



## Costs Decision

Inquiry held on 13 February 2024

Site visit made on 15 February 2024

**by Jonathan Bore MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 02/04/2024**

---

### **COSTS DECISION B: application by Merton College, Oxford for a partial award of costs against Oxfordshire County Council in relation to Appeal Ref: APP/C3105/W/23/3329587**

- 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 appeal was against the failure of Cherwell District Council to issue a notice of their decision within the prescribed period on an application for planning permission for the erection of up to 540 dwellings (Class C3), up to 9,000sqm GEA of elderly/extra care residential floorspace (Class C2), a Community Home Work Hub (up to 200sqm)(Class E), alongside the creation of two locally equipped areas for play, one NEAP, up to 1.8 hectares of playing pitches and amenity space for the William Fletcher Primary School, two vehicular access points, green infrastructure, areas of public open space, two community woodland areas, a local nature reserve, footpaths, tree planting, restoration of historic hedgerow, and associated works on OS Parcel 3673 adjoining and west of 161 Rutten Lane, Yarnton, OX5 1LT.
- 

#### **Preliminary matters**

1. In addition to the costs application which is the subject of this decision, another costs application was made by Merton College against Cherwell District Council. This is the subject of Costs Decision A.
2. In this decision Merton College and its consultant team are referred to as "the applicant".

#### **Decision**

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

#### **The submissions for Merton College**

4. The costs application was submitted in writing.
5. Merton College had entered into a planning performance agreement (PPA) with Cherwell District Council and Oxfordshire County Council on 13 July 2021, and payment of £22,344 was made to the District Council and £48,756 to the County Council. The PPA stated that where unforeseen circumstances meant that the application could not be presented to the District Council's planning committee by April 2022, the agreement would expire. The PPA was not adhered to by either the District or the County Council.
6. The application was not determined within the statutory deadline, as extended. The Council's handling of the planning application led the applicant to believe

that there was no prospect of obtaining planning permission within a reasonable period, so an appeal against the Council's failure to determine the application was made on 15 September 2023.

7. Following the submission of the appeal, the Council indicated that had it been in a position to determine the application, it would have been refused for five reasons. The third of these stated that the scheme had failed to secure an appropriate, safe and convenient access from William Fletcher Primary School to the proposed replacement playing fields. The County Council prepared and submitted a proof of evidence from a witness. Cherwell District Council as local planning authority indicated that it did not intend to pursue this reason for refusal, but the County Council unreasonably persisted in its objection, and this delayed the finalisation of the planning obligation to which the County Council are a party. The applicant wasted significant costs in trying to reach an agreement with the County Council on this issue.
8. Oxfordshire County Council was not a main party to the appeal: it did not apply for Rule 6 status. However, it stepped outside the remit of an interested party in preparing and submitting a proof of evidence relating to the access to the playing fields, an issue that the District Council had not chosen to pursue. In order to defend its position on this matter, the applicant had to submit rebuttal evidence addressing the point made in the County Council's proof of evidence.
9. The applicant also had to spend a significant amount of time addressing the County Council's request for a financial contribution towards a strategic infrastructure project which had already been constructed or which had already been committed using money forward funded from the Oxfordshire Housing Growth Fund Deal, namely the highway works on the A44 between Cassington Road and Peartree Interchange. This necessitated significant involvement by the applicant's transport consultant and leading Counsel. The applicant had to make an information request to the County Council pursuant to the Environmental Information Regulations 2004 and the Freedom of Information Act 2000 to obtain copies of the relevant agreements relating to the Housing Growth Fund Deal and its funding streams for the infrastructure works and had to follow up those requests. Leading Counsel had to provide an opinion appended to the transport proof of evidence to explain why there was no legal basis for such a contribution.
10. Neither council has attempted to defend the request for this financial contribution. The acceptance that the contribution was not being pursued was first communicated to the applicant at the case management conference on 31 January 2024 and was only formally notified in writing to the applicant team on 9 February 2024. This led to wasted time and expense defending the applicant's position and producing comprehensive legal submissions, with broader input, in order to address this issue at the inquiry.
11. The County Council's lack of cooperation with other parties and its delay in providing information led to the applicant incurring unnecessary expense in preparing the proof of evidence in relation to education matters, reviewing it and preparing a rebuttal proof of evidence. It also led the applicant to incur unnecessary expense in making its information request to conclude whether the highways contribution sought was in compliance with the CIL Regulations, and preparing the legal submissions relating to the strategic infrastructure.

12. There are therefore exceptional circumstances for an award of costs against the County Council.

### **The response by Oxfordshire County Council**

13. The response was made in writing.
14. As regards the access to the school playing fields, the County Council's Pupil Place Manager did not submit a proof of evidence as a main party to the appeal; it produced one to support the District Council's case. This is standard practice and it avoided the necessity for the County Council to register as a party to the appeal. The proof of evidence was submitted by the District Council on 17 January 2024 and the County Council was informed on 31 January (following the case management conference) that the District Council was not going to pursue this reason for refusal. The applicant's rebuttal statement was requested by the Inspector in the knowledge that the District Council was not pursuing this putative reason for refusal.
15. The solution to the access issue was secured by a planning obligation and it was reasonable for the County Council to have continued to negotiate with the applicant on this point to find an acceptable solution.
16. Extensive discussions had taken place on the matter of the access before during and after the inquiry. Throughout these discussions the County Council had tried to be as flexible as possible, but it is bound by its duty to ensure satisfactory access to education provision for both the residents of the new development and the existing local population.
17. The original access solution set out in the District Council's development brief proved not to be deliverable. The alternative involved crossing a driveway to a care home. This involved lengthy discussions with the owners whose terms were unacceptable. The County Council worked with the applicant to assess other alternatives and to find a fallback position.
18. Following a series of meetings and emails between the parties in early January, progress had been made such that the County Council indicated to the applicant that they would be able to advise that the putative reason for refusal had been addressed, subject to final confirmation of triggers, specifications and detailed drafting of a s106 obligation to ensure that the footpath would be delivered in good time with permanent rights of access. But in an email of 2 February 2024 the applicant stated that they could not agree to an obligation requiring delivery of the footpath without the County Council being first required to use CPO powers to seek to acquire permanent access rights across the care home access road. This required a further meeting on 8 February 2024. The applicant's solicitor provided further drafting in relation to the playing field access which was received by the County Council on 12 February 2024. The County Council continued to work with the applicant up to and through the inquiry and since the Inquiry solicitors for both parties have spent many hours in discussion to agree drafting.
19. The County Council attended numerous meetings throughout the process and kept the applicant informed. There is no evidence of a lack of cooperation, merely different stances.
20. There are no exceptional circumstances for claiming costs against the County Council. The County Council was not required to apply for Rule 6 status and did

not step outside the remit of an interested party. The proof of evidence was submitted prior to the withdrawal of the reason for refusal and the rebuttal evidence was required by the Inspector. The applicant would have had to negotiate with the County Council regardless of the appeal because this would have been required for the s106 agreement.

21. As regards the A44 Cassington Road to Peartree Interchange highway works, this scheme has a direct relationship with the development and is critical infrastructure. Policy PR11 of the Local Plan Partial Review states that all sites are required to contribute to the delivery of Local Plan Infrastructure, and where forward funding for infrastructure has been provided, for example from the Oxfordshire Growth Board as part of the Oxfordshire Housing and Growth Deal, all sites are required to contribute to the recovery of these funds as appropriate. The request for a contribution was made in line with this policy.
22. However, in light of the contributions now agreed toward the Mobility Hub, A44 improvements (north of the Cassington Road junction) and the ongoing viability assessment of the development, a decision was made to withdraw the request to recover the funding used for the recently implemented scheme.
23. An email requesting further information relating to the Cassington Road to Peartree Interchange contribution request was sent by the applicant on 30 March 2023. Much of the information sought in this email was responded to by email on 14 April 2023, with a follow up email sent on 16 May 2023. No case was made against the contribution request between that point and the email received on Wednesday 10 January 2024. Whilst Freedom of Information requests were made on 16 November 2023 (responded to on 15 December 2023) and 5 January 2024 (responded to on 2 February 2024), County Council officers involved in the negotiation of the s106 agreement were only made aware of a challenge to this contribution via an email to the County Solicitor, which was received on Wednesday 10 January 2024.
24. The County Council disagrees that the Freedom of Information request was part of the appeal proceedings, and it was unnecessary as the applicant had not approached the County Council to discuss the contribution. The applicant's case against the contribution was set out in the applicant's Transport Proof of Evidence, which the County Council first had sight of on Friday 19 January. The County Council informed the applicant that the request would be withdrawn verbally at a meeting on 2 February 2024 and the District Council confirmed this in writing on 9 February.
25. The County Council does not agree that the contribution was incorrectly requested. The County Council does not agree that the request should never have been made.

## **Reasons**

26. 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.

*Access to the replacement school playing fields*

27. The access to the school playing fields was discussed in meetings from December 2021 onwards and a number of options were considered. The County Council objected at various times to the terms of the proposed licence, which it said could be withdrawn at any time; to the alternative fallback path, which it said was too long and would make it difficult for staff to manage children; and to the use of CPO powers, pointing towards the objection by the owner of the driveway to the use of those powers.
28. However, reasonable and practical ways to resolve this issue, including the use of CPO powers, had been identified and discussed early in the life of the planning application. The applicant devised a sequence of actions for the draft s106 obligation involving the use of CPO powers with the provision of the path as a fallback. The County Council resisted these suggestions over a long period of time, objecting to both the use of CPO powers and the fallback path.
29. Although the matter was cited as a putative reason for refusal, the District Council announced at the second case management conference on 31 January 2024 that it was not going to defend this reason for refusal, on the basis that it considered that the matter had been satisfactorily resolved.
30. The County Council did not attend that meeting but continued to object to the applicant's proposal that the use of CPO powers should be tried first with the alternative path as a fallback. The Inspector therefore pointed out in the subsequent case management conference note that the County Council would need to defend its approach at the inquiry and be subject to questioning, and the applicant would need to be prepared to deal with the matter; hence the production of the applicant's rebuttal proof, which was necessary to help the inquiry in the circumstances of the County Council's continuing resistance.
31. The County Council produced a proof of evidence. It is of little relevance as to whether it submitted the proof as part of the Council's case or the County Council's case. The objection was fundamentally that of the County Council, not the District Council. The s106 agreement could not be finalised until the County Council was prepared to sign it.
32. The County Council did not present evidence verbally at the inquiry, because on the morning of the second day it agreed that the approach which had been advanced by the applicant could be included in the wording of the s106 obligation.
33. The County Council argues that up to that point negotiations had been continuing, and that they were set back by the applicant's insistence that CPO powers should be tried before the fallback path was provided. Yet the eventual solution to which the County Council finally agreed contained the elements, proposed many months earlier, which it had earlier rejected. Whilst negotiations were indeed continuing during the inquiry, this was only necessary because the County Council had unreasonably resisted progress on this matter over many months. The matter should never have had to come to appeal.
34. Whilst it is unusual for costs to be awarded against a third party, the County Council's involvement in this matter was pivotal. Its role in education provision made it an important party to the s106 obligation. It bears direct responsibility for the delay on this issue; it was still an outstanding matter at the opening of

the inquiry despite the District Council having withdrawn its objection. It led the applicant to the unnecessary expense of producing evidence for the inquiry, including the rebuttal proof, and having a witness ready together with legal representation.

*Contribution towards the Cassington Road to Peartree Interchange highway works*

35. Oxfordshire County Council Highways identified a requirement for a financial contribution towards the A44 Highway Works Package 2, Cassington Road to Peartree Interchange. This amounted to £1,762,912. Local Plan Policy PR11 states that where forward funding for infrastructure has been provided, for example from the Oxfordshire Growth Board, all sites are required to contribute towards the recovery of these funds as appropriate.
36. There is no disagreement that the works for which the contribution was sought were a critical piece of infrastructure. But the Central Oxfordshire Travel Plan, which was adopted by the County Council in July 2022, did not state that these works were contingent on Policy PR9 and the other PR housing sites coming forward. The works formed part of the County Council's wider active mode strategy and were intended to provide a wider public benefit. They are now in place.
37. The contribution thus sought a payment to the public purse for the funding and construction of works which were not dependent on the development and which had already been funded from the public purse and built. The proposed contribution was immaterial to the planning application and could not be made relevant or lawful by the Local Plan Policy PR11. The works did not therefore have sufficient connection to the proposed development, and the contribution should not have been sought. But the County Council persisted in its request for the contribution. It does not appear to have critically assessed the requirement for the contribution in the light of this background.
38. To find out whether the County Council's demands for contributions were fairly and reasonably related to the development, the applicant had to make an information request to the County Council pursuant to the Environmental Information Regulations 2004 and the Freedom of Information Act 2000 to obtain copies of the relevant agreements relating to the Housing Growth Fund Deal and its funding streams for the infrastructure works, and had to follow up those requests. Having obtained that information, it was also necessary for the applicant to append Counsel's opinion to the transport proof of evidence to explain why there was no legal basis for such a contribution.
39. Whilst the County Council did not apply for Rule 6 status, it had a pivotal role in these matters and a direct influence over the progress of the application and appeal and the content of the s106 obligation. The District Council's approach towards viability, which is common practice, was to take into account all the highways contributions and infrastructure requirements, and to then adjust the level of affordable housing to achieve viability. Thus the County Council's requirement for the contribution towards the Cassington Road to Peartree Interchange highway works was directly relevant to the level of affordable housing that could be provided on the site, itself a putative reason for refusal, and was critical to the s106 obligation.
40. The County Council's behaviour in this respect was unreasonable and led the applicant to incur the unnecessary expenses of having to produce highways

evidence, with a witness and legal representation; and having to make information requests, and in needing to provide a legal opinion to ensure that the s106 obligation did not contain the unreasonable contribution sought by the County Council. Such expenses would not have been necessary if the County Council had properly assessed whether the contributions which it sought were needed and were fairly and reasonably related to the development.

### **Conclusion**

41. Costs should only be awarded against a third party in exceptional circumstances. In this case those circumstances exist. The County Council's position was critical to the progress of the planning application and subsequent appeal because of its role as a main party to the s106 obligation, and it bears full responsibility for the delay and costs incurred in addressing the matters discussed above. The matter of the playing field access was capable of being addressed much earlier as part of the planning application if the County Council had taken a reasonable approach, and should never have had to come to appeal. The County Council did not defend its position at the inquiry. The request for a contribution for the Cassington Road to Peartree Interchange highways works should never have been made. The County Council behaved unreasonably in both respects and caused the applicant to incur unnecessary expense in addressing these issues in respect of legal representation, expert witnesses, the preparation of statements of case, proofs and rebuttals, and in having to seek information and prepare a legal opinion to inform the inquiry. A partial award of costs is therefore warranted.

### **Costs Order**

42. 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 Oxfordshire County Council shall pay to Merton College, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred by the applicant in addressing the matters of the access from William Fletcher Primary School to the proposed replacement playing fields, and the A44 Cassington Road to Peartree Interchange highway works, in respect of legal representation, expert witnesses, the preparation of statements of case, proofs and rebuttals, and in having to seek information and prepare a legal opinion to inform the inquiry; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Oxfordshire County 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.

*Jonathan Bore*

INSPECTOR