



Costs Decision

Hearing held on 7 May 2025

Site visit made on 7 May 2025

by J Hobbs MRTPI MCD BSc (hons)

an Inspector appointed by the Secretary of State

Decision date: 25 June 2025

Costs application in relation to Appeal Ref: APP/A2335/W/25/3359581 Land at Grid Reference E346580 N452460, Lancaster Road, Cockerham, Lancashire

- 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 L&W Wilson (Higham Ltd) for a full award of costs against Lancaster City Council.
 - The appeal was against the refusal of planning permission for the erection of up to 24 dwellings (C3) and provision of new vehicular access, and pedestrian access to Willey Lane (pursuant to the variation of Condition 3 on planning permission 19/01223/OUT to alter the visibility splays) without complying with a condition attached to planning permission Ref 23/00750/VCN, dated 26 January 2024.
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Decision

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

The submissions for L&W Wilson (Higham Ltd)

2. The costs application was submitted in writing. The following additional points were made orally during the Hearing:
 - In addition to paragraph 14 of the written submission: "In so far as the Council's case is that there is a different position because development has commenced, that is wrong and unsupported by legal authority."
 - The applicant made specific references to paragraphs within the quoted appeal decisions and court judgments within the footnotes on page 4 of their written submission.
 - In addition to paragraph 18: "The Council accepted that Policy DM3 applies to this application and is not limited to being only applicable before development has commenced."
 - In addition to paragraph 19: "That error has persisted through this appeal with references to the Links case which is appended to the Council's Statement of Case."
 - In addition to paragraph 21: "They seem to accept this, as there was no point to the viability assessment. Directly contrary to DM3 which is accepted does apply."
 - In addition to paragraph 24: "Telling the submission of interested parties, would it not be appropriate for the Council to accept good grace."

The response by Lancaster City Council

3. The response was made in writing.

Reasons

4. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (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.

Procedural grounds

5. The applicant submitted a draft Unilateral Undertaking (UU) with the appeal. The appeal start letter specified that a signed planning obligation should be provided 2 weeks before the Hearing opens, 23 April 2025. It was subsequently agreed that a draft agreement could be provided by this deadline.
6. It is not disputed that the applicant offered to engage with the Council on a Section 106 agreement in advance of the appeal. There is no evidence before me that the Council corresponded with the applicant on this matter until 14 April 2025. At this stage the Council indicated that a Section 106 agreement would be necessary. Given the upcoming deadline the applicant had already instructed their solicitor to finalise the UU in the absence of correspondence from the Council.
7. I acknowledge that the Council did not initially provide sums they were seeking nor the reason why they were seeking them. However, the Council needed to correspond with Lancashire County Council (LCC) on this matter. I am satisfied that the Council made a reasonable effort to obtain the information they required from LCC in a timely manner and ultimately the delay in providing this information was due to matters which they could not control. I also acknowledge that a draft legal agreement was submitted prior to the specified deadline.
8. Notwithstanding this, the lack of communication by the Council in relation to the legal agreement between the appeal submission and 14 April 2025 was unreasonable. Whilst I have not assessed the merit or otherwise of a UU, it was reasonable for the applicant to pursue this approach considering the upcoming deadline, a lack of communication from the Council, and a lack of an alternative if the Council refused to negotiate. Accordingly, as a result of the Council's unreasonable behaviour the applicant incurred an unnecessary and wasted expense in attempting to finalise the UU.

Substantive grounds

9. The Council did not seek to argue that the planning obligation would still be enforceable if a new permission was granted. Furthermore, it did not dispute that a new permission would be granted, if a Section 73 application was approved. Also, the Council contended that the final column of both the approved and revised Accommodation Schedule is superfluous, and that Condition 11 does not control the provision of affordable housing. With this in mind, it is unclear why the Council concluded that the proposed wording of Condition 11 would be contrary to the secured planning obligation.
10. The Council referred to the tests for the modification of planning obligations set out within Section 106A of the Town and Country Planning Act 1990, within both the Delegated Report and its Statement of Case. The applicant has argued throughout their appeal representations that this is the incorrect approach and referred to established case law.

11. I acknowledge that the applicant has submitted appeal decisions and court judgments after the deadline for evidence. However, this evidence was material to the appeal proposal. Moreover, an appeal decision¹ appended to the applicant's Statement of Case alongside Counsel opinion indicated that it was possible to remove an obligation for the provision of affordable housing under a Section 73 application.
12. In light of the submitted evidence, the Council has not explained why it still considers that the proposal should be assessed against the tests specified within Section 106A. Moreover, within its Cost Rebuttal where it considers the relevance of the Balborough Links appeal², the Council now appear to accept that there is not a requirement to assess the removal of an obligation against these tests, in this instance.
13. It was therefore unreasonable for the Council to conclude that the proposed wording of Condition 11 would be contrary to the secured planning obligation. Consequently, it was also unreasonable for the Council to not assess whether planning obligations were required as part of the planning application and to not assess the need for a planning obligation afresh, rather than against the tests specified within Section 106A.
14. I acknowledge that the Council did not engage with the applicant over viability matters during the planning application. Albeit no draft agreement or deed of variation was submitted with the application. As above, and in accordance with my decision I consider that the Council should have determined it was possible to amend Condition 11 and then it should have reassessed the need for a planning obligation as part of the determination of the planning application. Established case law indicates that the planning merits on whether a Section 106 obligation should be entered following the determination of a Section 73 application is a contemporaneous decision.
15. As part of the appeal, the Council concluded that the proposal, if it included affordable housing at the level previously agreed, would lead to a small return albeit below what would be expected by a developer. It went onto to assess that this is due to a realisation of risk and in accordance with the PPG³ this in itself does not necessitate a need to reassess viability. Although I disagree with the Council's conclusion, I consider that during the appeal it made a contemporaneous assessment on the viability of the ongoing development and consequently the need for a planning obligation. The Council has therefore not acted unreasonably during the appeal in this regard.
16. Although it may have been beneficial for the Council to view the properties internally to inform its understanding of the progress of the development, I do not consider this would have altered their assessment on viability or the overall acceptability of the appeal proposal.
17. I acknowledge that the Council submitted evidence which went beyond the scope of the reason for refusal. However, the planning application was refused on procedural grounds and did not address the substantive matter of viability. It is

¹ Appeal Ref. APP/J4423/W/23/3318273

² Appeal Ref. APP/R1010/Q/24/3350501

³ Planning Practice Guidance – Viability, Paragraph 009 Reference ID: 10-009-20190509

reasonable for the Council to seek to rebut substantive matters raised by the applicant as part of the appeal.

18. I also acknowledge that interested parties spoke in favour of the proposal during the Hearing. Their comments were material and were considered as part of my assessment of the appeal proposal. However, I do not consider that the Council acted unreasonably by not altering its assessment based on these comments alone.
19. I consider that the Council acted unreasonably in seeking to defend the first two main issues, in light of established case law and with regard to its position on Condition 11 and the enforceability of the planning obligation. However, the Council did not act unreasonably when undertaking an assessment of the viability of the proposal. Consequently, the applicant has incurred unnecessary and wasted expense in producing evidence to address the first two main issues of the appeal.
20. Overall, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the work undertaken to finalise the draft UU after the submission of the appeal and prior to 14 April 2025, and to produce evidence to address the first two main issues of the appeal, a partial award of costs is therefore warranted.

Costs Order

21. 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 Lancaster City Council shall pay to L&W Higham Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in finalising the draft UU after the submission of the appeal and prior to 14 April 2025 and in producing evidence to address the first two main issues of the appeal; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Lancaster City 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.

J Hobbs

INSPECTOR