



Costs Decision

Inquiry Held on 30 & 31 January 2024

Site visit made on 30 January 2024

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date 23 February 2024

Costs application in relation to:

Appeal A Ref: APP/J2210/C/21/3281250

Appeal B Ref: APP/J2210/C/21/3281251

Appeal C Ref: APP/J2210/W/21/3275629

Land at Moate Farm, Stodmarsh Road, Canterbury, Kent CT3 4AP

- 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 Friends of Fordwich & District and Fordwich Town Council for a full award of costs against Mr T Delaney.
 - The inquiry was in connection with an appeal against the Council's decision to issue an enforcement notice alleging: Without planning permission, the change of use of the land for the stationing of 37no. additional static caravans for residential use and in respect of refusal of planning permission for siting of additional 37 static caravans for Gypsy/Traveller Accommodation, and the provision of storage for touring caravans.
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Decision

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

The submissions for Fordwich & District and Fordwich Town Council (Rule 6 Party)

2. The Rule 6 Party submit that a full award of costs is justified in relation to both procedural and substantive matters at appeal. They contend that the Appellant behaved unreasonably by exercising their right of appeal in an unreasonable manner when it clearly had no prospect of succeeding. Furthermore, it was unreasonable for the Appellant to withdraw their appeal on the second day of the Inquiry without good reason. The Rule 6 Party contend that throughout the appeal process the Appellant has failed to provide information requested and/or to adhere to deadlines, including not completing a timely statement of common ground nor agreeing factual matters common to witnesses of the principal parties. Consequently, the Appellant's unreasonable behaviour resulted in the Rule 6 Party incurring wasted expense in the appeal process.

The response by Mr T Delaney

3. The Appellant believes that it was not unreasonable to withdraw the Section 78 appeal in the circumstances he found himself in following the quashing of the enforcement notice. He contends that the ground (a), deemed planning application the subject of the notice and S78 appeal were interrelated, and

the issues relating to those two appeals should be heard together. Consequently, it was the quashing of the enforcement notice that led to its withdrawal, and this was a reasonable outcome.

4. Furthermore, the s78 appeal was made in good faith and inevitable after the Council declined to consider the subsequent application submitted by the Appellant who was seeking an amended scheme. In addition, the s78 appeal included a proposed "Wheatcroft Amendment". It was not until two years after the appeal submission that the Inspector declined to accept that amendment. Thus, until her decision was made, the basis on which the appeal development would be determined was not known. It was not therefore unreasonable for the Appellant to pursue the appeal, and any findings that may have been made by the Inspector on the s78 appeal should not be prejudged.
5. It is submitted that the Appellant requested an inquiry based on the Council's four reasons for refusal and based on their request for a "Wheatcroft Amendment". Having regard to the proposed amendment it would have been necessary for the Appellants to give evidence on oath in relation to occupation of the site and its proposed transitory use. The inquiry procedure was agreed by PINS. However, following the Inspector's refusal to accept the proposed amendment it was no longer considered necessary for the Appellants to attend.
6. Based on the concerns raised by the Council and the Rule 6 Party, the Appellant believes he adequately engaged and addressed the reasons for refusal and produced evidence to support his case. Furthermore, the Appellant did not fail to engage in the completion and agreement of a Statement of Common Ground (SOCG). However, the late introduction of the ground (b) appeal meant that there was genuine disagreement over matters in relation to the notice which resulted in the SOCG remaining unsigned. The fact that the SOCG remained unsigned did not render the site visit in December 2023 being a wasted expense.

Reasons

7. The 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.
8. PPG advises that an appellant is at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal. It advises that the right of appeal should be exercised in a reasonable manner and the appellant is at risk of an award of costs if the appeal has no reasonable prospect of succeeding. Examples include, the development is clearly not in accordance with the development plan, and no other material considerations such as national planning policy are advanced that indicate the decisions would be made otherwise, or where material considerations are advanced, there is inadequate supporting evidence.¹
9. In relation to procedural matters, PPG advises that appellants are required to behave reasonably in relation to procedural matters on the appeal. Examples of unreasonable behaviour which may result in an award of costs

¹ PPG, Paragraph:053 Reference ID: 16-053-20140306

include, withdrawal of an appeal without good reason, delay in providing information or other failure to adhere to deadlines, not completing a timely SOCG or not agreeing factual matters common to witnesses of both principal parties.²

10. The Appellant's application form was dated 1 September 2020 and indicated that the development had already started at the time of the application, but was not complete. The Local Planning Authority (LPA) subsequently refused planning permission for reasons relating to absence of evidence in relation to the occupants of the site, harm to the character and appearance of the area, failure to demonstrate that the development would not have an adverse impact on highway safety and amenity, and failure to demonstrate nutrient neutrality and failure to secure the delivery of necessary measures to mitigate the impacts of the proposed development on the Stodmarsh SAC, SPA and Ramsar.
11. The appeal was made on 24 May 2021 with a request that it follow the inquiry procedure. Reasons given related to the number of issues raised, the need for evidence to be tested through cross examination, including matters of unmet need, the need for the development, the way in which the site is used, and the resulting harm of the development to the setting of the conservation area. It was further stated that it was considered necessary for evidence to be given under affirmation regarding the way in which the site is used. It was indicated that three witnesses would be called, including the Appellant and his brother.
12. The appeal included a proposed "Wheatcroft Amendment" seeking to amend the application with a reduced site area, a reduction in the number of static caravans (24) and stating that the development no longer proposed storage for touring caravans. In addition, it indicated that the additional static caravans would be occupied for short periods, akin to a transit site, albeit with the caravans being a more permanent fixture on the site. It was stated that the caravans would be occupied by Gypsy and travellers who meet the PPTS definition.
13. The Appellant's initial Statement of Case (SOC) indicated that their appeal would demonstrate that there is no risk to highway safety resulting from the development; would demonstrate that the development would not harm nitrate neutrality and that there are a number of material considerations which weigh in favour of the development, including significant unmet need within the region, effective use of previously developed land, compliance with locally specific criteria policy for the Gypsy and travellers site and the effective use of landscaping.
14. The appeals against the enforcement notice and S78 appeal were linked by PINS and considered together. The appeals in relation to both the ground (a), deemed planning application and the s78 appeal related to the same site, the same Appellants and with related planning issues. Nevertheless, I see no reason why it was necessary for the s78 appeal to be withdrawn just because the enforcement notice was quashed. The s78 appeal was submitted prior to the enforcement notice being issued and a determination of the s78 appeal would have given the Appellants the opportunity to gain a planning consent for the development also to have been considered under

² PPG, Paragraph: 052 Reference ID: 16-052-20140306

the appeal on ground (a), had the notice not been quashed. I do not consider that the quashing of the enforcement notice provided a good reason for the s78 appeal to be withdrawn, and its withdrawal was unreasonable behaviour.

15. That said, it is necessary to consider whether that unreasonable behaviour resulted in any unnecessary expense to the Rule 6 Party in the appeal proceedings. As set out above, the planning issues pertaining to the deemed planning application and s78 appeal were related. Therefore, it is reasonable to assume that had the Appellant withdrawn the s78 appeal at a much earlier date, the Rule 6 Party would have continued to defend their position in so far as it related to those same planning issues which were under consideration as part of the deemed planning application, the subject of the enforcement notice appeal. Consequently, as the withdrawal of the s78 appeal and quashing of the notice were simultaneous, the unreasonable behaviour of the Appellant in withdrawing the s78 appeal at a late stage did not to my mind result in any unnecessary or wasted expense in the appeal proceedings.
16. It was not unreasonable for the Appellant to pursue the s78 appeal against the Council's decision to refuse planning permission for their retrospective application for development, particularly as the Council had refused to validate a subsequent revised application. It is also relevant that the Appellant sought a "Wheatcroft Amendment" with their s78 appeal, again seeking to modify their original proposal. However, I concluded that this proposed amendment and further suggested amendments to include a wetland area would result in a "different application" from that considered by the LPA such that it would result in a fundamental change to the original application. Those revised plans were not therefore accepted, with the appeal to proceed based on the plans and proposal before the Council when they determined the original application.
17. In the appeal process the Appellant addressed matters relating to character and appearance and suitability of the site's location in relation to policy criteria relevant to Gypsy and Traveller sites. They also provided information in relation to unmet need and provision of Gypsy and traveller sites in the District, which they considered to be a relevant material consideration in these appeals. I accept that any findings that may have been made by the Inspector on the s78 appeal and/or deemed application should not be prejudged. However, I agree with the Rule 6 Party that the Appellant did not effectively engage with matters relating to the impact of the unauthorised and/or proposed development on Stodmarsh SAC, SPA and Ramsar throughout the appeal process nor on matters relating to highway safety/amenity.
18. The PPG advises that if an appellant only supplies relevant information at appeal when it is requested, but not provided at application stage, then they are at risk of an award of costs.³ In this case, even when further information was requested, it was not forthcoming.
19. A reason for refusal on the s78 appeal, and a relevant material consideration in the deemed planning application, related to the Appellant's

³ PPG, Paragraph: 052 Reference ID: 16-052-20140306

failure to demonstrate nutrient neutrality, and failure to secure the necessary measures to mitigate the impact of the proposed development on Stodmarsh SAC, SPA and Ramsar. The Appellant was professionally represented and clearly aware that he was required to provide information necessary to enable an Appropriate Assessment (AA) and Environmental Impact Assessment screening direction to be carried out.⁴ However, considering at the time of the planning application nutrient neutrality was a relatively new issue within the District, I do not consider that it was unreasonable for this matter to be considered further on appeal, particularly as issues relating to nutrient neutrality and measures to secure mitigation often evolve over time. Nevertheless, there is no evidence that the Appellant put his mind to how he intended to address this important consideration during the appeal process, and in any event, not until the Inspector's request for such evidence in the Case Management Conference (CMC) in December 2023, just six weeks before the Inquiry. I have had regard to the Appellant's belated suggestion that a wetland area could be provided as mitigation. However, had this been his intended solution, details should have been provided at SOC stage, not more than two years after the appeal was submitted.

20. It was unreasonable for the Appellant not to proactively review his case during the long appeal process and to fail to provide any substantive evidence to inform an AA. On the other hand, the Rule 6 Party produced written proofs of evidence and legal notes setting out the position on the law applying to the Protected Site which would not have been necessary if the Appellant had effectively addressed the matter in his SOC or prior to the preparation of proofs of evidence. The Rule 6 Party thus incurred unnecessary expense in relation to this matter in the appeal process.
21. The further reason for refusal on the s78 appeal and a relevant material consideration in the deemed application, related to the appellant's failure to demonstrate that the development would not result in any adverse impact on highway safety and amenity. The Rule 6 Party's Statement of Case (SOC) indicated that *"Fordwich already suffers from an inadequate highway network and the appellants have failed to demonstrate that the proposed development will not have an adverse impact on highway safety or the network"*.
22. The Appellant's SOC accepted that requisite visibility splays needed to be provided and that the highway reason for refusal stemmed from the absence of a Transport Statement to ascertain the number of additional vehicle movements generated by the proposal and the submission of an assessment of Personal Injury Collision data. Their SOC indicated that they would demonstrate that there was no risk to highway safety resulting from this development.
23. The LPA subsequently advised the Appellant that if a visibility site plan was produced, showing visibility splays of 2.4m x 59m in both directions, with no obstructions over 1.05m in height within the splays and on land owned by the Appellant or within highway limits, then the Highway Authority would

⁴ The Conservation of Habitat and Species Regulations 2017, as amended ('the Habitats Regulations') set out the provisions and procedures which must be followed to assess the implications of plan and projects on European sites (Regulations 63 and 64).

- lift their objection.⁵ The Inspector's CMC note, dated 5 December 2023, similarly requested details in relation to the highway concerns raised, including visibility splays, traffic speeds and trip generation. The Appellant indicated at the CMC that a highway consultant had been appointed to prepare a plan to show how those visibility splays could be achieved. The deadline for that information was 15 December 2023, prior to proofs of evidence being prepared.
24. The information requested was not provided in accordance with that deadline nor to the Inquiry. The Appellant seeks to blame the Highway Authority for a delay in providing details of their landownership and indicated that a condition could be imposed on a grant of planning permission which would be sufficient to demonstrate no adverse impacts on highway amenity and safety. However, it was clear from the evidence submitted that previous conditions stipulating the provision of visibility splays had not been adhered to, and without a plan there is no evidence that the requisite splays could be achieved. Furthermore, the Rule 6 Party had raised concerns regarding impacts on the wider highway network, and there was a clear request in the Inspector's CMC and CMC note for additional information to be provided. I therefore concur with the Rule 6 Party that the Appellant did not provide evidence to address the highway safety concerns despite having over two years to support his case. That was unreasonable behaviour and consequently the Rule 6 Party incurred unnecessary expense in engaging the expertise of a highway consultant and in producing legal notes to address the absence of evidence.
25. I have had regard to the Rule 6 Party concerns regarding the Appellant's absence from the Inquiry proceedings. However, it is for the Appellant to determine how he wishes to present his case and there is no substantive evidence to suggest that their absence resulted in any additional expense to the Rule 6 Party.
26. The Inspector requested in her CMC note the completion and agreement of a SOCG to be provided by 3 January 2024, such that it could inform the proofs of evidence. The latest version of the SOCG was not signed by the parties. However, from the evidence and correspondence before me, there was clearly engagement by all parties in securing versions of the SOCG, communication between the parties, and a site visit undertaken to inform caravan numbers. Although the SOCG was unsigned, it remained a document which had some use and correspondence attached to the draft versions indicated where the matters of disagreement lay. I do not therefore consider that the absence of final signatures resulted in the Rule 6 Party wasting expense in the appeal process.
27. For the reasons given above, I conclude that the Appellant did not adequately review his case nor provide requisite information in relation to matters pertaining to the Habitat Regulations including issues of nutrient neutrality. The Appellant also failed to provide information and did not adhere to deadlines in relation to highway matters.
28. I therefore conclude that unreasonable behaviour by the Appellant resulting in unnecessary expense, as described in the Planning Practice Guide, has been demonstrated and a partial award of costs is justified.

⁵ Email correspondence VLH Associates, dated 13 November 2023 to WSPA.

Costs Order

29. 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 Mr T Delaney shall pay to Fordwich & District and Fordwich Town Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to matters relating to the impact of the development on Stodmarsh SAC, SPA and Ramsar and matters of highway safety; such costs to be assessed in the Senior Courts Costs Office if not agreed.
30. The applicant is now invited to submit to Mr T Delaney, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching an agreement as to the amount.

Elizabeth Pleasant

INSPECTOR