The Planning Inspectorate

Costs Decision

Hearing Held on 14 August 2019

Site visit made on 14 August 2019

by Andrew McGlone BSc MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 August 2019

Costs application in relation to Appeal Ref: APP/L3245/W/3216559 Newcastle Court, Craven Arms, Shropshire SY7 8QL

- 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 Mr Peter Yeoward of J.C. Yeoward and Co for a full award of costs against Shropshire Council.
- The hearing was in connection with an appeal against the refusal of planning permission for a seasonal change of use from agriculture to site 21 pens and runs in fields C and D on the submitted plan for rearing pheasant chicks from the 1st May and to growing-on the pheasant poults for egg laying and breeding stock until end of February in fields A and B on the submitted plan.

Decision

1. The application for an award of costs is refused.

The written submissions for Mr Peter Yeoward

2. The applicant's application for an award of costs is based on the Council's alleged unreasonable behaviour linked to the refusal of planning permission, which the applicant says is ill founded and not supported by evidence. As a result, the applicant contends that they have incurred unnecessary costs in pursuing the appeal.

3. It is submitted by the applicant that the Council have caused delay to the development which they had previously suggested would be acceptable until a very late response by Natural England (NE) led the Council's officers to change their approach and refuse the planning application. However, in doing so, the applicant says that the Council and NE have failed to substantiate their concerns and have not thus substantiated the reason for refusal as no evidence has been provided of the likely probability of adverse effects occurring. The applicant considers that their evidence addresses this alleged unreasonable behaviour. Furthermore, this evidence is said to address the Council's various changes of position in relation to the Council's Habitats Regulations Assessments (HRA); which are said by the applicant to be further evidence of unreasonable behaviour by the Council.

The written response by Shropshire Council

4. In response, the Council say that the applicant's application for an award of costs is completely unfounded and not supported by the facts relating to this case. The Council strongly contest the application for an award of costs and totally refute that either, and certainly not both, of the tests for an award of costs are met.

5. Under Section 63 of the Conservation of Habitats and Species Regulations 2017, the competent authority (CA) must make an appropriate assessment (AA) before granting planning permission of the implications of the plan or project for that site in view of that site's conservation objectives. As part of this, a CA may reasonably require information from the applicant for the purposes of the assessment or to enable it to determine whether an AA is required. In addition, the CA must for the purposes of the assessment consult NE and have regard to any representations made by that body within such reasonable time as the authority specifies. A CA may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be). Under the Directives any impacts can be over-ridden by reasons relating to human health, public safety or beneficial consequences of primary importance to the environment, but only once the potential impacts have been identified, quantified and considered.

6. Despite the considerable time taken through the application process, with ongoing dialogue between the Council, the applicant and NE, the applicant failed to provide satisfactory evidence to enable proper assessment of the ecological impacts of the proposal. This was despite the use applied for continuing through much of that time, in part to enable data capture and assessment rather than relying on modelling. Hafren Water only became involved in this late on in the application process.

7. While the Council at one point indicated that the proposal was acceptable, this was only on the basis that the potential impacts on the Special Area of Conservation (SAC) were evidentially of no consequence or could be adequately mitigated. However, that position has never been reached. Reference is made to a very late response by NE, but at no point in their five consultation responses (from April 2013 to May 2018) did NE deviate from their position of objecting to the proposal and requiring further information. The applicant was aware of this position. The Council did discuss with the applicant and NE the possibility of a temporary consent to allow for more detailed water quality assessment but this was ultimately rejected by the applicant as being commercially unacceptable.

8. In response to the applicant's view that the Council and NE have failed to substantiate their reason for refusing planning permission, the Council say that this is simply not true. The Council and NE have both invested considerable officer time (and public money) into working with the applicant to try and identify what evidence was required to enable a potentially positive outcome. It is important to bear in mind that the onus lies with the applicant to demonstrate that there would be no adverse impact on the SAC by whatever means possible and not the Council. The Council has in making its judgements needed to have regard to NE's comments and should therefore be able to rely on their expert advice. During the planning application the Council did advise the applicant to liaise directly with NE through their discretionary advice services but this was consistently ignored.

9. The Council accept that at two points in the lengthy planning application process that they did draft positive HRA documents. The first in August 2014 was intended to draw comments from NE that had been lacking to that point. The second in January 2018 was designed to support a potential temporary consent (and further monitoring) but this was later rejected by the applicant.

10. In summary, the Council say that it was not, and never had been, in a position to positively determine the planning application. This was despite working with the applicant and NE to try and get to such a position. This was ultimately confirmed by the applicant in an email received after the decision had been taken. To now claim that the Council has acted unreasonably and has put the applicant to unnecessary expense is absurd, and in itself unreasonable.

The submissions made at the Hearing for Mr Peter Yeoward

11. At the Hearing, the applicant made several other points. They said that based on what we have heard today, NE have said that no monthly samples would provide the certainty required. Therefore, all the work over the last six years seems to be in vain based on the scope of works undertaken if it would never meet the requirement that NE need to have certainty. That is unrealistic for us to undertake the work to reach the certainty that is proportionate without undertaking a university scale research project.

12. In their final submissions, the applicant said that we felt we would have liked the opportunity to question NE's conclusions that led to the refusal. The NE response was received 16 weeks after the original position HRA was prepared which is well after the statutory timeframe for a response. We received an amended HRA on 21 May 2018 and responded to the Council on 22 May 2018 and the decision was made on 23 May 2018 without any further discussions. After six and a half years of difficult scientific evidence we felt we would have liked to question NE response including the area surrounding an intensification, significantly when this was unfounded. It was my understanding that Eric Steer from NE had agreed that a temporary planning permission would be acceptable. So, NE have not always maintained their objection, subject to conditions. The applicant's technical experts have never had the opportunity to discuss with NE the details and as Mr Rogers said, the Council was caught in the middle and feel that the appeal could have been avoided if technical experts had been given the opportunity to meet and discuss.

The submissions made at the Hearing by Shropshire Council

13. At the Hearing, the Council said that it could not answer for NE and whether or not there are any mitigation measures that would provide the certainty that is required. Throughout the protracted time this application has been with us there has clearly been changes in personnel at NE, but they have maintained their objection through the process of the planning application and given that the Council didn't have the in-house expertise we have been reliant on NE to assess the proposals which ultimately led to the decision to refuse the proposal that has resulted in the appeal. You'll see that the Council have effectively been stuck in the middle of a dispute between technical experts about potential impacts. You'll see that the Council tried to work with the applicant over several years and the situation was complex to assess the pheasant rearing effect as we don't have a straightforward approach to deal with the activity.

14. The Council continued to say that we have always acknowledged this is a use you would find in a rural agricultural area and not an agricultural use as it needs planning permission, hence the Hearing today, even if it is similar to those uses. The fact that it needs planning permission is not disputed. In fact, it would be acceptable in other locations and policy supports this and evidently NE do not consider it to be the right location and this led to the decision. As part of their cost's submission, the applicant indicated that the Council acted unreasonably in issuing its decision quickly and shortly after receiving

responses from NE after Dr Sue Swales HRA. However, at that point there had been discussions for six years and the Council reached a point where it was clear that it was going to be very difficult and unfairly onerous for the applicant to meet the need to demonstrate no harm. The Council was also mindful that the use was not quite but approaching ten years since it started and thus potentially becoming lawful through that being the case. That is why it was considered appropriate and quite reasonable to refuse planning permission and specifically this is what we did after the last NE response. In summary, the Council doesn't accept that it has acted unreasonably and the tests for an award of costs have not been met.

Reasons

15. The Planning Practice Guidance (the 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. In order to be successful, an application for costs needs to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. Parties in the appeal process are normally expected to meet their own expenses. The Guidance also advises that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals.

16. It is evident that the applicant, the Council and NE have spent considerable time and resources over a number of years in considering the proposal. All concerned acknowledged the difficulties associated with obtaining and providing satisfactory evidence to support the development. This was in the context of an activity taking place in a location with a particular set of circumstances that have not evidently been easy to grapple with. I have no doubt that the Council worked with the applicant over a number of years and had tried to look positively on the applicant's proposal. By the Council's own admission, they did not have the specialist in-house expertise to form its own view on the proposal. This is understandable. As a result, the Council's stance and decision to refuse planning permission was, and has remained to be the case, reliant on NE's technical expertise. NE provided multiple consultation responses before the Council refused planning permission, before the Hearing and attended the Hearing itself.

17. In this case, the onus to demonstrate the proposal's effect or likely effect on the SAC was the applicant's responsibility. It is not the Council's. However, it is abundantly clear that there could have been a greater degree of dialogue and advice provided to the applicant through the engagement of technical experts so that a consensus was reached about issues such as monitoring locations, methods, sample frequencies, and the provision of supporting documentation. Given the ongoing environmental issues experienced associated with the SAC and the steps being taken to bring about recourse, it was in everybody's interests for the effects of the development to be properly understood. While, disagreement may have remained, at the very least, proper engagement may have provided a comprehensive suite of evidence that could account for the inherent degree of uncertainty associated with assessing complex hydrological issues. It may have also shortened the 'pathfinding' process that both parties undertook in trying to understand the potential effects of the proposal.

18. In this regard, the Council could have potentially done more to encourage or facilitate the engagement of technical experts. However, it is important to say that there was no easy or straightforward answer in this case, and while there may be lessons that can be taken from this scheme, the Council has not caused the appellant to incur unnecessary or wasted expense given that the onus is theirs to bear in terms of producing the evidence. While evidence does need to be proportionate, considerable detail is warranted in this case given the range of factors which need to be accounted for in relation to the SAC.

19. It is regrettable that there appears to have been a variety of advice provided over the course of the scheme's consideration. Even so, this is a reflection of the case's complexity, the unknowns of preserving the Fresh Water Pearl Muscle and the SAC, the involvement of various professionals and different traches of evidence, including mitigation measures over a number of years. I am of the view that the Council acted reasonably in reaching a decision on the proposal, given that it had been subject to consideration of a number of years. While the applicant may have wished to discuss the scheme further, the Council does also have a duty to determine planning applications, despite my views about the greater engagement and agreement around surveying.

20. Due to the submission of various pieces of evidence over time, multiple HRA's were produced by the Council. While, one of the HRA's may have been positive, and tantamount to supporting a temporary planning permission, the Council was entitled to take account of NE's comments, and I note that their decision to refuse planning permission was evidently supported by a subsequent specific HRA. It is also incumbent upon the decision-maker to make their decision based on the circumstances that are before them at the relevant time.

21. By the applicant's own admission their earlier period of sampling was unreliable, and some of the later evidence, whilst more reliable, still had its uncertainties. This was the evidence available to the Council when they refused planning permission. While the applicant's most recent water quality evidence is 'more reliable', this was only undertaken after the Council refused planning permission, and hence the Council has only therefore responded to an evolving set of circumstances.

22. While NE expressed a view at the Hearing about whether the applicant would ever be able to provide technical evidence with the degree of certainty required, this was NE's view and theirs alone. NE are not the subject of the application for an award of costs. Hence, even though I understand the applicant's frustration, the Council have not behaved unreasonably in firstly refusing planning permission, and secondly substantiating their case at appeal given that both parties agreed that the case is complex. In short, there was no easy or straightforward answer to provide the necessary degree of certainty about the proposal's effect on the SAC and the Council was entitled to reach the view that they did, taking into account the view of NE.

Conclusion

23. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has not been demonstrated.

Andrew McGlone

INSPECTOR