



Costs Decision

Inquiry Held on 26-28 September 2023; 10-13, 17-20, 31 October 2023; 1-3, 7-10, 21-24, 27-30 November 2023; 1, 11, 18-20 December 2023

Site visits made on 22 September 2023, 16 January, 31 March and 3 April 2024

by Christina Downes DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24th May 2024

Costs application in relation to Appeal Ref: APP/Y3615/W/23/3320175 Land at the Former Wisley Airfield, Hatch Lane, Ockham, Surrey

- 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 Wisley Action Group, Ockham Parish Council and RHS Wisley for a full or partial award of costs against Taylor Wimpey UK Limited.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission.
- The development proposed includes a full application comprising:
 - i) a realigned section of the proposed Wisley Lane Diversion, to include a roundabout with a stub road as the primary access to serve the new settlement from Ockham Interchange;
 - ii) a road junction access into the proposed employment area from the proposed Wisley Lane Diversion;
 - iii) a new road junction as a secondary access to serve the new settlement from Old Lane;
 - iv) SANG and associated infrastructure, including SANG car parks;
 - v) Restricted access from Ockham Lane
- The development proposed includes an outline planning application (with all matters reserved) for the phased development of part of a residential-led new settlement comprising:
 - up to 1,730 dwellings (Class C3 use), 8 gypsy and travellers pitches, up to 100 units of housing for older people (Class C2 use), a mixed-use commercial local centre with public square, community hub and employment area alongside other commercial mixed-use neighbourhood centres located throughout and an employment area, (Classes E, F2(b), B2/B8, and sui-generis uses subject to specific planning permissions), a secondary school, a primary school, (Class F1(a)), up to 2 nurseries, (Class E (f)), also incorporating green infrastructure (including parks, neighbourhood greens and sports pitches (Class F2(c) and associated pavilion (Classes E(b) and (d), F2(b)), SANG other infrastructure, (Class E(b)), part of Wisley Lane Diversion between Ockham Interchange roundabout and realigned section of Wisley Lane Diversion, a vehicular / cycle / pedestrian sustainable transport corridor (linking the proposed Wisley Lane Diversion roundabout to Old Lane) and associated infrastructure and earthworks at land at the former Wisley Airfield (with construction access from Ockham Interchange and Elm Corner).

Decision

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

The submissions for Wisley Action Group, Ockham Parish Council and RHS Wisley

2. The Applicant's case was submitted in writing and the main points are set out below.

Ground One: The application relating to a premature and incomplete appeal

3. The Respondent had submitted a premature and incomplete appeal. On 16 March 2023, 53 new or amended documents were submitted, including amendments to the Environmental Statement. These required re-consultation with the public and statutory consultees. The appeal form was dated 11 April 2023 and there was therefore no time for the Borough Council to determine the application itself.
4. The Planning Inspectorate's *Planning Appeals Procedural Guide* indicates that an appellant should be confident that the full case could be made and that the appeal should be complete when submitted. The Statement of Case should contain all of the arguments to be advanced along with the supporting documents and evidence. The *Town and Country Planning (Development Management Procedure) (England) Order 2015* states that any documents that are intended to be referred to or put into evidence are required with the full Statement of Case. They cannot therefore be left to the proofs of evidence as suggested by the Respondent. The Statement of Case was submitted in April 2023. The *Planning Appeals Procedural Guide* indicates that a final draft of the Planning Obligation should be submitted no later than 10 working days before the inquiry in order to allow the Inspector and all parties to prepare properly.
5. The *Planning Practice Guidance* indicates that the right to appeal should be exercised in a reasonable manner. It is not reasonable to lodge an appeal on the grounds of non-determination before the Borough Council had a chance to determine the application. The Borough Council could have granted planning permission with conditions imposed on matters such as skylark mitigation and the cycle routes. This would have meant that an appeal would not have been needed at all. Whilst this was not the outcome sought by the Applicant it would have avoided the costs of the appeal, which would vastly exceeded the costs of any judicial review.
6. Alternatively, planning permission may have been refused. However, if an appeal did then take place, all of the information would have been available and there would have been clarity about the issues to be addressed provided by the reason for refusal.
7. Even after the consultation had been undertaken on the March 2023 material this was not in a form that was fit to support an appeal. There was a great deal of further evidence submitted in July 2023. This included a complete replacement for the air quality modelling, which was not about the APIS change to the critical load; a revised cycling strategy; a transport position statement, the WACT Framework; information for the Habitats Regulations Assessment, road safety audits; and a Flood Risk Assessment Addendum. TRICS data was handed to some but not all Rule 6 Parties, and corrections to the air quality reports were submitted in late August. The exchange of proofs was two working days later so this allowed insufficient time to analyse the information before the proof deadline. No complete or even final draft of the Section 106 Agreement was submitted 10 days before the inquiry. The respondent cannot

blame the Borough Council for the lack of critical details in the early drafts or failing to produce the document on time.

8. It is appreciated that material is often updated during the appeal process, new issues have to be addressed and errors have to be corrected. However, here the situation was exceptional and unreasonable. The Council's putative reasons for refusal were being addressed during the appeal process through the presentation of new material. Agreement with the Borough Council and Highway Authorities were being sought throughout the appeal process rather than before it has begun. Much of the Respondents case, including what was being proposed in the planning obligations, was only revealed during the course of the inquiry. There were repeated changes in the Respondent's evidence and much time had to be spent in identifying errors, for example in the air quality and highway evidence. This all extended the length of the inquiry and increased the time spent by all parties engaged on it.
9. On the basis that the appeal could have been avoided, a full award of costs is being sought. On the basis that an appeal would have been made but with all the correct information, half of the Applicant's costs are being sought.

Ground Two: The application relating to the LINSIG modelling of the Ockham Interchange

10. The LINSIG modelling of the Ockham Interchange was incorrect in the Transport Assessment and in the evidence of the Respondent's transport witness. The model showed additional lanes of traffic, which proved material to the operation of the roundabout. When corrected it was shown to operate close to or over capacity. This error was known by February 2023 because it had been revealed by National Highways. However, it was not spotted by the Respondent until well into the inquiry. The decision not to correct the application material that was before the inquiry either in March or in July 2023 was deliberate on behalf of the Respondent. It was said to have been because the amended LINSIGs were still being audited on behalf of National Highways. However, there is no explanation as to why the error was not corrected when proofs were submitted, and evidence was given.
11. The failure to ensure that the proof of evidence and oral evidence accorded with the correct position was unreasonable. It was clearly an error, but the highway witness continued to deny this, and this was also unreasonable. There was wasted expense preparing the highway evidence on the basis of the original incorrect information and identifying and addressing the error, including recalling the transport witnesses. This ground informs the first ground but also provides the grounds for an alternative partial award if costs are not awarded on the first ground.

The response by Taylor Wimpey UK Limited

12. The response was submitted in writing and the main points are set out below.

Ground One: The application relating to a premature and incomplete appeal

13. The Respondent was entitled to exercise its statutory right of appeal. Extensions of time had been agreed with the Council for the Planning Performance Agreements (PPA) because updated material was necessary following engagement with statutory consultees. The determination date of the third PPA was 21 March 2023. In view of the updated material on 16 March

- 2023 the Respondent offered to extend the determination date until 28 April, to allow consultation and a Report to be written. However, the Borough Council indicated that the earliest Committee date would be Autumn 2023. This was within the context of 2-3 years of pre-application discussions, a largely outline application and an allocated site. Most of the 16 March material responded to points made by consultees and most had been seen informally by officers beforehand. There was more than enough information for permission to be granted, subject to the Section 106 Agreement.
14. Confidence in the Borough Council had been eroded for various reasons. At times there was a seeming lack of resources and commitment to this major strategic site. In April 2023 the Secretary of State notified the Borough Council that on the basis of recent determination data he was minded to impose special measures. The Respondent had had a bad experience with the way that the Borough Council dealt with the Stub Road applications. These were twice refused permission against Officer recommendation, which meant that the access to the site could not be provided in conjunction with the DCO works by National Highways. Within this context the Defendant's decision to appeal was perfectly reasonable.
 15. The decision to appeal did not cause the Applicant to incur unnecessary expense. It was not obliged to participate in the appeal process and for the Applicant to say that the matter should have been resolved at the local level is wholly inconsistent with its case that the appeal should be dismissed. A local level decision is not the outcome that the Applicant was seeking and its comment that the costs of judicial review would be much less than the costs of the appeal suggests that it would have challenged a grant of planning permission anyway. If this had succeeded the matter would have come back to the Borough Council and an appeal may have been the outcome in any event.
 16. The July 2023 material was intended to address matters raised after the appeal had been lodged. These included a Dropbox link to all the consultation responses since August 2022, which had included some representations that the Respondent had not seen before; the putative reasons for refusal and the detailed Planning Officer's Report; and the Statements of Case of the Borough Council and Rule 6 Parties. Most of the material addressed updated responses from the statutory consultees and the putative reasons for refusal. The revised air quality modelling was necessary because of the revisions to critical loads by APIS and sought to address points raised by statutory consultees and the Applicant.
 17. The July 2023 material was submitted in advance of the Case Management Conference and 6 weeks before the proofs of evidence were due. The Respondent would have been entitled to address all of these matters in its proofs of evidence, but its earlier provision was in order to be of assistance to all parties. At the start of the previous inquiry the Applicant had sought an adjournment because the Respondent had included information in its proofs of evidence that the Applicant thought should have been provided earlier.
 18. A meeting was arranged on 29 August 2023 to help the Rule 6 Parties with the information they were looking for in the Transport Assessments and Transport Position Statements. The Respondent provided a Technical Note thereafter, which set out the TRICS data being relied on. This was not even addressed in the Applicant's evidence-in-chief. The air quality figures were corrected as

there were some errors. They were only presentational and did not affect the Respondent's air quality evidence. This is neither unreasonable or unusual.

19. This is a large and complex development. The Heads of Terms to the Section 106 Agreement, which were included with the planning application, made clear what was being proposed. The Planning Officer's Report to Committee in July 2023 outlined the Borough Council's Heads of Terms, which were very similar to those of the Respondent. The Section 106 Agreement is a complex document accompanied by a suite of documents that relate to the stewardship arrangements by the WACT. Drafts were available for all parties up to 1 December 2023. There was plenty of time to consider the document in advance of the round table session of the inquiry.
20. The draft Section 106 Agreement was provided on 19 September 2023 as required by the Inspector's Pre-Inquiry Meeting Note. It is acknowledged that this was not a complete draft. However, as explained to the Planning Inspectorate, the delay was caused by the failure of the Borough Council to engage through their appointed solicitor until July 2023. This is notwithstanding the Respondent providing several fee undertakings to cover the Borough Council's legal costs.

Ground Two: The application relating to the LINSIG modelling of the Ockham Interchange

21. The LINSIG issue arose because the Applicant without any prior notice made the point in cross-examination that the layout for the Ockham roundabout did not fully reflect the approved layout for the DCO works. After the matter had been flagged by National Highways in November 2022, a further model run was carried out based on the corrected layout. Both of the statutory Highway Authorities and the Borough Council were satisfied that it did not result in unacceptable impacts on the network, including the Ockham Interchange. The reason for not updating the Transport Assessment were explained in the evidence. It is not credible to think that the Respondent would have hidden this information and there is no evidence that this happened. The matter was immaterial.

Reasons

22. The *Planning Practice Guidance* 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.

Ground One: The application relating to a premature and incomplete appeal

23. There is a statutory right of appeal if a local planning authority does not determine a planning application within the prescribed time period. In the case of major Environmental Impact Assessment Development this is 16 weeks, although an extension can be agreed between the council and the applicant. In this case there were several PPAs and the third one agreed to an extension of time until 5 April 2023. On 16 March the Respondent submitted further information addressing matters raised by the Borough Council and consultees. This was subject to consultation by the Borough Council for a 30-day period. The appeal against non-determination was made on 11 April, although prior to this the Appellant did offer to extend the determination date until 28 April. It is clear to me though that the Borough Council would not have had time to

- consider the consultation responses and prepare its Report within the sort of timescale that the Respondent had in mind.
24. However, the decision to appeal needs to be considered in context. This was a planning application for a site that was allocated in the development plan for a similar scale and type of development that was being applied for. It had been submitted in August 2022 and from all accounts there had been a considerable amount of pre-application discussions. It seems as if the March 2023 material did not come out of the blue but had been discussed with officers beforehand. However, even after the consultation period had ended there could be no expectation of a speedy determination, and the Respondent was given a target Committee date many months ahead. So not only was the Respondent entitled to lodge the appeal but, in the circumstances, it is fair to conclude that the decision was neither premature nor unreasonable.
25. There is no denying that a lot of additional material was submitted during the course of the appeal, most particularly in July 2023. However, this was well after the submission of the Respondent's Statement of Case in April 2023. The latter included a full list of the documents on which it was intending to rely at the inquiry. There was therefore no offence in terms of the requirements of the *Town and Country Planning (Development Management Procedure) (England) Order 2015*. In April 2023 the Appellant did not know the cases of the Rule 6 Parties, which were not submitted until July. Considering the timeline, it is not unreasonable that additional documents would need to be relied on in order to address the points made by those other parties.
26. It is of course not ideal for large amounts of additional material to be submitted during the appeal process and this is discouraged in both the *Planning Practice Guidance* and the *Planning Appeals Procedural Guide*. However, these are not statutory rules, and the guidance cannot cover all circumstances. In my experience over many years of inquiry-holding further information is often submitted during the appeal period, especially in larger and more complex cases that involve many participants and consultees. In the case of a non-determination appeal it is even more likely that everything will not have been resolved at application stage. In this case the Council's putative reasons for refusal were not even known until a Special Meeting of the Planning Committee had been held on 10 July. In addition, there were outstanding objections from statutory consultees including the Environment Agency, Natural England and Surrey County Council as local highway authority. Continuation of discussions during the appeal period to try and resolve or narrow the areas of dispute in advance of the inquiry is a normal part of the process. It is not the same thing as evolving the scheme, but rather its objective is to save inquiry time.
27. The additional material submitted in July 2023 was discussed at the Pre-Inquiry Meeting and I commented that it was difficult to keep up with the new material and where it could be found. I asked the Respondent to prepare a list of all of the documents it would be relying on at the inquiry and a link to where they could be found. A timetable was given, and this was complied with. All main parties were allowed to add to the core documents, which were managed by the Respondent's team. One Rule 6 Party wanted access to the data input for the traffic modelling and I asked for the Respondent to engage with the Objector in that respect. As I understand it this was subsequently done, and the Applicant attended this meeting as well.

28. The main point seems to me to be one of fairness and whether the objecting parties had sufficient time to consider the July 2023 material and address it in their evidence. The proofs of evidence were due on 4 September, and it seemed to me that those with professional representation should have had sufficient time to do so. However, I was well aware that there were two Rule 6 Parties who were not professionally represented¹ and for them the inquiry was particularly accommodating in respect of when their evidence was submitted.
29. Even though Heads of Terms had been submitted with the planning application, the Section 106 Agreement did not progress quickly. The final draft was not submitted before the inquiry as it should have been to accord with the *Planning Appeals Procedural Guide*. It was to be a bilateral agreement and the Respondent has blamed the Borough Council for the slow progress. As the Borough Council is not party to this costs application this has not been rebutted, but I suspect that part of the problem related to resources. However, whatever the reason, I consider that the objecting parties, including the Applicant, were inconvenienced because the document contains the provisions by which many aspects of the proposed development would be delivered and managed in perpetuity.
30. The delay of the Section 106 Agreement was very unsatisfactory, albeit that this cannot be laid solely at the door of the Respondent. Nevertheless, various drafts were provided during the course of the inquiry and the information was available sufficiently in advance of the relevant round table sessions. These spanned two days towards the end of the inquiry on 11 and 18 December. There was a very full discussion of all of the obligations, and I do not consider that anyone was ultimately disadvantaged. Furthermore, I do not believe that the discussion was more protracted than it might otherwise have been given the amount of content that had to be discussed. Even if there was unreasonable behaviour in this respect, wasted expense was not therefore incurred.
31. For all of the above reasons given above, I have concluded that the decision of the Respondent to appeal when it did was not unreasonable, and that the Applicant was not subject to unnecessary expense. The two scenarios that were given to determine whether the Applicant's full costs or half of its costs were justified seem to me rather strange. This is because I have no way of knowing how the Borough Council would have determined the planning application had the Respondent allowed the decision-making process to take its course. Furthermore, the basis for its contention that half of its expenses should be paid if I concluded that an appeal would have been made following a refusal of planning permission is difficult to understand. In any event, these are thankfully not scenarios with which I need to engage.

Ground Two: The application relating to the LINSIG modelling of the Ockham Interchange

32. The Applicant considers that this ground informs the first ground, but I do not agree. This is because the LINSIG error was raised by the Applicant during the course of the inquiry. It had nothing to do with the timing of the appeal or the further information submitted in March or July 2023, other than that it was not addressed in either. There is no dispute that the Respondent knew about the

¹ Villages Against Wisley New Town and Ripley and Send Parish Councils.

error, which had been flagged up by National Highways in November 2022. Furthermore, an amended model run had been carried out based on the correct layout.

33. It seems to me very unfortunate that the matter arose as it did. I consider the implications in my decision. However, whatever the outcome it remains the case that the situation was known to the Respondent but was not reflected in the Transport Assessment or the oral or written evidence of the highway witness up until the point that it was raised by the Applicant in cross-examination. It is not a question of whether it would ultimately result in an adverse effect in terms of highway safety or whether it was acceptable to the statutory authorities. It rather goes to the issue of fairness and transparency and giving people the opportunity to consider, question and comment. So, in my opinion the Respondent's behaviour was unreasonable.
34. Whilst the Respondent wished for the matter to be dealt with through written evidence, I agreed with the Applicant that it should be addressed through oral evidence. The Applicant was therefore put to unnecessary expense. This included identifying the error in the first place, preparing written notes and extra evidence, recalling its highway witness and preparing and delivering cross-examination. This all took an extra inquiry day, which was dedicated to considering this matter.

Conclusions

35. In respect of Ground One, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the *Planning Practice Guidance*, has not been demonstrated.
36. In respect of Ground Two, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the *Planning Practice Guidance*, has been demonstrated and that a partial award of costs is justified.

Costs Order

37. 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 Taylor Wimpey UK Limited shall pay to the Wisley Action Group, Ockham Parish Council and RHS Wisley, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in dealing with the issue of the LINSIG modelling of the Ockham Interchange; such costs to be assessed in the Senior Courts Costs Office if not agreed.
38. The Applicant is now invited to submit to Taylor Wimpey UK Limited, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Christina Downes

INSPECTOR