Planning Inspectorate

Costs Decision

Inquiry Held on 5 November 2024

Site visit made on 20 November 2024

by SRG Baird BA (Hons) MRTPI

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

Decision date: 17th February 2025

Costs application in relation to Appeal Ref: APP/V4630/W/24/3347424
Land off Chapel Lane, Great Barr, Walsall

- 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 Anesco Limited for a partial award of costs against Walsall Metropolitan Borough Council.
- 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 for the construction of a temporary 49.35MW battery energy storage facility, with security fencing, access and associated works.

Decision

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

Reasons

2. 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.

   Reason for Refusal (RfR) 7 - Unitary Development Plan (UDP) Policy 13

3. The relevant limb of UDP Policy ENV13: Development Near Power Lines, Substations and Transformers says that to, "*…protect the general amenity of occupiers and users, development for uses other than industry and warehousing will not normally be permitted in close proximity to high voltage electricity lines…"* During evidence-in-chief, the Council's Planning Officer withdrew RfR No. 7, indicating that, in this case the policy was, "*not relevant*" and that the RfR was based on, its "*purest form of application*".

4. This "purest" approach appeared in the Planning Officer's report to Committee and in the Council's Statement of Case (SoC). The Statement of Common Ground notes that, whilst UDP Policy 13 seeks to protect the general amenity of occupiers and users and apply appropriate operational safe clearances, the development would have no occupiers or permanently based users and there was no objection from either the National Grid or other operators of power lines. Notwithstanding this agreement, this "purest" approach appeared in the Planning Officer's proof-of-evidence.

5. Planning Practice Guidance (PPG) indicates that Council's should properly exercise their development management responsibilities, by relying only on

RfRs that stand up to scrutiny on the planning merits of the case[1]. Moreover, PPG makes it clear that following the lodging of an appeal[2], the Council should, as part of sensible on-going case management, promptly review its case.

6. Here, it is clear that the Council did neither and it was only at the last-minute that the it applied its mind to the underlying aim of the policy. The applicant's planning and legal team were required to prepare for and address the RfR based on UDP Policy 13. On this matter, by withdrawing RfR 7 at the last-minute, the Council behaved unreasonably and thereby caused the applicant to incur unnecessary and wasted expense.

Reason for Refusal 4 - Highways

7. The appeal application was the resubmission of a previously refused application. Then, the highways reason for refusal had been withdrawn before the Council submitted a SoC for an appeal that was subsequently withdrawn.

8. The timeline in relation to the access details for this appeal is important. Based on the access plan submitted with the application, the Highway Authority (HA) indicated that although adequate visibility splays could be achieved, there was concern that the visibility splay to the west was not shown to the kerb line and the splay included an existing hedgerow. A holding objection was issued.

9. A revised plan was submitted to the Council on the 25 March 2024, which moved the access some 30m to the east to ensure that the necessary visibility splays could be demonstrated. The applicant emailed the Council on 3 April and again on 7 June 2024 querying whether the revised plan had been submitted to the HA for comment. It is not clear if any response was received. The appeal against non-determination was submitted on the 3 July 2024, when jurisdiction over the determination of the application transferred to the Secretary of State.

10. On 2 August 2024, the Council forwarded to revised plan to the HA who it appears responded promptly withdrawing the holding objection. The Council's SoC was submitted on 22 August 2024 noting the withdrawal of the HA objection but indicating that the Council did not accept the amended drawing or formally consult on it. That said, the SoC indicated that subject to the amended drawing being accepted, the Council would withdraw RfR 4. On the 5 September 2024, the Planning Officer reported the application to the Planning Committee seeking putative reasons for refusal. Regarding access, the report reiterated the position set out in the SoC.

11. A request from the applicant that the appeal be determined on the basis of amended plans, was confirmed on the 7 October. The ruling confirmed that dealing with the application on the basis of the amended plans would not result in the proposal being fundamentally changed and there would be no procedural unfairness to any party. Given this ruling preceded the deadline for the submission of proof-of-evidence by one day, the date for submitting proofs of evidence was amended to allow a further week for submissions. That said the applicant had already prepared a highways proof of evidence dated 7 October 2024. The Council formally withdrew RFR 4 on the 15 October 2024.

[1] Paragraph 028 Reference ID: 16-028-20140306.
[2] Paragraph 049 Reference ID: 16-049-20140306.

12. Whilst PPG[3] indicates that costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviour and actions at the time of the planning application can be considered when deciding whether or not costs should be awarded.

13. There is no explanation why in the 3 months before the applicant submitted the appeal against non-determination, the Council did not forward the March 2024 plan to the HA. Given the HA's response, had the Council responded promptly to the submission of the amended plan, it was unnecessary for the applicant to appoint a highways consultant and for them to produce a proof-of-evidence to rebut RfR 4. The Council acted unreasonably and thereby caused the applicant to incur unnecessary and wasted expense.

Noise

14. Between the application being submitted and up until the applicant submitted the appeal, the response of Environmental Protection Team, albeit 2 of the responses were notated as drafts, was that subject to a condition containing a Noise Rating Curve, the potential noise impact of the development could be satisfactorily addressed, and no further background noise assessments would be required. However, after the appeal had been lodged and following what was described as, *"…a further internal review…"* the Council's position was that the Noise Assessment was inadequate, it could not be relied on, and more detailed and extended examination was required. This position was maintained within the Council's proof-of-evidence. However, in a Rebuttal proof-of-evidence, the Council's position essentially reverted to one where the imposition of a condition would represent an acceptable degree of control.

15. I can understand the applicant's obvious frustration. However, it is clear that given the nature of the development, noise impact was a complex and emerging issue. By the end of this process, the difference between the applicant and the Council related to the nature of a planning condition. Whilst I ultimately did not agree with the Council on the extent of the suggested condition, the assessment of what would be appropriate required a detailed airing of the noise evidence and the competing conditions. Looking at the matter in the round, I consider the Council did not act unreasonably or cause the applicant to incur unnecessary and wasted expense.

Drainage & Ecology RfR 6

16. The site adjoins a Site of Importance for Nature Conservation through which a watercourse where the White-Clawed Crayfish, a protected species, has been identified. Given the potential for contaminated water to drain into the watercourse, matters of ecology, drainage and fire safety are linked.

17. Following submission of the application, the Local Lead Flood Authority (LLFA) indicated in November 2023 that insufficient detail had been provided to show that an acceptable drainage strategy was proposed. Following the provision of additional detail, in December 2023 and reiterated in July 2024, the LLFA withdrew its objection.

18. The Council's SoC noted the lack of objection from the LLFA. However, noting a report prepared by the Environment Agency (EA) on the development of battery storage facilities, the SoC concluded that sufficient mitigation of the

[3] Paragraph 033 Reference ID: 16-033-20140306

potential for contaminated surface water runoff during a fire incident had not been provided. This position was confirmed by the Planning Committee on the 5 September 2024. Whilst not intending to call a drainage witness, this assessment was the basis of the Council's ecological evidence.

19. Following an indication that the application would be determined on the basis of the amended plans, which included details of drainage, on the 10 October 2024, the LLFA reverted to the November 2023 response i.e. that insufficient detail had been provided to show that an acceptable drainage strategy had been proposed. The applicant's drainage and ecological evidence was submitted on the 15 October 2024 with rebuttal proofs-of-evidence submitted on the 24 October 2024, which contained further detail. Following this, the LLFA withdrew its objection on the 25 October 2024. The Statement of Common Ground (SoCG) dated the 4 November 2024, the day before the inquiry opened, confirmed that drainage matters could be dealt with by a suitable condition, that the Fire Authority, who had previously not objected had been reconsulted on the amended plans and a response was awaited. That said, the SoCG confirmed that a Fire Strategy could be dealt with by condition. The Council withdrew the objection on drainage and ecological grounds the day before the inquiry opened and subsequently the Fire Authority confirmed its lack of objection.

20. At the SoC stage, I consider the Council took a balanced view of the LLFA's and EA's advice and on that basis, it was reasonable to pursue the matter addressed by RfR 6. These were matters that the applicant would need to address and engaged drainage and ecology consultants to provide proofs-of-evidence. Whilst the applicant submitted that this was unnecessary, the train of events indicate otherwise.

21. I recognise, based on the LLFA response, that by Friday 25 October 2024, the Council could have been in a position to withdraw the drainage/ecological elements of RfR 6. However, this was an inquiry that covered a extensive range of issues and it was not unreasonable, given that the LLFA response was received on a Friday, that the Council took time to review its thoughts on the matter. As to the applicant bringing the relevant witnesses to the inquiry, the costs application acknowledges that they were there partly to address any queries I might have had following the withdrawal of RfR 6. That was the applicant's choice. I had no queries, and the relevant witnesses were released. Taking this matter in the round, the Council did not act unreasonably or cause the applicant to incur unnecessary and wasted expense.

Conclusion

22. I find that unreasonable behaviour resulting in unnecessary or wasted expense as described in Planning Policy Guidance relating to UDP Policy ENV 13 (RfR 7) and highways (RfR 4) has been demonstrated and that a partial award of cost is justified.

Costs Order

23. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Section 7(2) and Schedule 3 of the Countryside and Rights of Way Act 2000, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Walsall Metropolitan Borough Council shall pay to Anesco Limited, the costs of the appeal proceedings described in the heading of this decision limited

to those costs incurred in relation to putative Reasons for Refusal 4 and 7; such costs to be assessed in the Senior Courts Costs Office if not agreed.

24. The applicant is now invited to submit to Walsall Metropolitan Borough 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.

George Baird

Inspector