, the Appellant has submitted a letter from Southern Water, dated 15 September 2023. This identified that there is currently adequate capacity in the local sewerage network to accommodate foul drainage but no surface water flows (existing or proposed) can be accommodated within the existing foul sewerage system unless agreed by the Lead Local Flood Authority in consultation with Southern Water. I have no evidence to indicate whether any subsequent discussions have occurred with

the Lead Local Flood Authority which would likely require foul sewage system capacity surveys.

19. Therefore, although the Flood Risk Assessment and Drainage Strategy identified alternative approaches to site drainage, these were reliant on further investigations and consultations being required. I have no evidence to suggest that the Appellant pursued such investigations and consultations and therefore the Council was not unreasonable to maintain its contention that such issue had not been adequately addressed.
20. With regard to noise, I found that the Council were correct in suggesting that a technical noise survey was necessary. During the determination of the planning application it was clear that no technical information was provided to support the proposal to construct residential units in close proximity to an operational airport with the units themselves containing noise generating activities associated with the use of the ground floor and hangar space.
21. I have no evidence to indicate the extent to which the prevention of access to the site may have influence the completion of a competent assessment as no technical consideration appears to have been given to this issue at all. However, it seems to me that some technical evidence should have been submitted with the planning application to address the material planning consideration of siting noise sensitive uses in close proximity to noise generating sources. The fact that the planning application and the appeal submission are silent on such technical evidence is not as a consequence of any unreasonable behaviour by the Council, it is effectively the choice of the Appellant.
22. To some extent, the Appellant argues that there was no point in providing such survey but would provide one if requested by the Inspector. As set out in my Decision Letter, it is not a matter for the Inspector to request evidence in the appeal process. It is a matter for the parties to ensure that any evidence, technical or otherwise, is submitted by the parties as part of the process to support their respective case. In my view, the Appellant had ample opportunity to provide a more technical based assessment to support the appeal.
23. Although the Appellant suggests noise and drainage issues could have been addressed prior to the determination of the planning application had site access being granted, I am not convinced that this would have been the case. During the lengthy process of this appeal, these matters still remain unresolved despite access to the site being granted and which is not as a consequence of any unreasonable behaviour by the Council.
24. In considering the above approach, there is also a degree of obligation on behalf of applicants to ensure that development proposals accord with the relevant Local Plan and Framework policies. I also found significant and unacceptable adverse impacts of granting planning permission upon the delivery of the Swordfish Business Park. This matter contributed to my conclusion that these impacts would significantly and demonstrably outweigh the benefits associated with the appeal proposals.
25. I recognise that the Council could have been more helpful, in its role as landowner, in providing earlier access to the site. However, for the reasons set

out above, I am not convinced that this would have resulted in the resolution of some of the disputed matters.

26. Whilst it could be argued that the Council's decision to proceed to determine the application effectively cut off any opportunity for the Appellant to provide additional information, there was nothing procedurally incorrect in the Council taking this stance, particularly as it had other concerns, including the effect on the delivery of the Swordfish Business Park, that were not reliant on site access matters being addressed. As such, I do not consider that the appeal could have been avoided.
27. In these circumstances, I have no compelling evidence to suggest that the Council's approach was unreasonable in the consideration of the planning application. There were clearly a number of matters that were unresolved during the consideration of the planning application and remain unresolved in my consideration of the appeal. In my view, these matters justifiably contributed to the Council's position in determining that planning permission should be refused.
28. For these reasons, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated and having regard to all other matters raised, an award of costs is not justified.

Stephen Normington

INSPECTOR