



Costs Decision

Inquiry held on 9 April 2024

Site visit made on 12 April 2024

by Jonathan Bore MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd May 2024

Costs application in relation to Appeal Ref: APP/B3030/W/23/3334043
Staythorpe, Newark, NG23 5RG
Grid Ref 475454 353713

Decision

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

The submissions for Ecap Staythorpe BESS Ltd

2. The costs application was submitted in writing.
3. The Council adopted a confrontational attitude based on unreasonable decision making. Elected members took a different approach to the scheme from their professional officers, who recommended the scheme for approval. They are entitled to do so but have a duty to act reasonably and they did not do so in this case. When elected members reject a professional recommendation, they have to have clear and justifiable reasons, supported by evidence for doing so.
4. A single reason for refusal was issued by the Council, with several components: scale size and design, proximity to dwellinghouses, visual harm, loss of an ancient hedgerow, loss of agricultural land, failure to meet the flooding sequential test and perceived risk to safety from potential battery fire.
5. Landscape character was not mentioned in the reason for refusal, and the Council explicitly agreed in the Statement of Common Ground that there was no outstanding landscape character-based objection. However, it pursued an objection based on landscape character at the inquiry despite having no authority from elected members to do so. The Council's witness did not have authority from the Council to run a landscape character case. The appellant prepared evidence on the basis of dealing with visual and amenity harm and it was only when it became clear that the Council's witness was intent on running a landscape character case that the appellant's witness was put to the time and expense of preparing such a case.
6. In respect of the proximity to dwellinghouses, the Council agreed in the Statement of Common Ground that the visual amenity threshold was not breached and it offered no evidence in relation to the impact on the amenity of properties in Staythorpe Road. The development was screened three times and the Council had formed the view each time that, for the purposes of Schedule 2 of the EIA Regulations 2017, the proposed development would not result in any significant environmental effects. Taken at its highest, the Council's case was

that some local residents would experience a change in the view from their first floor windows.

7. As regards the hedge, the Council misinterpreted and misapplied the Hedgerow Regulations 1997; despite being made aware of this, the Council initially refused to withdraw this reason for refusal arguing that it was an "Important Hedgerow" under the regulations. The appellant was put to the expense of instructing a specialist ecologist to demonstrate that it was not. The Council reluctantly accepted this evidence and then sought to argue that it qualified on the basis that it was more than 30 years old and marked all or part of a parish boundary that existed before 1850.
8. The proposed hedge translocation was objected to by the Council in its Statement of Case on the basis of arguments about the loss of biosphere. The Appellant was again put to the expense of addressing these arguments. Though it had seen the evidence for well over a month, the inquiry was the first occasion on which the Council accepted that translocation would be successful and that there would be no net loss. The Council eventually withdrew this part of the reason of refusal in the Statement of Common Ground on 14th March 2024.
9. As regards agricultural land, the Council argued that the scheme conflicted with Policy DM8 of the Newark and Sherwood Allocations and Development Management Document (DPD) 2013. However, this was not a relevant policy; renewable energy related schemes are addressed by Policy DM4 rather than Policy DM8. The Council therefore pursued an argument under the wrong policy. Moreover, its argument concerning the loss of best and most versatile agricultural land had no basis in the wording of Policy DM8 or in the wording of the reason for refusal, which simply referred to the loss of agricultural land. It also argued that there should be a sequential approach in respect of agricultural land, which ignored case law in *Bramley Solar Power Residents Group v SSLUHC* [2023] EWHC 2842 as well as national policy or guidance.
10. The Council failed to produce any evidence in relation to the potential impact of the proposed development on loss of agricultural land or any evidence in relation to food supply or security. The Council should never have refused permission on this basis and should never have persisted with its objection throughout the appeal process.
11. In respect of the flood risk sequential test, there was only ever one potentially sequentially preferable site identified in the officer report, which was PDA16. This was the site which is subject to a separate application for a BESS proposal by SSE and which the Council agrees should be discounted on the basis of that it is not reasonably available. The appellant drew this to the Council's attention but this was not passed on to the elected members who refused permission on the basis that PDA16 was a reasonably available sequentially preferable site.
12. The Officer Report expressly agreed that the Exception Test had been satisfied but, based on a spurious reading of the NPPF, the Council sought to resile from that position and wasted considerable inquiry time in the process. The Council sought to adopt a perverse interpretation of the definition of essential infrastructure and provided no evidential support for its position of any kind. No objection to the planning application was raised by any technical flood consultee. Moreover, the Council accepted that the proposed development would be safe for the duration of its lifetime, would not increase flood risk

elsewhere and was subject to an acceptable drainage scheme. It was only when pressed by the Inspector that the Council's witness was forced to amend his attribution of "substantial weight" to the issue of flood risk to "neutral". All that he was actually talking about was policy harm in his continued argument about site selection. For the first time, during Closing Submissions, the Council accepted that both limb (a) and limb (b) of the Exception Test had been passed. Nothing had changed and no explanation was provided for the change of mind other than the Council, presumably, accepted that it had been wrong all along. The Council's unreasonable conduct in relation to sequential testing and the Exception Test, and its failure to act on clear evidence regarding PDA 16 resulted in a very considerable waste of time and money.

13. Had the elected members dealt correctly and reasonably with these topics then there can be no question that they would have granted planning permission. Elected members misunderstood development plan policy, primary legislation, policy and guidance and in so doing prevented or delayed development which should clearly should have been permitted, having regard to its accordance with the development plan, national policy and any other material considerations.
14. After the Appellant was forced to appeal, the Council failed to produce evidence to substantiate some of the reason for refusal, and failed to review its case and accept that its continued resistance to the scheme was unreasonable. The Council could have taken the matter back to Committee with a resolution that no evidence should be offered upon proper reflection. This opportunity was never taken as a result, the Appellant was forced to run a time consuming and expensive appeal which it should never have been forced to do.
15. This is an exemplar case of unreasonable behaviour on the part of a Council which has resulted in a huge waste of time and expense. This appeal should never have needed to happen. The Appellant is entitled to a full award of costs but, without prejudice to those submissions, if such full application fails, a partial award of costs for identified elements of work which have resulted in unnecessary or wasted expense would be justified.

The response by Newark and Sherwood District Council

16. The response was made in writing.
17. It is unfair to say that the Council adopted a confrontational attitude. At the application stage, the case officer recommended that planning permission be granted. In doing so, she concluded that the benefits of the proposal would "marginally outweigh the harm identified". That the members took a different view and refused planning permission having read and heard the evidence was entirely reasonable. The Council's witnesses have considerable experience in their fields and would not have agreed to give evidence if they felt unable to support the Council's case. The Council did review its case and did withdraw elements of the reason for refusal.
18. Landscape character was relevant because it is intertwined with visual impact and openness. Policies DM4 and DM5 of the Allocations and Development Management DPD refer to landscape character and they align with the landscape elements of the appellant's landscape and visual appraisal. When considered in context, it is plain that landscape harm had been a concern at all stages. There was a whole section on landscape harm in the officer's report,

which stated that the change of use from agriculture to industrial use in this countryside location would result in major landscape and visual harm that would reduce over time to moderate and that this would represent one of the most significant impacts on the residential amenities of local residents. Landscape harm was discussed at the committee meeting.

19. The Council's witness was instructed to look at landscape and visual matters but was not instructed to go beyond the reason for refusal. Unfortunately landscape was erroneously not included as a matter of dispute in the Statement of Common Ground dated 12 March 2024. However, the appellant was not prejudiced by this oversight because it knew that landscape was a matter on which the Council was going to produce evidence, having agreed the Landscape and Visual Topic Paper on 8 March 2024. Furthermore, the appellant produced evidence on landscape character in its proofs.
20. Visual impact was not confined to views from upper floor windows. Evidence was produced that there would be major/moderate and adverse impacts from Staythorpe Road and from the residents and recreational users of the public right of way.
21. The Council's landscape witness did not act unreasonably in utilising his own methodology.
22. The Council reviewed its reason for refusal in the light of the amended scheme and stated that it was no longer pursuing harm to residential amenity as part of the reason for refusal. But the Council's witness stated in his proof that this does not mean that the proposed development will not have major and major/moderate visual impacts on residential properties, which is significant and needs to be considered as part of the planning balance. For these reasons, the Council did not behave unreasonably in relation to its landscape and visual impact evidence so as to cause the Appellant to incur unnecessary or wasted expense.
23. Regarding the hedgerow, there is no dispute that it has been in situ for centuries. Whether a hedgerow is ancient is not an exact science. Very little information was provided about the hedgerow at the application stage. The appellant did not undertake a detailed assessment of the hedgerow until 22 February 2024. As a result of the investigations the Council stated that it was satisfied that the hedgerow was not an ancient or important hedgerow. This demonstrates that the appellant was working proactively with the Council.
24. Council officers were initially uncertain as to whether it would be possible to translocate the hedgerow and explained their concerns in their Statement of Case. Whether or not the hedgerow was an "ancient hedgerow" was a technical issue which was complicated by the Appellant's decision to try to translocate it. The Council cooperated with the appellant to resolve the matter swiftly.
25. In respect of agricultural land, a reason for refusal does not have to relate to a development plan policy. As the reason for refusal referred to agricultural land it was entirely reasonable for the Council to address it. The whole site would be lost from agricultural purposes for 40 years, including best and most versatile land and the Ministerial Statement of March 2015 highlights the requirement to protect agricultural land. The appellant is incorrect in stating that Policy DM8, which refers to the loss of the most versatile areas of agricultural land, is not applicable to the scheme; the policy is entitled "Development in the Open

Countryside” which is where the scheme is located, and the relevance of the policy is recognised in the proof of the appellant’s planning witness. On a sensible reading, “most versatile” equates to “best and most versatile”.

26. *Bramley Solar Power Residents Group v SSLUHC* [2023] EWHC 2842 does not mean that alternative sites should never be considered, such as in the appeal scheme where a specific development plan policy requires it. The appellant did not challenge the need to consider alternative sites until the inquiry and the appellant’s planning witness stated that a sequential assessment was undertaken in accordance with Policy DM8.
27. The Council did not act unreasonably in connection with the issue of agricultural land.
28. As regards flooding, there was no requirement of officers to further inform members that PDA16 was not reasonably available. It is not practical to repeat orally all the information that is in officers’ reports or supplementary reports. Members had been informed that there was an active planning application on the site but that does not mean that it was not “reasonably available”. Costs cannot be claimed for the period during the determination of the planning application. In any case during the course of the appeal, the appellant realised that the Sequential Test analysis that it had carried out at the application stage was not in accordance with the requirements of the NPPF and the PPG.
29. The Council’s arguments regarding the exception test were valid. It did not consider the scheme to be essential infrastructure because it did not have to be located in a flood risk area for operational reasons. The meaning of “community” means a group of people living together or sharing a characteristic and it is plain from a reading of the NPPF as a whole that this is the meaning afforded to the word. It was reasonable for the Council to consider the sustainability benefits to the community around Staythorpe or possibly the wider community. The Council’s arguments in relation to the Exception Test were entirely reasonable.
30. In respect of fire safety, the Council reconsidered its case at appeal and informed the appellant of this. This could not be construed as unreasonable behaviour.
31. The appellant argues that the Council failed to produce evidence to substantiate some of the reasons for refusal and failed to review its case. This is again unfair; the fact that the Council decided not to pursue parts of its case is itself evidence that the Council did review its case and it has provided evidence for the remaining parts of the reasons for refusal. It was not necessary to go back to Committee as the officers had the appropriate delegated powers to agree the nature and extent of the Council’s case at appeal.
32. The appellant’s claim for a partial award largely repeats its application for a full award.
33. For all these reasons, the Council did not act unreasonably and the appellant was not put to unnecessary expense. Local residents raised matters that had to be addressed, and even if they had not, the appellant would still have needed to attend the inquiry and to satisfy the Inspector of the strength of the scheme in the face of vehement local objection.

Reasons

34. 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.
35. The visual impact of the scheme was the sole area in which the Council had reasonable grounds for opposing the scheme at appeal. That is because the development would take up 10.1ha of land in the countryside, would involve the placing of containers, the erection of fencing, and the construction of industrial structures, and would have a visual impact on its immediate surroundings, especially the footpath through the site. There was also a potential impact on Staythorpe Road, and it was reasonable to test the efficacy of the landscaping in mitigating the visual impact of the scheme. Visual impact was a legitimate planning argument, and although I have come to a different conclusion from the Council on the subject, I do not consider that the Council acted unreasonably in pursuing this aspect of the reason for refusal.
36. In respect of the hedge, which was originally proposed to be removed and replaced further back, and subsequently translocated, the Council described it in the reason for refusal as an "ancient hedgerow". The Council said that it meant by that term that it had been in existence before the Enclosure Acts. It claimed that it was shown on an old map and followed the line of the parish boundary. It also argued that it was an "Important Hedgerow" under the 1997 Regulations by reason of it being species rich. In its Statement of Case, the Council opposed the translocation of the hedge, claiming that its current location would have developed its own biosphere over hundreds of years in balance with its current environment.
37. All of this was argued without basis. It contradicted the Ecological Impact Assessment which was carried out by a suitably experienced and qualified ecologist, which found the hedge to be species poor, consisted predominantly of hawthorn, field maple, blackthorn, ivy and bramble punctuated by ash, silver birch and horse chestnut trees. Moreover, investigation revealed that the hedge did not align with the Parish boundary. Given that Staythorpe Road displays modern alignments, it should have been obvious to the Council that any claim as to the historic origins of any hedge that bordered it would first need to be carefully verified. This was not an example of the applicant/appellant producing inadequate evidence; it was an example of the Council making assertions without supporting them with adequate evidence. The appellant was put to the expense of instructing a specialist ecologist to demonstrate that it did not qualify as an "Important Hedgerow". When faced with this additional evidence the Council withdrew this part of the reason for refusal. The Council acted unreasonably on the matter of the hedge which led the appellant to incur unnecessary expense at appeal.
38. As regards the impact on overall landscape character, this subject was not mentioned in the reason for refusal, and the Council agreed in the Statement of Common Ground that there was no outstanding landscape character-based objection. However, it stated its intention to pursue a landscape character argument at the case management conference. Whether or not the Council's witness had a mandate to do so, his evidence failed to demonstrate any real impact on the wider landscape character. Moreover, the argument run by the

Council about an alleged disparity between the character of the proposed site landscaping and the nature of planting in the wider landscape, including hedge heights, was simply not borne out by any reasonable examination of the wider landscape character and it was unreasonable to pursue it. The appellant was put to unnecessary expense to deal with this matter.

39. Turning to flood risk, it appears that the committee was not fully cognizant of the circumstances of site PDA16 when coming to its decision, despite the appellant having informed officers that it was subject to a separate live planning application and was not available, so the committee may have erroneously come to a decision believing that there was an available sequentially preferable site. The Council spent time arguing at the inquiry, without any adequate evidential basis, that other sites which were fragmented by power lines or in separate fields could somehow be conjoined to accommodate a BESS. It also pursued an argument that certain sites were sequentially preferable when it was evident that they were not available and, in one case, where the access was clearly inappropriate.
40. The Council also argued at the inquiry that not only did the scheme not pass the sequential test, but it did not pass the exception test either, because it did not represent essential infrastructure and did not deliver a particularly large sustainability benefit to the local community. This perverse argument was made notwithstanding the strong local planning policy support for schemes supporting renewable energy, the acknowledged benefits of the scheme in respect of power stabilisation, and the declaration by the Council in 2019 of a climate emergency – all clear evidence of local community commitment to a sustainable low carbon future, towards which the scheme would deliver important benefits. In closing submissions, the Council appeared to accept that the two limbs of the exception test were met, but until that point it continued to take an illogical and obstructive stance on the matter.
41. Moreover, the Council advanced these arguments against a background in which none of the relevant consultees, including the Environment Agency, the Lead Local Flood Authority, the Trent Valley Drainage Board, or Severn Trent Water, objected to the proposal, and in which the Council's own witness agreed under questioning that there would be no actual flood risk from the scheme. The Council acted unreasonably in every aspect of this subject causing the appellant unnecessary expense.
42. In respect of agricultural land, the Council behaved unreasonably irrespective of the arguments over the applicability of Policy DM8 and the differences in terminology. The scheme would entail the loss of only 2.4ha of Grade 3a agricultural land for a temporary period, comprising 23.8% of the site area. The Council greatly, and unreasonably, exaggerated the weight to be attributed to this loss and argued that other sites might be sequentially preferable on the basis that they might have less Grade 3a land. There was no evidence of any reasonably available sequentially preferable site from the agricultural land classification mapping, which did not differentiate between Grade 3a and Grade 3b land. Heedless of practicality and proportionality, the Council argued that the appellant should have sampled a wider range of sites in the area to see whether there were any that had a lower proportion of Grade 3a land, despite the fact that detailed surveys of 4 nearby sites showed that it was unlikely that other possible sites would be better in this respect. The Council acted

unreasonably on this issue leading the appellant to incur unnecessary expense at appeal.

43. For the reasons given above, the Council demonstrated unreasonable behaviour, resulting in the appellants incurring unnecessary or wasted expense in having to address, at appeal, the hedge, overall landscape character, flood risk and the loss of agricultural land. A partial award of costs is therefore warranted.

Costs Order

44. 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 Newark and Sherwood District Council shall pay to Ecap Staythorpe BESS Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of the removed/translocated hedge, overall landscape character, flood risk and the loss of agricultural land; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Newark and Sherwood District 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