Planning Inspectorate

Costs Decision

Inquiry held between 5 February 2025 and 6 March 2025

Site visit made on 5 and 7 March 2025

by C Dillon BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5th August 2025

Costs application in relation to Appeal Ref: APP/A1910/W/24/3345435
Land west of Leighton Buzzard Road, Hemel Hempstead HP1 3LP

- 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 Fairfax Strategic Land (Hemel) Ltd for a partial award of costs against Hertfordshire County Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for development proposed.

Decision

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

The submissions for Fairfax Strategic Land (Hemel) Ltd

2. An application for a partial award of costs against Hertfordshire County Council on procedural and substantive grounds was submitted in writing. The application was made following the refusal of the County Council to exclude individual liability for all obligations, and notably the financial obligations entered into in favour of them under a section 106 legal agreement.

3. The applicant has submitted a detailed account of the interaction between the parties since July 2024.

4. In summary, the applicant highlights that in general, all parties to an appeal are expected to behave reasonably to support a timely and efficient process. Unreasonable behaviour is claimed because firstly, this position was expressly considered and rejected by the Inspector and the Secretary of State in the recent Chiswell Green appeal decision[1]. Secondly, the appellant states that the County Council refused to agree to a 'blue pencil' clause in a substantially agreed section 106 agreement to allow the applicant's alternative drafting on the exclusion of the liability to be considered by me, as the appointed Inspector.

5. The partial award sought relates to the costs of amending the initial legal agreement in order to respond to the County Council's position; the preparation thereafter of a unilateral undertaking with a blue pencil clause on liability given that common ground could not be reached; contacting the County Council in a bid to resolve the disputed matter; and resources to address the particular matter during the Inquiry sessions.

[1] Document Ref: CD8.28

The response by Hertfordshire County Council

6. The County Council's response was made in writing. In summary, argue that in citing examples of unreasonable behaviour from the Planning Practice Guidance (PPG), the applicant's costs application incorrectly refers to paragraphs that do not apply to the County Council. They believe that as no claim has been made under the correct paragraphs of the Planning Practice Guidance (PPG). Therefore, they believe that the appellant's costs should be struck out.

7. The County Council also submits that, as a procedural point, that the applicant has failed to make out a right to seek costs against the County Council in this matter where the County Council is not a Rule 6 party, the implication being that the appointed Inspector has no jurisdiction to award costs against them.

8. Furthermore, the County Council draws attention to the Tring case[2] which they believe supports their position on individual liability. Furthermore, the County Council argues that it has sought to follow the indication of the Chiswell Green Inspector and Secretary of State that such matters should not be left for determination by an Inspector.

9. The County Council states that had the applicant been prepared to negotiate an agreed form of wording at any point in the proceedings an agreed form of wording might have been reached. The County Council believes that it has reasonably sought to reach an agreed form of wording, and it has been the applicant's position, that it insists on the form of their preferred wording which is unreasonable.

10. It is submitted that the County Council has not acted unreasonably in seeking to ensure that the public purse is protected to, at the very least, the same level that it was protected in the Chiswell Green matter. They consider that there is nothing unreasonable in their approach and maintain that they have sought to negotiate an agreed form of wording, however, offers of negotiation have been consistently turned down by the applicant.

Reasons

11. The County Council is a principal party, being a statutory consultee whose functions and interests are matters that have been of direct relevance and have informed some of the planning obligations before this Inquiry. Moreover, the Inspectors' power to award of costs derives from section 250(5) of the Local Government Act (1972). This provides "the Minister causing an inquiry to be held under this section may make orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid and every such order may be made a rule of the High Court on the application of any party named in the order". It follows that the jurisdiction to award costs applies to any party "at an inquiry". The fact that the County Council was not a main party to the appeal is irrelevant. They are a party who participated in the Inquiry, having attended the round table discussion session.

12. Consequently, the applicant is entitled to have submitted their application for costs against the County Council. If that were not the case, then the County Council would have known not to have sought an award of costs on the same basis.

[2] Ref: APP/A1910/W/22/3309923

13. 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. Such costs may be awarded where a party has behaved unreasonably; and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

14. In general, all parties to an appeal are expected to behave reasonably to support a timely and efficient process.

15. The PPG cites examples of unreasonable behaviour which may result in a procedural and of substantive costs award. Significantly, the examples cited in the PPG in both respects are non-exhaustive and give a flavour as to the types of behaviour which are candidates for being found unreasonable. This includes a lack of co-operation with the other party or parties; acting unreasonably with respect to the substance of the matter under appeal, including persisting in objections to a scheme or elements of a scheme which the Secretary of State or and Inspector has previously indicated to be acceptable or not determining similar cases in a consistent manner. Such behaviours can frustrate the appeals process and/ or cause unnecessary and wasted expense to another party regardless of the parties' status.

16. In this case, the proposed planning obligations themselves are not disputed in terms of scope and level. Moreover, they have been demonstrated, including through the use of the County Council's calculations and input, to be necessary to make the appeal proposal acceptable.

17. It is reasonable to expect that a principal party, particularly another local planning authority, will be aware that failure to secure such obligations can be determinative to a negative outcome at appeal and therefore poses a high risk to the appellant.

18. It is evident that despite being sought by the applicant, the County Council had not provided any comments on the drafting of the initial legal agreement before the submission deadline of 1 October 2024 which had been set by the Inspector appointed by the Secretary of State at that time.

19. It is part of the course with appeals that matters may remain in dispute throughout. I accept that a party is entitled to maintain a particular stance on the drafting of legal agreements.

20. Furthermore, the fact that another appellant may have chosen to agree with the County Council's approach to liability during another appeal does not necessarily obligate me to find likewise. In terms of the Tring Decision, the issue of individual liability was not a matter on which the Inspector or the Secretary of State was required to make a decision. The basis that appellant was prepared to accept the wording, or the consequences which flowed from that acceptance is not before me. The Inspector's report considers the substance of the various obligations in detail; it is in that context that he concludes the obligations meet the CIL tests. There is no indication that his conclusion extended to matters which were not discussed in the letter. Furthermore, there is no indication that the Secretary of State considered the planning obligations in that case in a broader sense than his Inspector; and that appeal was dismissed. In addition, there is no commentary on blue pencil clauses in that decision and, as set out above, the issue of individual liability was not considered by the Inspector or the Secretary of State.

21. As such, there is no basis for suggesting that the County Council's position on the blue pencil clause in this case is supported by the Tring decision. Whereas, in the more recent Chiswell Green case, which did include a blue pencil clause, it is clear that the Inspector's decision was made in the full knowledge of the County Council's position.

22. Consequently, the County Council has not demonstrated that its preferred approach to liability is reasonable and has been found so by the Secretary of State.

23. Nonetheless, it is not the stance of the County Council on the wording itself which is concerning here. Rather, it is the manner in which that unfolded and the consequences of that on the applicant's purse and Inquiry time that is. It is plainly unreasonable for a party to refuse to include a blue pencil provision to allow an Inspector to determine a disputed issue which could be determinative to the outcome of an appeal.

24. It is clear to me that despite the applicant's attempts both in the lead up to and during the Inquiry, the chronology of events before me demonstrates a clear unwillingness on the County Council's part to engage constructively with the applicant to employ a remedy to assist my adjudication, given the disputed matter ultimately related to the question of whether or not necessary planning obligations could be secured.

25. It is true that a bilateral legal agreement is not the only mechanism available to an applicant. However, the alternative unilateral undertaking avenue can potentially be less favourable to the appellant in terms of securing claw back on unspent sums at the very least. It was not an avenue that the Borough Council favoured.

26. The failure to provide legally compliant and enforceable planning obligations which meet the prescribed tests is a ground for dismissal regardless of the merits of an appeal scheme. Hence, the disputed issue is a matter that falls squarely within my remit. It was wholly unreasonable for the County Council to have effectively held the applicant hostage by declining to accept a blue pencil clause simply because it "is not an approach which the County Council wishes to put to the Inspector's discretion"[3]; and that is the case, whether or not that was the intention.

27. Furthermore, it is equally unreasonable for the County Council to have persistently insisted upon the drafting in a section 106 agreement in the knowledge that, in the more recent Chiswell Green Decision, the Inspector and Secretary of State indicated that the County Council's approach to liability is unacceptable, particularly given that legal agreement did include a blue pencil clause which allowed that adjudication to take place.

28. The County Council has provided no convincing reason for departing from the Chiswell Green Decision in this case. In that instance the County Council's approach was found to be disproportionate, unreasonable and unrealistic. In determining the appeal which gave rise to this application for costs, I also rejected the County Council's approach to liability for necessary planning obligations for the reasons set out in my Decision.

[3] Communication between the County Council and Pinsent Masons on behalf of the applicant dated 21 January 2025.

29. The fact that the County Council indicated during the round table discussion that it had no intention of enforcing the obligations against individual occupiers only serves to heighten the level of unreasonableness displayed.

30. This all amounts to unreasonable behaviour on the County Council's part on both procedural and substantive grounds. This directly resulted in the need for the applicant to arrange for a subsequent unilateral undertaking to be drafted along with additional communication and professional support during the Inquiry itself. Whereas a more cooperative approach would simply have led to the inclusion of a blue pencil clause in the initial section 106 agreement and discussion of the disputed issue at the scheduled round table session.

31. For the reasons given above, unreasonable behaviour resulting in unnecessary and wasted expense has occurred in respect of the applicant being compelled to convert the draft section 106 trilateral agreement into a separate unilateral undertaking and bilateral agreement in order to secure necessary planning obligations for my consideration. Furthermore, that unnecessary wasted expense extends to the preparation and response to additional communication with the County Council and the professional resource in defending the remedial course of action proposed by the applicant during the Inquiry. There is no doubt that a partial award of costs is therefore warranted.

Costs Order

32. 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 Hertfordshire County Council shall pay to Fairfax Strategic Land (Hemel) Ltd, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in being compelled to convert the drafted section 106 trilateral agreement into separate unilateral and bilateral agreements in order to secure planning obligations, including the expense of additional communication with the County Council and professional resource in defending the remedial course of action proposed by the applicant during the Inquiry; such costs to be assessed in the Senior Courts Costs Office if not agreed.

33. The applicant is now invited to submit to Hertfordshire County 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.

C Dillon

INSPECTOR