



Costs Decision

Inquiry Held on 7 and 8 November 2023

Site visit made on 6 November 2023

by Mr Cullum Parker BA(Hons) PGCert MA FRGS MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 14 November 2023

Costs application in relation to Appeal Ref: APP/P0240/W/23/3325744 Land at Shenley Hill Country Park, Leighton Linlade Easting 493406 Northing 227047

- 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 AWGeothermal Ltd for a full award of costs against Central Bedfordshire Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for '*Planning application for an ambient Ground Source Heat Pump (GSHP) network on land at the Shenley Hill Country Park, Leighton Linlade*'.
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Decision

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

Procedural Matters

2. The application for costs was made concurrently with another application for costs relating to a s106B appeal (ref 3320249) for broadly the same site. That application is the subject of a separate costs decision. My consideration here relates to the s78 appeal, as detailed in the above header.
3. The application was made in writing prior to the Inquiry opening. By agreement with the main parties at the Inquiry, the Local Planning Authority was given until Friday 10 November to provide any written response. The Applicant then had until Monday 13 November to provide any final comments. These timeframes were adhered to by both parties.

The submissions for AWGeothermal Ltd

4. The application was made in writing by the Applicant before the Inquiry opened. Put simply, the Applicant considers that the three reasons for refusal could have been dealt with by condition. Furthermore, permission should not reasonably have been refused given the positive support in Local Plan Policy CC2 and should have been granted subject to conditions. This is underlined by the fact that CBC (the Council) at the time of the Inquiry, does not contest the appeal.

The response by Central Bedfordshire Council

5. The Council set out in their written response that permission was refused on the basis of representations made by the Environment Agency (reason 1), in the absence of a plan (reason 2), and the lack of agreement to the imposition

of a highways condition - a detailed Construction Environment Management Plan (reason 3). The Council also set out that they considered it reasonable to seek a planning obligation in respect of repair and maintenance of the ambient GSHP¹. The Council summarises its position that, whatever position the Inspector takes on its case, the reasons for refusal were only addressed by information submitted with the appeal, and even then the Applicant continued to argue about the necessity for the conditions, and had not provided an obligation in respect of repair and maintenance.

Reasons

6. The national Planning Practice Guidance (the Guidance) sets out how the matter of costs could be dealt with. In particular, it indicates that costs will normally be awarded when two conditions are met: firstly, the party against whom the award is sought has acted unreasonably – and that is in the sense of the ordinary meaning of unreasonable – and; secondly, the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
7. At the Inquiry, the main parties agreed that it is for the decision-maker to determine whether or not any unacceptable impacts arising from a proposal could be dealt with by condition. Moreover, they agreed that it is open to the decision-maker to impose such conditions as they see fit, subject to providing rational reasons for doing so. In April 2023, the decision-maker was the Local Planning Authority, who refused permission. In November 2023, the decision-maker was myself as the appointed Inspector.
8. With regard to Reason for Refusal 1, it is clear that this was given on the basis of advice from the Environment Agency. However, the Applicant made clear on 9th February 2023 by email to the Council that the glycol based thermal fluid was non-toxic and bio-degradable, and that the appeal part of Chamberlains Barn had not been quarried. It is clear that the decision-maker could have reasonably imposed a condition restricting the type of fluid used to ensure that it met those stated. Such a condition could have been imposed at the time a decision was made in April 2023. I therefore find that in respect of the first reason for refusal, the Council had acted unreasonably.
9. With regard to the second reason, the Council considers that the application for costs is only a partial one, and that the Applicant *'thus accepts that CBC did not act unreasonably in relation to RfR2'*². However, the Applicant sets out that *'the amended plan could have been sought or conditioned without refusing the application or necessitating an appeal'*³. I concur with the latter position. It is clear that the simple act of submitting one drawing at the appeal stage by the Applicant to address this reason for refusal has addressed this matter.
10. This could have been achieved easily by the Council saying to the Applicant that 'a drawing is required to address our concerns over the relationship between the GSHP network proposed and the landscaping of the Country Park'. At best, this could have been submitted prior to determination, or at worse, this could have been secured by means of a planning condition. In either case, it was unreasonable of the Council to not have considered the imposition of

¹ Although I note that this did not form a reason for refusal by the Council.

² CBC's response to Costs Application, Page 4, Paragraph 11

³ Costs application by the Appellants, page 4, paragraph 14

such a condition in April 2023, or sought a drawing back in February 2023 when asking its 47 questions to the Applicant.

11. With regard to the third reason, as pointed out by the Council, the application for costs is silent, and without articulation comparable to that given for reasons one and two. Nonetheless, the essence of the reason relates to concerns over traffic movements arising from the potential need to move soils or earth from the site during the borehole excavation. However, it is clear that such matters could be dealt with by the imposition of a planning condition. Indeed, that is a fairly typical way in which any highway impacts of this nature are usually dealt with. This is a further example of where a condition could have been imposed to address this issue.
12. The Council's points to the fact that the Applicant's stance was to not agreeing to a highways condition prior to the Inquiry. That meant that if a condition had been imposed the Applicant would have sought to have made an application for its removal. It is no more than speculation as to what, if the Council had granted planning permission, the Applicant would or would not have done.
13. Indeed, this was a refusal which, by the Council's own case – notwithstanding disagreement on specific wording – could have been avoided were conditions imposed on any grant of planning permission. This would have been open to the decision-maker at the point permission was refused in April 2023. Put another way, it is plain that all three reasons for refusal could have reasonably been addressed by the use of planning conditions.
14. Turning to the planning obligation, the Applicant has submitted a unilateral undertaking to address the repair and maintenance of the GSHP network, and making good any repairs to the Country Park during installation. Given that this did not form a reason for refusal, it is unclear as to how this matter is of much relevance in defending the Council's position in terms of unreasonable behaviour. Given the speed at which the Applicant submitted a completed undertaking (within two weeks of the draft and then completed version being submitted) and the fact that the Council raised no issue with it in terms of its legal effect or construction, it would appear as though this matter could have been dealt with at the first decision-making stage in April 2023. In any case, this does little to aid the Council's case on the matters above.
15. I find that the Council did, therefore, act unreasonably in this instance. It was within the scope of its powers in April 2023, and indeed even in February 2023, to have sought clarity or further information. Or alternatively, have used planning conditions to mitigate those factors where it had concerns. By not giving detailed consideration to the use of planning conditions in early 2023, I find that the Council did act unreasonably in this case.
16. Moreover, if it had adopted such an approach, and that was an approach which as a local planning authority it would have been familiar with, then it is highly likely that an appeal could have been altogether avoided. The Council's behaviour has therefore resulted in the Applicant incurring unnecessary and wasted expense in having to prepare and present evidence to an appeal. For the avoidance of doubt, this is the costs for the whole s78 appeal and in having to address all three reasons for refusal.

17. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified.

Costs Order

18. 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 Central Bedfordshire Council shall pay to AWGeothermal Ltd the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
19. The applicant is now invited to submit to Central Bedfordshire 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 Parker

INSPECTOR

Richborough