The Planning Inspectorate

Costs Decision

Site visits made on 13, 15 and 16 January 2025

by David Spencer BA(Hons) DipTP MRTPI

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

Decision date:11/02/2025

Costs application in relation to Appeal Ref: APP/W3005/W/24/3250529
Land at junction of Newark Road and Coxmoor Road, Sutton in Ashfield.

- 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 Hallam Land for a full award of costs against Ashfield District Council.
- The appeal was against a failure to give notice within the prescribed period of a decision on an application for outline planning permission (with all matters reserved except access) for a residential development of up to 300 dwellings with associated infrastructure and landscaping.

Decision

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

Reasons

1. The application for costs seeks a full award on primarily substantive grounds although there is some overlap with procedural matters. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only 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[1].

2. The appellants application for costs was submitted and rebutted in accordance with a process and timetable jointly put forward by legal representatives for both main parties at the Inquiry event. Both parties adhered to the timetable. There can be no retrospective criticism of the timing of the appellants costs application, the intention for which was disclosed at the start of the Inquiry event.

3. The PPG advises that the aim of the costs regime is threefold[2]. It is to encourage all those involved in the appeal process to behave in a reasonable way; encourage local planning authorities (LPAs) to properly exercise their development management responsibilities (to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case); and to discourage unnecessary appeals. It is the first and second strands of this aim which are in focus here. In addition to the PPG, the Written Ministerial Statement (WMS) of 19 December 2023 cautions that decisions not in accordance with the recommendation of a professional or specialist officer should be rare and infrequent. The WMS goes on to say that where the Inspectorate cannot find reasonable grounds for the Committee having

[1] PPG paragraph 16-030-20140306
[2] PPG paragraph 16-028-20140306

overturned the officer's recommendation it should consider awarding costs to the appellant.

4. As the LPA point out a successful award of costs requires demonstrating that any alleged unreasonable behaviour has resulted in unnecessary or wasted expense[3]. In terms of procedural matters that may give rise to an award of costs, the PPG provides a non-exhaustive list at paragraph 16-047. This includes withdrawal of any reason for refusal.

5. The subsequent paragraph 16-048 of the PPG is relevant in this case and addresses when the handling of planning applications prior to an appeal might lead to an award of costs. The parts of the paragraph of particular relevance to this appeal are as follows. "In any appeal against non-determination, the local planning authority should explain their reasons for not reaching a decision within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period. If an appeal in such cases is allowed, the local planning authority may be at risk of an award of costs, if the Inspector concludes that there were no substantive reasons to justify delaying the determination….".

6. Turning to the substantive matters identified at PPG paragraph 16-049, the costs application asserts the LPA behaved unreasonably by failing to determine the planning application and by unreasonably defending the appeal (up and until the point of withdrawal). Consequently, it is submitted that in doing so, the LPA had prevented or delayed development which should clearly be permitted. I consider allied to this is also the substantive matter of whether the planning grounds were capable of being dealt with by conditions, where it is concluded that suitable conditions would enable the proposed development to go ahead.

7. The application for the appeal proposal was submitted to the LPA in August 2022, following a protracted, unresolved process with an earlier 2017 application. After some two years of assessing the 2022 planning application, including multiple consultations with statutory bodies and technical consultees, the application was reported to the District Council's Planning Committee in July 2024 with a recommendation for approval subject to the imposition of conditions and securing planning obligations. The officer report recommending approval was well-constructed, comprehensive and recorded that there were no objections to the proposal from statutory consultees (subject to the imposition of conditions). This included, amongst others, the Council's Contaminated Land Officer, the Local Highway Authority, the Local Lead Flood Authority, Network Rail, the Environment Agency and Severn Trent Water.

8. At the time the application was reported to the July 2024 Committee meeting the appeal proposal was informed and accompanied by, amongst other technical documents, a Transport Assessment, separate Pedestrian and Cycle Access and Movement Strategies, detailed plans for off-site highway improvements, a Travel Plan, a Phase 1 Geo-Environmental Desk Study, a Landscape and Visual Impact Assessment, and a Soils and Agricultural Quality Report.

9. There has been no ambiguity, at either the planning application stage or at the appeal stage, that because of a lack of five year supply of deliverable housing

[3] PPG paragraph 16-032-20140306

land the tilted balance at paragraph 11(d) of the National Planning Policy Framework (NPPF) should be engaged. This requires decision-making to grant planning permission unless the harm of doing so would significantly and demonstrably outweigh the benefits. This still requires the weighing up of the benefits and harms in a transparent way. This was clearly set out in the officer's report in a lengthy section under 'The Planning Balance'.

10. As the minutes of the July 2024 meeting record, the Members of the committee deferred making a decision on that occasion. They did so for various reasons including: (i) clarification and reassurances with regard to the proposed drainage and contamination strategies which might give rise to the potential contamination of the watercourse from previous landfill; (ii) further information on the sustainability of the site particularly in relation to bus provision and accessibility and security of the station to cyclists and others given distance from facilities; (iii) concern that (ii) would lead to a more severe impact on highways and junctions in the vicinity and sought more detail; and (iv) a better understanding was required as to the impact development would have on the best and most versatile land (BMV). The appellant appealed against non-determination approximately 3 weeks later on 21 August 2024.

11. Matters are then amplified when the application is returned to the Committee at its meeting in October 2024, shortly before the LPA had to submit its Statement of Case for the appeal. At this point the appeal was live and so the LPA is correct that it was no longer the decision maker. However, the submission from the LPA that the putative decision from this meeting was made to provide assistance to the Inspector is troublesome. There were 3 clear options for decision-making at the conclusion of the updated officer report for that meeting. These were: (1) To revert to accepting the previous officer recommendation of a conditional consent subject to a Section 106 agreement. (2) Minded to grant consent subject to different conditions or altered heads of terms in a S106. Or (3) minded to refuse and the reasons would be the basis on which the Council's case at the Public Inquiry maybe based. The report is clear that the options were presented to Members to "steer the public inquiry and reduce time and costs for all parties."

12. The discussion of the appeal proposal was held in private such that there are no published minutes of what was discussed. As such it is difficult to know how the tilted balance was applied, and how Members considered the additional submissions made by the appellant in response to the matters for deferral at the July 2024 committee. The Council's Statement of Case reveals that Members would have been minded to refuse the planning application for five reasons had it been in a position to do so. Putative reasons 1-3 would ordinarily be understood as harms arising from the principle of what is proposed relating to sustainability of location, loss of BMV and adverse impact on character and appearance. Reason 4 has morphed from the basis for the deferral in July to a wider harm of insufficient information to demonstrate that the development would be suitable to provide a residential use taking account of ground conditions and risks arising from contamination. Reason 5 has also evolved since the deferral in July to a position of "insufficient information has been provided to fully assess the impact on the local highway network. In particular there is insufficient information on the impact of the development having regard to its proximity to the existing level crossing and the implications when the crossing gates are closed during peak times." As such putative

Reason 5 says that it has not been demonstrated that a severe impact on the highway would not arise.

13. For the purposes of this costs decision, I turn first to whether the appeal was necessary and then to consider whether once the appeal was submitted whether the LPA behaved appropriately in the context of an appeal for non-determination. In particular, why permission would not have been granted had the application been determined within the relevant period. A key aspect running through the costs material before me is the handling of matters in respect of contamination on that part of the appeal site which was a former landfill site.

14. The July 2024 Committee Meeting was the first opportunity for the LPA to properly exercise their development management responsibilities having received a lengthy and considered officer report recommending approval. It is not clear from the perfunctory minutes of this meeting what particular clarification and reassurances the Committee were seeking in relation to drainage and contamination. There is some illumination when tracking back through the long chain of emails between the appellant and the case officer immediately after the meeting (contained in CD2.24). This provides an officer view of what information might address Members concerns prior to the published minutes being available. The officer interpretation is not supported by the technical evidence or the position of statutory consultees during the application process. Indeed, at the end of the long sequence of emails in CD2.24, the Council's Contaminated Land Officer reiterates on 29 September 2024 that a "… a full contaminated condition should be appended to any permit issued for this development as stated in my email dated 21/01/2024". The Contaminated Land Officer does not request or suggest a Phase 2 investigative report at this point.

15. Furthermore, it is not clear from the Committee meeting minutes, what additional details were required on transport matters, despite the Local Highways Authority advising they had no objections subject to conditions and planning obligations. Nor is it clear what was deficient with regards to the evidence on BMV land to require a "better understanding". Members are entitled to defer a decision and request additional information, but there must be cogent reasons for doing so. The Committee meeting minutes, at 3 relatively short paragraphs, does not provide this.

16. It is understandable that Councillors and Committees want to be assured that developments are going to be safe and avoid unacceptable harms. It is also recognised that Councillors represent local communities and have a democratic mandate. However, the planning system must operate in the wider public interest, balancing competing objectives and ensuring that there would be no unacceptable risk to human health and the environment. The planning system, including the NPPF, reflects this and requires applicants to provide sufficient evidence to demonstrate that the proposal, on balance, would be acceptable, particularly on technical matters such as contamination and highways. It is also important that decision makers understand what they are determining (here an outline application with all matters reserved except access) and what would be a reasonable and proportionate level of evidence. What was apparent in the accompanying appeal is that ordinary thresholds of being put at unacceptable risk had shifted towards almost a demonstration of zero risk.

17. The evidence provided by applicants to accompany the planning application was prepared by qualified persons, as required. It was assessed by persons who were professionally qualified and/or experienced in the particular field and relevant knowledge of the appeal location. Those assessing the appellant's evidence are either officers of the Council or public bodies. Often, there is a good degree of risk aversion with these consultees, exemplified, as in this appeal, by the extensive degree of engagement, refinement and clarification in the multiple responses received during the course of the application. Consequently, if those technical consultees raised no objections and were satisfied that planning matters could be appropriately dealt with by condition or planning obligation, that should have been given very substantial weight. It is not good enough to arbitrarily seek additional (largely unspecified) evidence and so further delay decision making, creating significant and unwarranted uncertainty.

18. Whilst I accept Members are not beholden to accepting the advice of their officers and technical consultees, there must be legitimate and clear reasons for doing so, including when deferring from making a timely decision. Those reasons could be drawn from factors such as competing technical evidence (i.e. a technical report commissioned by an objector) or where a planning officer, taking the bigger picture, has nonetheless recommended approval contrary to the advice of a technical consultee. None of that was in play here. The officer recommendation to grant planning permission, when correctly applying the tilted balance, followed a clear and logic audit trail through the various issues and evidence.

19. As set out above, the Member concern regarding drainage and contamination strategies which might give rise to the potential contamination of the watercourse from previous landfill has come under particular focus. As set out above, there is very little that spells out what Members were seeking and why that would be necessary in light of the clear advice from the Contaminated Land Officer, the Environment Agency and the Local Lead Flood Authority. There is no record that Members had identified a need for a more detailed Phase 2 investigative report or why they were not satisfied that recommended conditions would be ineffective or unenforceable.

20. Overall, I find the Members prevarication in deferring a decision at the July Committee meeting was unreasonable. There was no real basis for doing so and the issues which members were concerned were all entirely capable of resolution through the imposition of conditions and planning obligations. In my view the actions at the July Committee were a key first step in delaying or preventing a development which should be clearly permitted.

21. Turning to whether the appellant was justified at this stage to appeal against non-determination on 21 August 2024, the LPAs costs rebuttal says that at that stage the appeal was entirely speculative as the LPA had only deferred from making a decision at that point. Moreover, the LPA says that the ultimate position it adopted, in withdrawing all of its reasons for refusal, demonstrates that had the appellant provided additional evidence to assuage Members concerns, there would have been a positive outcome. I do not share the LPAs rosy outlook on this point. As set out above, the reasons deferral were poorly articulated and, on balance, unreasonable. When taking the long planning

history of this site into consideration, including "political"[4] resistance to its inclusion within draft Local Plans, I consider the appellant was legitimate after 2 years of hard work to get the proposal to a point of officer recommendation for approval to fear that prevarication at this meeting was the precursor to the LPA ultimately not reaching a positive outlook. In any event, when presented with options at the Committee meeting in October 2024, Members nonetheless resolved that they would have refused the application, including on grounds at variance to those recorded as the reasons for deferral. In my view, the appellant was not unreasonable in promptly pursuing an appeal against non-determination.

22. I now turn to whether, once in appeal, the LPA behaved reasonably in terms of the reasons for refusal and the timing of the withdrawal of all five putative planning reasons. Much of this hinges on contaminated land. As the Council's letter of 17 December 2024 discloses, by reference to an unsubmitted proof of evidence from the Council's independent planning witness (Mr Whitehouse), it is asserted that additional evidence on the contaminated land matter ultimately enabled the Council to withdraw all its putative reasons for refusal, through a revisited titled balance undertaken by Mr Whitehouse.

23. As the appellant identifies, whilst this may provide an explanation in relation to the fourth reason for refusal, it nonetheless remains that following skeleton arguments in the Council's statement of case, there has been no substantiation of its putative reasons for refusal on matters of sustainability of location, BMV land, character and appearance and highway safety including the additional issue of the proximity of the level crossing. The appellant had to prepare its evidence to the Inquiry in this context. Whilst the LPA submits that the reasons for refusal were to "provide assistance to the Inspector", they were nonetheless reasons why the LPA, if the appeal had not been lodged, would have refused to grant planning permission. In withdrawing all reasons for refusal on 17 December 2024, the day of the deadline for proofs of evidence, the appellant has had no opportunity to cut its cloth accordingly, in a way which could potentially have reduced time and cost in terms of the remit and depth of its evidence for the Inquiry. As the updated officer report to the October 2024 committee advised. "The decision may go beyond the questions asked[5] however members are reminded that any reasons for their decision should be defendable at the Public Inquiry." Reasons 1-3 and 5 have not been defended.

24. The LPA submit that the appellant has not incurred any unnecessary or wasted expense because these putative reasons for refusal were also reflected in third party objections to the appeal proposal, which the appellant would have had to address in any event. As set out above, I consider had the LPA not unreasonably deferred a decision contrary to the officer recommendation, the appeal would have not been necessary in the first instance. Local objections to the appeal proposal were properly summarised and recorded in the officer report to the July committee meeting. There has been relatively limited public interest in the appeal and very little new evidence in response to the appeal notification from third parties (and none from technical consultees) that the appellant has needed to address. There have been appeal statements from Councillors Relf and Zadrozny but these largely capture and speak to local

[4] As evidenced in the original wording of the 2021 Regulation 18 Sustainability Appraisal report, at Appendix 5 to Gary Lees Proof of Evidence.
[5] Interpreted to mean the 4 points raised at the Committee meeting on 30 July 2024.

concerns that have been long established. In preparing their evidence, the appellant would have been appropriately focused on the LPAs statement of case and the reasonable expectation that the LPA would defend its putative reasons.

25. As such, I find the last-minute pivoting to withdraw those reasons for refusal not related to contaminated land to have been unreasonable, particularly in relation to significant matters such as highway safety and sustainability of location, which may have required the Council to obtain technical evidence and a related witness. As set out above, from the original deferral, the Council's position on what evidence was lacking on BMV land has been entirely opaque.

26. On the issue of contaminated land, as set out above, the appellant provided, in support of an outline application, a Phase 1 Geo-Environmental Desk Study which contained further evidence on ground gas contamination and hydrology. Additionally, a separate Flood Risk and Drainage Strategy Report was submitted. The Council's contaminated land officer, the Environment Agency and the Local Lead Flood Authority all concluded that the technical evidence was appropriate for the outline proposal subject to the imposition of conditions. They did not require more detailed investigative survey work. In terms of Member considerations, as set out above, concerns on this issue evolved between the initial deferral and the putative reason for refusal.

27. The Council's Statement of Case (paragraphs 6.17-6.19) puts some flesh on the bones of the putative reason for refusal on ground condition/contamination in terms of returning to the issue of risk to water and drainage contamination and whether this can be satisfactorily mitigated where further ground testing is required to be carried out to inform the mitigation. There is a reference to the lack of "uniform testing across the site" to inform proposed mitigation measures and inaccuracies in the appellant's evidence, namely its assumption there are no on-site water courses.

28. As considered in the accompanying appeal decision, the test at NPPF paragraph 187d is "unacceptable risk" (not zero risk). There is little to demonstrate that the Members, in initially deferring the application and then pursuing a putative reason for refusal applied PPG paragraph 33-008 in terms of the proportionate level evidence needed for an outline application. Other than local concern and anxiety, there is little else to explain why Members deviated from the advice from the technical consultees that development of this low-risk site could be appropriately managed through the imposition of conditions.

29. Nonetheless, during the appeal process (on 13 November 2024), the appellant submitted two reports prepared by Eastwood Consulting Engineers (ECE). These documents are not the appellants (insofar that they are not documents the appellant commissioned and potentially withheld). They were prepared for a regional housebuilder to inform a subsequent detailed reserved matters application, not unreasonably working to the conditions recommended to be imposed on any outline consent as recommended by the Contaminated Land Officer. The main report is effectively a Phase 2 investigative report. Whilst the appellant has referred to it in further demonstrating the low degree of risk in their evidence to the Inquiry, it was not confirmed during the application process that this level of information would be necessary or proportionate at this outline stage. It could be secured by condition as part of a suitably precautionary approach when looking at the details and prior to construction. I

also share the assessment of the appellant that if the LPAs main concern was attenuation basins on the landfill part of the site that could have been addressed by way of a condition, either at the July 2024 meeting or under Option 2 at the October 2024 meeting.

30. The LPA submits that the ECE reports were the determinative factor in revisiting its position for the appeal. That does not square with the preceding evidence from the technical consultees during the application process. The Council's Contaminated Land Officer on 29 November 2024 in responding to the ECE reports says, for the first time, that they were on the cusp of requesting a Phase 2 report anyway. However, there is nothing over the preceding 2 plus years to indicate this, including as late as the email of 29 September 2024 to the case officer (CD2.24) after members had made their initial deferral. In any event, the response of 29 November 2024 still seeks the imposition of recognised, precautionary contamination conditions. Whilst the timing ECE material has muddied the waters, and having regard to the position Mr Whitehouse may have taken, it does not justify the Council's approach to assert there was insufficient information, that uncertainty around the risk was too great and as a consequence the issue could not be appropriately dealt with by condition. This was not a situation where Members had competing technical evidence. The body of evidence by July 2024 pointed in one direction, and that was of a low risk, requiring recognised remediation approaches and the imposition of standard, precautionary conditions. The two ECE reports have not changed this situation.

31. Overall, I consider the Council's behaviour in advancing a statement of case on 5 reasons for refusal, perpetuating that position until the deadline day for proofs of evidence and then ultimately withdrawing all reasons for refusal on the grounds of the two ECE reports, and the Contaminated Land officer comments of 29 November 2024 was unreasonable. Accordingly, the appellant has incurred unnecessary expense in the appeal process.

32. Whilst I have sought to be comprehensive and fair in the accompanying appeal decision, recognising that the appeal proposal is of concern to local residents, the bottom line is that there was nothing of substance at the appeal stage to demonstrate that the various technical assessments of the appellants on matters of transport, contaminated land, agricultural land quality, flood and drainage and landscape and visual impacts undertaken by accredited companies were inaccurate or insufficient. The overall planning balance was firmly tilted to the grant of planning permission despite the conflict with the aged 2002 Local Plan Review.

33. The LPAs letter of 17 December 2024) also refers to the December 2024 NPPF as an explanation for withdrawing all of its reasons for refusal but sheds little light on why this would be the case. The statement of common ground in November agreed there was no five year housing land supply and the tilted balance was engaged on this reason alone. The new NPPF does not change this. On the main issues for the appeal, it is difficult to see how the December NPPF has materially changed matters. Overall, I find the LPAs use of the December 2024 NPPF as a reason for its very late change in position obfuscatory in seeking to defend the invidious position resulting from Members unreasonable avoidance and resistance to approve a development that should have been permitted, including through the imposition of suitable conditions.

Conclusion

34. I therefore find that the LPA has unreasonably prevented or delayed a development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations in the terms expressed at PPG paragraph 16-049-20140306. It has also behaved unreasonably in the handling of the application in the terms at PPG paragraph 16-048-20140306 for non-determination appeals in not reaching a decision within the relevant time limit, where there were no substantive reasons to justify delaying the determination.

35. As such I find that unreasonable behaviour on the part of the Council resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated. Accordingly, I conclude that a full award of costs is justified.

Costs Order

36. 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 Ashfield District Council shall pay to Hallam Land the costs of the appeal proceedings described in the heading of this decision, and such costs shall be assessed in the Senior Courts Costs Office if not agreed.

37. Hallam Land is now invited to submit to the 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.

David Spencer

INSPECTOR.