The Planning Inspectorate

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 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 Taylor Wimpey UK Limited for a partial award of costs against Wisley Action Group, Ockham Parish Council and RHS Wisley
- 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 Taylor Wimpey UK Limited

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

3. It was always the Applicant's position that a number of aspects of the Respondent's case were pursued in an unreasonable way. However, it was prepared to forgo its own costs application if the Respondent did the same. Far from being threatening it was an offer to save time and cost in dealing with the costs issue at the inquiry. It was not an acceptance by the Applicant of the weakness of its costs case or a "tit for tat" application.

The ecology evidence

4. The ecology evidence pursued arguments that had previously been made and rejected by four Inspectors, the High Court and two Secretaries of State. The Respondent's ecology expert acknowledged that he was doing so and seemed unaware that this was an example of unreasonable behaviour. The same arguments in respect of the SANG were made at the previous appeal. The Respondent's ecology witness's views on the exceedance of critical loads had been labelled by the High Court as "extreme". He said he was adopting a different approach at this inquiry but that it did not accord with his professional view. That was not consistent with his professional duties as an expert witness and much time was wasted at the inquiry dealing with this shortcoming.

5. The Respondent argued that there had been a change in circumstances in terms of the role of ammonia and the sensitivity of habitats to nitrogen deposition. However, ammonia was not a new issue and had been recognised by the DCO Examining Authority and Secretary of State. Critical loads were revised in July 2023 well after the Respondent's ecology witness had set out his views on the application. In any event, these changes did not go to the heart of his air quality arguments as they related to the SPA, which had been run at the previous appeal, the Local Plan examination and the DCO examination.

6. The evidence regarding inadequacy of ecological surveys on a number of species was withdrawn at the last minute. The criticisms of the surveys relating to bats, birds, newts and invertebrates were without merit. This is demonstrated by the fact that the survey points were not even pursued by the Respondent in questioning the Applicant's ecology expert witness, apart from in respect of bats. The Respondent's ecology witness sought to disparage Natural England's expertise, which was wholly unjustified. Great weight should have been given to its views.

7. It is not accepted that the habitats issues are very different from the previous appeal or that the need for an Appropriate Assessment was a material change. There is legally no rigid separation between the screening stage and the full appropriate assessment stage. The Respondent's ecology witness made clear that he did not agree with the approach of Lord Carnwath in the *Champion* case in the Supreme Court. This was in respect of the requirement for the use of best scientific knowledge in Habitats Regulations Assessment and the finding that whilst a high standard of investigation is required it is ultimately an issue that rests with the judgement of the competent authority. The *Planning Practice Guidance* indicates that acting contrary to well-established case law is unreasonable behaviour and the unlawful approach of the Respondent's witness infected his evidence generally.

Failings in the evidence

8. Various points were raised by the Respondent earlier in the appeal process. These concerned a number of points, about AADT traffic flow data, alleged discrepancies between the Environmental Statement and Transport Assessment, how sensitive receptors on highway links had been dealt with and matters relating to trip generation. All of these points had been addressed through Technical Notes. However, this was completely ignored in the Respondent's subsequent oral and written transport evidence.

9. In addition, the Respondent's transport and air quality witnesses made no attempt to contact the Applicant's experts, despite criticising the way that the transport and air quality modelling work had been carried out. None of the points raised were pursued in cross-examination of the Applicant's witnesses and the Respondent's witnesses were forced to concede the points in cross-examination.

10. Several points were raised at a late stage, and this necessitated the expert highway witnesses having to be recalled in relation to the LINSIG issue at the Ockham Interchange. The points related to the Transport Assessment, which had been submitted in August 2022. The concerns had not been flagged up before the inquiry, despite a large number of representations on the application by the Respondent. They were not even mentioned in the Respondent's Statement of Case, Proofs of Evidence, Rebuttal Proofs or oral evidence to the inquiry. These matters should and could have been raised earlier. They went nowhere as was reiterated by the Borough Council in its closing submissions. They wasted a day of inquiry time as well as time producing additional Technical Notes.

11. Landscape impacts and detailed design points were raised in cross-examination by the Respondent despite no evidence having been produced on these matters by its witnesses. There were also points raised about breaches of policy, despite its witnesses having conceded these points in cross-examination.

Development principle

12. The policy evidence was not properly thought through and the Respondent's planning witness accepted that points were made that related to the principle of the development. It was further acknowledged that these points had failed at the examination of the LPSS.

RHS Wisley and the cycle routes

13. RHS Wisley had failed to deliver on the cycle route that were a condition of its planning permission for redevelopment at its site. It had said that it was not seeking to frustrate delivery of the Applicant's cycle routes and yet it challenged the sustainability of this allocated site whilst breaching the delivery of sustainable modes that were agreed as a condition of its own planning permission.

Replying to the Respondent's costs application

14. The Respondent's costs application at the previous appeal was strongly rejected. There was no merit in its costs application to this appeal either.

15. Either costs should be awarded separately to each of the instances of unreasonable behaviour cited above; or a proportion of the Applicants full costs should be given relating to the time wasted on all of them, and 15% of the Applicant's total costs is suggested.

The response by Wisley Action Group, Ockham Parish Council and RHS Wisley

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

17. The Applicant had applied a threatening tactic that a costs application would be made to shut down evidence and questions. Now the Applicant says that no costs application was intended. An attempt was made to disuade the Respondent from making its costs application and this was an unsuccessful attempt at intimidation. The costs application that has emerged from the Applicant is purely on a "tit for tat" basis.

The ecology evidence

18. As the Applicant acknowledged, the habitats issue was very different from the previous appeal. Appropriate Assessment had not been required because air quality and recreation impacts were not considered to have likely significant effects. That is not the case in this appeal. The evidence was also very different now in terms of ammonia, nitrogen deposition, critical loads and the test of no net increase in recreational use. Although the DCO examination did consider ammonia it was on the basis of out-of-date science.

19. The criticism of the surveys was justified and there were legitimate concerns which came to light. The use of zero crossing on the detectors to reduce the records of Barbastelle bats is one such example.

20. The *Champion* case was not referred to in the ecology evidence of the Respondent and was not relevant to the issues in the appeal. In any event there was no offence in disagreeing with the Supreme Court, which itself disagreed with the High Court.

Failings in the evidence

21. This comes down to a complaint by the Applicant that other experts did not agree with its own experts. The contemptuous language used by its consultants, for example in its July Technical Note was hardly persuasive.

22. At the pre-inquiry meeting, the Inspector asked that data input to the traffic modelling be provided by the Applicant. This was provided to the Respondent and another Rule 6 Party on the evening of 30 August, which was two working days before proofs of evidence were due. It allowed insufficient time for analysis before the deadline.

23. The Respondent reviewed the Applicant's evidence as it was submitted. It also attended several meetings with the Applicant's experts in May, and August 2023. It was unclear what more could have been done but it was notable that the Applicant's team failed to provide requested evidence to the opposing Rule 6 Parties. It takes two to communicate and the rude nature of any of the Applicant's responses did not help.

24. The Applicant's transport expert witness was cross-examined about errors in his own evidence. The errors were totally unexpected and only identified

shortly before he was cross-examined. The error in the LINSIG model had not been spotted by the Applicant's highway expert until National Highways pointed it out. Even then he spent time arguing that the modelling was correct. The capacity problems at what was supposed to be the main junction serving the development had not been revealed.

25. There is no issue with cross-examining an expert witness when there was no expert evidence being called in that discipline. The matter of the primary access in policy A35 was a matter of law and that it would be the access used the most is there for obviously good reasons.

Development principle

26. The policy evidence was clearly put by the Respondent's planning witness. There was little at issue at the start of the cross-examination and not much difference at the end.

Replying to the Respondent's costs application

27. The Respondent's costs application was not unreasonable given that consultation on the submitted information was underway when the appeal was made. It was not unreasonable to present to the inquiry what had been acknowledged as incorrect highways modelling.

Reasons

28. 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.

29. This costs application relates to the behaviour of the Respondent and not the Applicant. Whether or not the latter behaved in an intimidating manner or engaged in threatening behaviour is therefore not of relevance in this respect.

The ecology evidence

30. There were a number of aspects about the Respondent's ecology case that rehearsed the same arguments as those that had been put forward and had been rejected by previous decision-makers. It is the case that the previous Inspector and Secretary of State had ruled out likely significant effects on the SPA. This took account of the mitigation measures provided by the SANG in terms of recreational impacts, which now cannot be considered at scoping stage on account of the European Court ruling in *People over Wind and Peter Sweetman v Coillte*. The agreed position in this appeal was that an Appropriate Assessment would be required on account of the aforementioned judgement. However, that does not alter the fact that the previous appeal Inspector and the Secretary of State were satisfied that with the same mitigation proposals, comprising the same quantum, quality and location of SANG, the same SAMM contribution and SAMM Plus scheme, and the same management proposal as envisaged in the WACT, there would not be a likely significant effect on the SPA.

31. The Respondent referred to the "no net increase in recreational use test" as a change of circumstance. However, this seems to me to be an obvious requirement if a likely significant effect is to be avoided. There is no evidence that a different test was applied previously.

32. On the question of the effect of air quality on the SPA, the Respondent's ecology evidence did not primarily rely on changes such as those relating to the consideration of ammonia or the lowering of critical loads. Rather, they rehearsed the same arguments that had been made and rejected before, most recently by the DCO Examining Authority and the Secretary of State. I have addressed these points in detail in my decision. In brief they assert the importance of the woodland belts in terms of providing an invertebrate resource to the SPA birds; the potential for the future restoration of shelter belt woodland to heathland; the importance of the DCO Compensation land in supporting the SPA birds by providing an insect resource; the inevitable consequence that where critical loads were exceeded damage was being caused and that further nitrogen deposition from development would necessarily fail an Appropriate Assessment. Although this was said not to be the case that was being made, it was the professional view of the Respondent's expert witness and came across in his evidence.

33. I have considerable concerns about the issues raised by the Respondent's ecology expert about the inadequacy of the surveys. For the reasons given in my decision he did not seem to me to adopt a proportionate approach or to recognise the considerable amount of survey effort that had already been expended over the years at this site. Some of the concerns were withdrawn at a late stage, for example in relation to the surveys on white-clawed crayfish, otter and Hazel dormouse. With regards to the survey inadequacy in relation to birds, Great Crested Newts, invertebrates and badgers, there was little substance when it came to considering that the purpose of further surveys would serve in respect of understanding the ecological value of the site. In fact, the only substantive points that had some merit concerned the bat surveys. This was the only survey matter on which the Applicant's ecology expert witness was cross-examined at the inquiry.

34. In all the above respects, the ecology case of the Respondent was unreasonable.

Failings in the evidence

35. The point here was that certain matters were repeated in the Respondent's highway evidence that had already been raised and answered by the Applicant's highway team. Three specific examples were given. With regards to AADT traffic flow the Applicant's Technical Note (July 2023) did not, in my opinion, give a very helpful response to the matter raised. It did offer to provide a briefing, but it was not phrased in a manner that particularly encouraged this. In any event the Respondent wanted to interrogate the transport model itself. Raising the matter again in the proof of evidence was not unreasonable in the circumstances.

36. The alleged discrepancies between the Environmental Statement and Transport Assessment related to the absolute flows in the morning and evening peak periods. The Applicant's Technical Note gave an explanation as to why there were differences, and these included a different number of accesses and different purpose between the two documents. Raising the point again in the proof of evidence without considering or even acknowledging the explanation that had been given was not a reasonable approach to take.

37. The point about the sensitive receptors is that there was no explanation in the Environmental Statement as to which receptors along the chosen links were

considered to be sensitive. This was not properly answered in the Technical Note and seems to me to have been a reasonable matter for the Respondent's highway witness to continue to address in his evidence. Whether or not the Applicant's highway witness was cross-examined on the point does not make the position of the Respondent's witness unreasonable.

38. There was a Technical Note relating to the trip rate generation produced in March 2023, but this was not seen by the Respondent's highway witness until after the meeting with the Applicant's highway team on 29 August. This allowed a very short time before proofs of evidence were due on 4 September. I have a note that the trip rates were addressed in the Respondent's highway evidence-in-chief. I do not consider there was unreasonable behaviour in respect of this matter.

39. It is clear that the Respondent's highway, air quality and ecology witnesses did not generally seek to discuss or clarify matters with the Appellant's team. Whilst this may have been helpful in some cases there was no obligation for them to do so and in my experience such a collaborative approach is not commonplace. Perhaps it should be encouraged to happen more often, but I do not consider that it can be identified as unreasonable behaviour in this case.

40. The Ockham Interchange and LINSIG issue was extremely unfortunate. There is no dispute that it was raised late in the day and the Borough Council refer to it as the "rabbit out of the hat" issue, which it certainly was. However, to my mind this is not a matter about the outcome, as I have indicated in my costs decision on the application made by the Respondent. It is a matter or process and transparency.

41. The LINSIG diagrams and evidence provided to the inquiry by the Applicant were incorrect and had already been revised following a review by National Highways. The statutory authorities and Borough Council were content. However, the inquiry did not know that the evidence was based on a misrepresentation. That it only came to light late in the day was far from ideal. But the point is that it should have been in the Applicant's highway evidence well before the inquiry so that everyone had the correct information from which to work. Although the Applicant wished for the matter to be dealt with in writing, the Respondent wanted the highway witnesses to be recalled, with which I agreed. The Respondent's behaviour was not unreasonable.

42. The Respondent did cross-examine the Applicant's witnesses on landscape and design. This is relatively unusual given that it provided no evidence of its own on these matters. Nevertheless, I was not pointed to any section of the *Town and Country Planning (Inquiries Procedure) Rules (England)* that prohibits such questioning and it does not seem to me to be a costs matter.

Development principle

43. The Respondent's planning witness accepted that the site was allocated. He nevertheless produced evidence that questioned the principle of the development in terms of its size and its shape and sustainability. This was not a matter that was accepted by the Local Plan Inspector when the allocation of the site was found to be sound. In cross-examination by the Applicant, he accepted that the Respondent party continued to object to the principle of the development. To the extent that this admission affected his planning evidence and policy consideration it was an unreasonable approach to take.

44. However, I am not convinced that this unreasonable behaviour resulted in a great deal of unnecessary expense. This is because the policy issues had to be addressed in any event. Despite my warnings that the principle of development was not an issue, it was raised by many local objectors and some other Rule 6 Parties and therefore had to be dealt with by the Applicant's planning witness. In the circumstances the unnecessary expense derived solely from the cross-examination and its preparation of those particular aspects whilst the Respondent's planning witness was giving evidence.

RHS Wisley and the cycle routes

45. Whether or not RHS Wisley, who are part of the Respondent Rule 6 Party in this case, have behaved unreasonably in relation to their own planning issue is not really relevant. I am not convinced from the evidence that it was attempting to frustrate the proposed off-site cycle route to Byfleet. The evidence suggests that an alternative cycle route is being discussed with the Borough Council along the eastern side of the RHS Wisley site. I have dealt with this in my decision, but I find no convincing evidence that the cycle route when it has been constructed would not be available for use whatever the legal position is purported to be. There is no unreasonable behaviour in relation to this matter.

Responding to the Respondent's costs application

46. A costs application made on this basis is unusual but not novel. As referred to by the Applicant, I have dealt with such a costs application before in this Borough. As I said in that decision, such an application must go beyond the mere failure of the application to succeed otherwise an applicant would be at risk of costs against them whenever its costs application was unsuccessful.

47. The Respondent's costs application was made on two grounds. As I allowed costs on the second ground there was no unreasonableness there. Ground One was related to the alleged premature nature of the appeal given that additional material had been submitted shortly beforehand. I decided that given the context, the decision to appeal was a reasonable one, setting aside that there was a statutory right to do so. There were further documents submitted during the appeal process and again I did not find this unreasonable. The rather strange point made about the application related to whether there was justification for all the costs, or half the costs based on what the Council might have done had it been in a position to determine the application. This did not really matter because an award on this ground was not made anyway. Overall, I consider that Ground One of the Respondent's costs application was arguable and was not unreasonably made.

Conclusions

48. This is a costs application with a number of grounds, and I have found that there has been unreasonable behaviour in the following respects:

- In the ecology evidence insofar as it related to matters that had already been addressed by previous decision makers; and in raising issues about the surveys, other than in relation to bats.
- In the highway evidence insofar as it related to the difference between the TA and ES in respect of peak traffic flows.

- In the planning evidence insofar as it persisted in raising issues about the principle of the development, but the costs limited to the cross-examination of this point and its preparation.

Costs Order

49. 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 Wisley Action Group, Ockham Parish Council, and RHS Wisley shall pay to Taylor Wimpey UK Limited the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in dealing with the issues of the ecology evidence, transport evidence and planning evidence as outlined in paragraph 48 above, such costs to be assessed in the Senior Courts Costs Office if not agreed.

50. The Applicant is now invited to submit to Wisley Action Group, Ockham Parish Council, and RHS Wisley, 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