



Costs Decision

Hearing held on 9 & 10 July 2024

Site visit made on 10 July 2024

by S Heywood BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd September 2024

Costs application in relation to Appeal Ref: APP/T2405/W/24/3342111 Enderby Hub, St Johns, Enderby, LE19 2AB

- 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 application is made by Mather Jamie Ltd on behalf of Drummond Estate and Inverock Ltd for a full award of costs against Blaby District Council.
 - The appeal was against the refusal of planning permission for is an outline application for a commercial development consisting of the erection of x4 warehouse buildings with ancillary offices and gatehouses (Use Class B8) and x1 training and education centre (Use Class F1) including associated access off Leicester Lane.
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Decision

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

The submissions for Mather Jamie Ltd on behalf of Drummond Estate and Inverock Ltd

2. The costs application was submitted in writing. The following additional points were made orally. The appellants confirm that a partial award is sought if a full award is not found to be justified.
3. The Council compounded their unreasonable behaviour in their defence of the appeal. The Council sought to introduce additional matters beyond the reasons for refusal including questions of compliance with policy SA3 and national policy which were not in the reasons for refusal.
4. The Council have ignored the consequences of their own decision on 13 June 2024 to approve the Hub 2 application. The Councillors defending the appeal persisted in pursuing concerns which have no technical evidence basis and are matters that the Council has been satisfied on in relation to the same issues on Hub 2. The Council failed to recognise that the Council can only speak with one voice. The Councillors defending the decision for Hub 1 did not accept the Council's decision on Hub 2 and were pursuing their own separate objectives. This is unreasonable.
5. The Council relied on the proposition that each case should be considered on its own merits. However, they accepted that there is no material difference between the Hub 1 and Hub 2 applications. The Council were unable or unwilling to articulate the reasons why the merits of the two applications are different. Therefore, the position presented to the hearing is inconsistent and contradictory having regard to the Council's position on the Hub 2 application. This is unreasonable.

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6. The Planning Practice Guidance (PPG) sets out that not determining similar cases in a consistent manner can lead to an award of costs due to unreasonable behaviour. The appellants say that the Council should not have refused the Hub 1 application in the first instance but, having done so, they should not have continued to resist it having approved the Hub 2 application.
 7. The Council sought to rely on the fact that the composition of the Planning Committee changed between the two decisions. There is no legal or planning significance to this. The Planning Committee is a representative of the local planning authority (LPA) and the LPA is expected to be decision maker and to make the decision based on policy and evidence.
 8. It is clear that the site is allocated in the development plan. If the development plan is viewed as a whole there is no breach in policies CS10 or SA3. In a plan-led system planning permission should have been granted. The refusal was unreasonable and there has been a failure to provide substantial evidence in defence of the refusal.
 9. The Council's costs response says that they rely on the technical evidence submitted by the appellants. This evidence supports a grant of planning permission and that has been accepted by the Council in the Hub 2 application.

The response by Blaby District Council

10. The response was made in writing. The following additional points were made orally. The Council's written response sets out the reasons why the opposition to the scheme was justified.
11. In relation to reasons for refusal 1 and 3, it is clear from the evidence that the development is proposed to be sited in an exceptionally busy part of the highway network; it is of very considerable scale; will increase the use of cars and HGVs and will inevitably increase congestion. That is demonstrated in the updated Transport Assessment (TA). The local highway authority and the appellants have taken the view that the highway impact would not be severe, but the LPA has not acted unreasonably in disagreeing with this view.
12. In terms of the evidence to substantiate the reason for refusal, there is no reason why there is an obligation on the authority to provide a separate set of evidence when the evidence of the appellants supports its position.
13. The Council did not expand its case during the hearing. Its reason for refusal 1 relates to highways impact and sets out that the highways report does not satisfy members in terms of highway impact. The Council stuck to that point at appeal. The Council does not advance a case that SA3 is breached but places reliance on the wording to evidence the issues identified at local plan stage regarding local congestion and pressure points. It has not acted unreasonably in this regard.
14. The claim that the Councillors defending the refusal did not recognise the Hub 2 approval does not accord with the evidence given. Both Councillors made frequent reference to Hub 2 and neither refused to accept or demurred from the decision made on that application. The Councillors were giving evidence as elected representatives familiar with the local area in support of the reasons for refusal of Hub 1. That is not an unreasonable position.

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15. The appellants refer to the PPG in relation to consistency of decision-making. This paragraph does not apply in this case as the Council is not making the decision but is presenting its case to the Secretary of State. Although Hub 2 was approved, each case must be dealt with on its own merits.
 16. In order to make a successful costs claim it is necessary to demonstrate wasted / unnecessary expense. The Council has acted reasonably in agreeing Statements of Common Ground and the conditions / S106 for the appeal. It would therefore be wrong to award full costs on the basis of Hub 2 alone as this was not approved until 13 June 2024, a considerable time after the Statement of Case and filing of evidence for the appeal. Even then there was a degree of uncertainty as the decision was subject to a S106. If costs are awarded on this basis, it should only be a partial award from a reasonable period after 13 June.

Reasons

17. Parties in planning appeals normally meet their own expenses. However, the PPG advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
18. The PPG sets out the type of behaviour which may give rise to a substantive award against a LPA. This includes preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failure to produce evidence to substantiate each reason for refusal on appeal and vague, generalised or inaccurate assertions about a proposal's impact, unsupported by any objective analysis.

Whether the Council's behaviour was unreasonable

19. The planning application was recommended for approval by Council Officers but Members refused planning permission for the following reasons:
 1. The Highways report doesn't satisfy Members in terms of highways impact.
 2. The proposal doesn't meet current needs.
 3. The proposal is contrary to Policy CS10 of the Local Plan.
20. In accordance with Article 35(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015, a decision notice must clearly and precisely set out the full reasons for refusal, specifying all policies and proposals in the development plan which are relevant to the decision. I agree with the appellants that the reasons for refusal fall short of these requirements.
21. However, that in itself is not necessarily unreasonable behaviour leading to unnecessary or wasted expense. It is evident that the appellants were aware of the issues involved in the appeal and prepared evidence in relation to each of these. That evidence is not demonstrated to have been more than they would have prepared had the reasons for refusal been more precise.
22. Of more significance in considering this costs application is whether the Council had proper regard to the allocation of the site for employment purposes.

Whilst the Council raise concern that the development would be sited in a congested part of the highway network, this will have been apparent at the time of allocating the site. As I have set out in my decision, it is to be expected that a site of this size allocated for employment purposes would be likely to increase traffic on the surrounding network.

23. The Council's case in terms of compliance with the allocation policy SA3 appears to be contradictory as set out in their Statement and at the hearing. In their Statement they set out the matters included in SA3 which have not been provided for in the application (8.4). At 8.19 they say that a 'comprehensive' package of measures (as required by SA3) has not been provided and at 8.23 they say that the application does not meet the requirements of SA3 in terms of the impact on the wider road network, the lack of phasing and funding details and the lack of inclusion of the Enderby Relief Road (the by-pass).
24. Despite these matters being set out in the Statement, the Council expressly confirmed at the hearing, including in their oral response to this costs application, that they did not advance a case that the proposal would conflict with policy SA3 and there was no reference to the policy in the reasons for refusal.
25. In relation to reasons for refusal 1 and 3 relating to highways and transportation matters, the Council had disagreed with the expert advice of the highway authority (Leicestershire County Council) and National Highways.
26. The highway authority appear to have had considerable input into agreeing the parameters of the Transport Assessment (TA), seeking improvements to the development from a highway perspective and setting out the necessary conditions and contributions to highway works in order to make the development acceptable in highway terms. This included a consideration of the sustainable transport options and contributions necessary to encourage further use. As a result, the highway authority were ultimately satisfied that there were no highway or transportation grounds to refuse the application and they recommended approval subject to conditions and the S106.
27. National Highways, who are responsible for the strategic road network including the motorways, similarly engaged with the appellants' transport consultants and ultimately raised no objection to the proposed development having regard to its impact on the M1 junction 21. Leicestershire Police Force initially objected to the proposal but did not maintain that objection in light of further information from the appellants.
28. The Council effectively acknowledge that they did not provide their own evidence to substantiate the reasons for refusal on highways and transportation as they say that they adopted the evidence in the appellants' TA. This in itself is not unreasonable, and they were entitled to draw different conclusions having regard to the highway evidence presented. However, these conclusions must be based on more than generalised assertions and should include an objective analysis of the issues.
29. The Council's Statement (8.12) sets out that they disagree with the highway authority's view that the development complies with the Framework and that they disagree with the views of the Police that their concerns had been satisfied (8.15). The Statement further sets out that neither the highway authority nor

Police had stated how close the extra traffic came to achieving a severe impact (8.18). But nowhere does the Statement set out an objective analysis of the evidence in the TA which led the Council to disagree with the highway authority, National Highways and the Police in relation to the impacts.

30. The Council expanded upon their case at the hearing. Their evidence amounted to concern that because the existing highway network was congested, the additional traffic from the development would, cumulatively, be harmful. This ignores the allocation of the site and the fact that any large B8 or B2 development of the site would be likely to have similar impacts.
31. Reason for refusal 3 refers to non-compliance with policy CS10. The Council's Statement raises concern that the development does not offer a sustainable transport strategy. Again, there is no specific evidence or objective analysis to demonstrate the harm in this respect.
32. The Council dispute the accessibility of the site by bus, train and cycling. However, the Delivery DPD at paragraph 3.28 states that the site is in a 'location accessible by walking, cycling and public transport'. The Council's evidence to this appeal does not explain why they come to a contrary view in relation to this application. Furthermore, the subsequent approval of the Hub 2 application undermines the stance taken on this matter in this appeal. I return to the matter of the Hub 2 approval below.
33. In the light of the highway authority and National Highways' views to the contrary it was incumbent on the Council to have provided substantive evidence to justify the refusal on these grounds. In this respect, the Council's reasons for disagreeing with the expert opinions of the highway authority and National Highways amount to generalised assertions which are not based on objective analysis.
34. In relation to reason for refusal 2 – not meeting 'current needs' - the evidence in relation to need for employment land demonstrates clearly that the development would meet the need identified through the local plan process. This is agreed between the Council and appellants in the Statement of Common Ground on Employment Land. It was also agreed that there is no requirement in local or national policy for an employment development to demonstrate need prior to being granted.
35. The Council's case in relation to unemployment rates and the labour market is set out in its Statement at paragraphs 9.3 and 9.4 and amount to no more than an identification of what the unemployment rate is compared to the East Midlands and nationally. They expanded upon this at the hearing to set out concerns that the appellants' socio-economic assessment demonstrated that the jobs profile would not meet that of the local population leading to increased commuting, but that matter goes to the highway impact rather than the need for the development. I have set out in my decision that the fact that the development may provide jobs for people living outside Blaby is not a reason to refuse planning permission and the Council put forward no further reasons to explain the harm caused in this regard.
36. Again, I consider that the Council's case in terms of need for the development amounts to generalised assertions, not based on objective analysis and it does not justify why permission should have been refused on this basis.

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37. I accept that there was a lot of opposition to the proposal from local residents. However, that in itself is not a reason to refuse permission, particularly for development of an allocated site.
38. The site is allocated for employment purposes and the Council confirmed that it would not conflict with the main allocation policy for the site. No other unacceptable harm has been demonstrated or any other material considerations which should lead to a refusal of permission. In terms of national policy, the Council did not demonstrate why the proposal would have an unacceptable impact on highway safety nor that the residual cumulative impact on the road network would be severe, in light of the highway authority and National Highways' conclusions to the contrary. No other conflict with national policy was claimed. In the circumstances of this case, it was unreasonable of the Council to have refused permission for the development.
39. I therefore find that the Council acted unreasonably in preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

Hub 2 application

40. The Council subsequently approved the Hub 2 application which they accepted at the hearing was not materially different to the application the subject of the appeal (Hub 1). Whilst the Planning Committee approved the Hub 2 application late in the appeal process for Hub 1, the Council could at that point have indicated that they would no longer be defending their reasons for refusal of Hub 1. Instead, they continued to defend these reasons at appeal relying on the fact that the make-up of the Planning Committee had changed between the two decisions. That fact is immaterial to the decisions made by the Council as LPA. Having resolved to approve Hub 2, the Council should not have continued to defend their reasons for refusing a substantially similar development.
41. The PPG advises that not determining similar cases in a consistent manner can be grounds for a substantive award of costs against a LPA. The Council were clearly inconsistent in this regard. It is immaterial that they are not the decision-maker for this appeal. They refused planning permission for Hub 1, approved a substantially similar application for Hub 2, but continued to defend the reasons for refusal of Hub 1. This was inconsistent and amounts to unreasonable behaviour.

Whether the unreasonable behaviour has caused the appellants to incur unnecessary or wasted expense

42. In order for an award of costs to be justified, the unreasonable behaviour needs to have directly caused another party to incur unnecessary or wasted expense in the appeal process.
43. In this case, I have concluded that the application should have been approved having regard to the development plan, national policy and other material considerations. The Council did not follow their Officers' advice and, whilst this was not unreasonable behaviour in itself, they put forward generalised assertions to defend the reasons for refusal. This amounted to unreasonable behaviour which directly led to the appellants having to lodge the appeal and incur the expense of doing so.

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44. The Council compounded their unreasonable behaviour, leading to wasted expense which could have been avoided, by continuing to defend their reasons for refusal despite having resolved to approve a substantially similar application before the hearing. The decision on Hub 2 was not issued until after the hearing. However, on resolving to grant planning permission, had the Council indicated that they would not be defending their reasons for refusal of Hub 1, the appellants would have had the opportunity to decide whether to withdraw the appeal and therefore not to incur the additional cost of attending the hearing. They were not given this opportunity.
45. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred and a full award of costs is therefore warranted.

Costs Order where awarding costs

46. 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 Blaby District Council shall pay to Mather Jamie Ltd on behalf of Drummond Estate and Inverock Ltd, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
47. The applicant is now invited to submit to Blaby 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.

S Heywood

INSPECTOR