
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 Fareham Borough Council in relation to Appeal Ref: APP/A1720/W/23/3321682

Land south of 16 & 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 Fareham Borough Council for a full award of costs against Enterprise Hangars Ltd.
 - 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).
-

Decision

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

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 Council's application for costs is that the Appellant acted unreasonably in pursuing a planning application without addressing all of the issues identified at the pre-application stage. This resulted in the refusal of planning permission and the submission of the appeal. The Council contend that the Appellant had been advised for some time that the proposal was not deliverable, particularly given that the Appellant had no interest in the land.
4. As such, the Council considers that the submission of a planning application without addressing the issues, without acquiring the site and to lodge an appeal against a refusal of planning permission with a case which fails to grapple with all of the Council's reasons for refusal is tantamount to unreasonable behaviour by the Appellant. This unreasonable behaviour has put the Council to unnecessary expense in wasted officer time in defending the appeal.
5. The Council also contends that throughout the application process the Appellant indicated that there was an intention to submit the necessary technical documents and secure the required ecological mitigation. These documents

would be provided once the Council (as landowner) and the Appellant had resolved the issue of site access, which was being considered in the High Court, for the purpose of undertaking a protected species survey.

6. At the time of the ongoing legal proceedings between the Appellant and landowner over site access, the Council maintains that it was clear that there were a number of reasons for refusal that could not be overcome by the submission of further technical documents. To that end, the Council took the decision to determine the application.
7. The Council considers that the Appellant has subsequently submitted the appeal in the full knowledge of the thirteen reasons for refusal. The Council is of the view that the Appellant has failed to advance a robust case to overcome all of the reasons for refusal and the required technical documents have not been submitted. It is the Council's case that the documents that have been submitted are not fit for purpose.
8. In my determination of this costs application, I consider that there are three substantive issues to address. Firstly, the Appellant's actions leading up to the determination of the planning application by the Council.
9. Secondly, the Appellant's actions during the appeal process in addressing those aspects of the Council's reasons for the refusal of planning permission relating to nitrate mitigation and financial contributions towards affordable housing and to offset the recreational pressure on Habitat Sites (Reasons Nos. 8, 11 and 13) which were sought to be addressed through the provision of a planning obligation. In considering this second substantive matter, I have not made any reference to reasons for refusal Nos. 9 and 10 which were resolved prior to my determination of the appeal.
10. The third, and final, substantive matter relates to whether the Appellant acted unreasonably in the provision of information to address reasons for refusal Nos. 7 and 12 relating to flood risk and noise.
11. There are other reasons for the refusal of planning permission relating to employment levels (Reason No. 1), delivery of the wider Swordfish Business Park (Reason No. 2), development outside of the settlement boundary (Reason No. 3), effect on character and appearance of the surrounding area (Reason No. 4), effect on the existing and future potential general aviation operation of the airfield (Reason No. 5) and the effect on the living conditions of residents in the vicinity of the proposed access (Reason No. 6). In my view, it cannot be reasonably argued that the Appellant failed to substantiate the evidence in contesting those aspects of the Council's case in the appeal, particularly in circumstances where some of these are a matter of subjective judgement.
12. In addition, matters relating to secondary habitat sites (Reason No. 9) and a protected species survey (Reason No. 10) were resolved during the appeal process based largely on the evidence provided by the Appellant. Consequently, I do not consider that it can be argued that the Appellant acted unreasonably with regard to these matters.
13. Considering the first substantive matter, the fact that the Council proceeded to determine the planning application in circumstances where it was nearly impossible for the Appellant to undertake a protected species survey does not constitute unreasonable behaviour on behalf of the Appellant. I recognise that

the Council in its capacity as landowner may have had a firm view of the proposed development but that should not fetter its role as local planning authority. Whilst, in my experience, it is unusual to submit a planning application on land to which an applicant has no interest and no likely prospect of such interest being secured, it was nonetheless entirely within the gift of the Council in its role as local planning authority to continue to liaise with the Appellant at application stage.

14. I note the Council's concern that the Appellant did not follow the pre-submission advice. However, this does not affect the Appellant's right to submit a planning application, but I recognise that there is a degree of expectation that sufficient information is provided to support such submission and address material planning considerations.
15. The extent to which any further information may have been forthcoming at application stage, had the Council not proceeded to determine the planning application, can only be a matter of speculation. I have found that there was nothing procedurally incorrect in the Council's decision to proceed to determine the planning application. However, this action, in circumstances where the Appellant had requested a delay until matters relating to access to the site were resolved, effectively cut off any opportunity for the Appellant to submit further information. In these circumstances, I find no compelling evidence of unreasonable behaviour on behalf of the Appellant at the application stage that would justify an award of costs. The Council effectively chose a path of action of its own accord in proceeding to determine the application knowing full well that there were several unresolved matters.
16. Turning now to the second substantive matter, the Appellant sought to address matters relating to nitrate mitigation and financial contributions towards affordable housing and to offset the recreational pressure on Habitat Sites through the submission of a Deed of Undertaking, dated 5 May 2023, pursuant to Section 106 of the Town and Country Planning Act 1990. Although both the Council and myself found such undertaking fundamentally flawed, the fact remains that it was prepared and endorsed by a legal practice.
17. The extent to which the obligation was considered legally suitable is a matter between that legal practice and the Appellant. In my view, the Appellant should have a reasonable degree of confidence that a document prepared by a legal practice is fit for purpose. Therefore, I see nothing unreasonable in the Appellant submitting the Deed of Undertaking in circumstances where, on face value, it was professionally prepared. Following the Council's articulation of its concerns regarding the suitability of the Deed of Undertaking to legally address the relevant planning considerations, the Appellant sought Counsel's opinion. This concluded to a large extent that the Council was correct in its interpretation of the enforceability of the obligation but it recommended two alternative courses of action. These comprised a new agreement under Section 111 of the Local Government Act 1973, but this was caveated with a concern that the Council may refuse to enter into such agreement, or the imposition of a Grampian Condition to the effect that development may not commence until a mechanism to secure the obligations was in place.
18. Perhaps understandably, given the Counsel advice, the Appellant sought to address these matters through the Grampian condition route. Although I found that the use of a Grampian planning condition would not be suitable in

these circumstances and would be contrary to the advice provided in the PPG, nonetheless this was a suggested route recommended by Counsel. Against this background, I do not consider that the Appellant can have acted unreasonably. The Appellant's actions in submitting the Deed of Undertaking and subsequently pursuing the Grampian Condition route followed legal advice.

19. I turn now to the third substantive matter relating to the flood risk and noise reasons for the refusal of planning permission that were before me in my consideration of the appeal. A desktop Flood Risk Assessment and Drainage Strategy was prepared dated 7 March 2023 and submitted as part of the appeal evidence.
20. 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.
21. With regard to discharge to sewer, the Appellant submitted a letter from Southern Water, dated 15 September 2023. This identifies 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 had no evidence to indicate whether any subsequent discussions may have occurred with the Lead Local Flood Authority. In any event, my experience suggests that such discussions would likely need to be informed by foul sewage system capacity surveys.
22. I recognise that the time the Strategy was prepared the Appellant had not secured access to the site. The evidence suggests that such access was granted in August 2023. I have no evidence to suggest that the Appellant attempted to undertake the infiltration investigations within the appeal timetable. Furthermore, I can find no suggestion that these were planned to be undertaken but their submission may have been precluded by the appeal timetable.
23. However, in my view, there were no reasons why technical dialogue should not have occurred with Southern Water to reach some conclusion regarding the extent to which there was any capacity in the local sewage network to accommodate surface water flows from the proposed development. Such discussions were not necessarily reliant on site access.
24. On the basis of the submitted evidence, it seems to me that the Drainage Strategy identified two options that required further investigations, design work and consultation with Southern Water. None of these required actions appear to have been pursued. Consequently, the Council were obliged to have to defend reason for refusal of planning permission No. 7 in the appeal process.
25. In my view, the Appellant had the basis of a Drainage Strategy but did not appear to act on the recommendation contained therein in the appeal process. Therefore, the Council had no option other than to contest those aspects of the Appellant's case relating to flood risk in the appeal process. The Appellant's actions in not providing evidence that was firstly clearly identified in the reason

for refusal of planning permission, and secondly in the desktop Flood Risk Assessment and Drainage Strategy constitutes unreasonable behaviour as identified in the PPG.

26. Turning to noise, reason for refusal No. 12 was quite clear in identifying that inadequate information had been submitted for the Council to come to a view that the proposed development would not have an unacceptable effect on occupants of existing properties and the proposed units by virtue of noise. Although the Appellant submitted views regarding noise generation and impact during the appeal process, these do not constitute a technical assessment prepared by a competent person experienced in such matters.
27. I have no evidence to indicate the extent to which the prevention of access to the site may have influenced the completion of technical evidence as no technical consideration by an experienced noise consultant appears to have been given to this issue at all. Any reasonable interpretation of the Council's reason for refusal No. 12 would conclude that some technical evidence should have been submitted to support the appeal to address the material planning consideration of siting noise sensitive uses in close proximity to noise generating sources. The fact that the appeal submission does not provide such technical evidence is effectively the choice of the Appellant.
28. 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 opportunity to provide a more technical based assessment to support the appeal. The Appellant's actions in not providing any technical evidence left the Council with no option other than to contest those aspects of the Appellant's case relating to noise in the Appeal process.

Conclusion

29. With regard to the first substantive matter relating to the Council's decision to determine the planning application and the matters that thereafter resulted in the 13 reasons for the refusal of planning permission, I consider that this was entirely the choice of the Council. I have no evidence to suggest that the Appellant was able to meaningfully influence the Council's action in this regard.
30. Whilst I accept that not all of the reasons for refusal may have been capable of resolution, nonetheless, the Council's actions in determining the planning application appear to have cut off any opportunity for the Appellant to have any further meaningful engagement. Consequently, 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 relating to the Appellant's actions leading up to the determination of the planning application is not justified.
31. With regard to the second substantive matter relating to the Deed of Undertaking, I have found that the Appellant broadly followed the external legal advice that was provided. I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. An award of costs relating to the Appellant's actions in

addressing matters relating to nitrate mitigation and financial contributions towards affordable housing and to offset the recreational pressure on Habitat Sites is not justified.

32. On the third and final substantive matter, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated with regard to contesting those aspects of the Appellant's case relating to noise and flood risk. With regard to these matters, a partial award of costs is justified.

Costs Order

33. 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 Enterprise Hangars Ltd shall pay Fareham Borough Council the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in contesting those aspects of the Appellant's case in the appeal that related to the flood risk, as identified in reason for refusal No. 7, and those incurred in contesting those aspects related to noise, as identified in reason for the refusal of planning permission No 12.
34. The Council is now invited to submit to the Appellant, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Stephen Normington

INSPECTOR