

RE: LAND AT HATFIELD AERODROME

PLANNING APPEAL

COSTS REPLY

INTRODUCTION

1. The Council concedes unreasonable conduct, waste of the appellant's costs and the making of an award. It seeks to limit those costs to the issues arising under the RfR and to exclude the costs of responding to additional points raised by the Colney Heath Group ('CHG'). Therefore, the only issues are:
 - i The premise of the Council's submission – has the Inquiry really been occupied with issues which it did not raise?
 - ii Who should pay: the appellant, or the Council?

THE REASONS FOR REFUSAL

2. The first RfR (Green Belt) encompass all of the matters on which permission was refused. This is demonstrable in three ways.
3. First, via RfR 1, the Council contended that the proposal was inappropriate development in the Green Belt. It said that very special circumstances had not been

shown. The very special circumstances test is, as is well known, and we draw attention to ‘and any other harm’:

“‘Very special circumstances’ will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.”

4. So, the Council set the Appellant the task of showing that the planning balance weighed in its favour such that the planning circumstances overall were sufficient to overcome the harms, against the high bar of very special circumstances. That requires consideration of all of the circumstances which, taken together, as are said to be very special.
5. It follows that the Appellant has prepared itself to show that the scheme is not inappropriate, but if it is wrong in that regard, that very special circumstances exist. It has therefore shown, via careful assessment and well drafted proofs of evidence that all technical considerations have been properly assessed, the scheme has been thoughtfully designed and that it gives rise to a wide range of clear benefits. All of the evidence is relevant to that assessment. The evidence was called because the Council refused permission and caused the Inquiry to be held.
6. Second, the Council knew exactly what would happen if it refused permission. It knew that there would be an appeal with several Rule 6 Parties. It knew that because it had happened before in 2021 and it knew what the issues were. It knew that it would have to call evidence on need, as it at has done at this Inquiry. It knew that conditions would be in issue as a means of addressing air quality and noise effects and that evidence would be required, accordingly. It knew, or should have known, that a regulation 25 request from PINS was likely, as happens in very many minerals appeals in both England and Wales, and it happened in 2021.
7. Third, this is a raft of reasons for refusal which is driven by local residents. Councillors went with residents, not professional advice and adopted their case wholesale. That can also be seen by the withdrawal of Rule 6 parties when the Council could not find any professional witness, or indeed Councillor, to give

evidence in support of any RfR. If the Council could not support its RfR, neither could anybody else.

8. Therefore, the Council's submission fails on the facts.

WHO SHOULD PAY?

9. Councillors caused the Inquiry to be held. None of the costs of the appeal would have been incurred but for the Council's decision.

The NPPG

10. The material at §§5-6 of the Costs Application is repeated here.
11. The Council relies on one word from the NPPG – '*directly*' - to submit that it should avoid part of the costs which it has caused to be incurred.
12. This ignores:
 - i The correct trigger for a costs award which is to behave unreasonably. The unreasonable behaviour is to refuse planning permission for eight unsupportable reasons. That is what triggered the costs, not the fact of local people seeking, quite properly, to make their case;
 - ii The aims of the costs regime, including proper exercise of development management powers, avoiding additional development costs;
 - iii The delay in reaching a decision to offer no evidence; not announced until the first CMC, by which time the Appellant's case, inquiry team and advanced drafts of all proofs were settled, ready for an Inquiry likely to last three weeks. The last bullet point at §7 of the Costs Application refers (not reviewing promptly).
13. '*Directly*' in the NPPG means costs of the appeal, and those occasioned by it. An appellant is not entitled to its costs of the application, however unreasonable the conduct might have been at application stage. An appellant is not entitled to loss of

profits or costs incurred by reason of delay. Those would be indirect costs. ‘Directly’ does not mean ‘only those costs arising from the unreasonable RfR’.

14. This is made clear by the Secretary of State in relevant decisions.

The Secretary of State’s Approach

15. The Secretary of State has previously addressed the argument that the Council makes here in *JBM Solar*¹. The Planning Authority in that case submitted that “*Had CPRE Devon not been granted Rule 6 status it is unlikely that the appeal would have proceeded to an Inquiry.*”². JBM Solar responded “*The reference to the Rule 6 party is misguided. The Council was the single cause of the Inquiry. If the application had not been refused there would have been no appeal and no Rule 6 party.*”³. The Inspector agreed with JBM Solar and the SoS agreed with the Inspector: “*There is a reference in the Council’s response to the costs claim to the existence of a Rule 6 party. But this is entirely irrelevant because if the application had been permitted in the first place there would have been no Inquiry and no Rule 6 party.*”⁴.
16. Accordingly, the Appellant submits that the involvement of interested parties and Rule 6 parties is entirely irrelevant. It would seem that the Inspector in the Caravan Site appeal⁵, relied on by the Council, was not referred to the Secretary of State’s decision in *JBM Solar*. If she had been referred to it, it is highly unlikely that she would have decided it in the same way.
17. In order to make a lawful decision along the lines submitted by the Council in this case, it would be necessary to explain why *JBM Solar* was wrongly decided and how it was relevant that interested parties took time to put their cases to the Inquiry, as they were entitled to do. There is no good reason to depart from the obvious course of making a full award.

¹ APP/Y1138/W/22/3293104, Annex 1

² § IR20

³ § IR24, sixth bullet

⁴ § IR33 and § DL4 & 5

⁵ APP/B1930/W/24/3343986, annexed to the Council’s Costs Reply

CONCLUSION

14. The costs application is largely conceded. There is no proper answer to the application as made, and a full award of costs is amply justified.

RICHARD KIMBLIN KC

ODETTE CHALABY

27th November 2024



Department for Levelling Up,
Housing & Communities

5 December 2022

Mr McAllister
JBM Solar Projects 2 Ltd
C/o Paul Burrell
Pegasus Group
Querns Business Centre
Whitworth Road
Cirencester
GL7 1RT

Our ref: APP/Y1138/W/22/3293104
Your ref: 19/01679/MFUL

Dear Sir

**LOCAL GOVERNMENT ACT 1972, SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990, SECTIONS 78 and 320
APPEAL MADE BY JBM SOLAR PROJECTS 2 LTD
LAND EAST OF LANGFORD MILL AND TYE FARM, LANGFORD, DEVON
APPLICATION REF: 19/01679/MFUL**

APPLICATION FOR AN AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying you of his decision on the above named appeal.
2. This letter deals with JBM Solar Projects 2 Ltd's application for a full award of costs against Mid Devon District Council. The application as submitted and the response of the Council are recorded in the Inspector's Costs Report (CR), a copy of which is enclosed.
3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.
4. The Inspector's conclusions and recommendation with respect to the application are stated at paragraphs CR25-38. The Inspector recommended that a full

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award of costs is justified on the basis that the authority acted unreasonably in refusing planning permission in the first instance, as demonstrated by its subsequent decision not to contest the appeal (CR36) and that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated (CR37).

5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in his report and accepts his recommendations. Accordingly, he has decided that a full award of costs, as specified by the Inspector at paragraph CR37 is warranted on grounds of unreasonable behaviour on the part of Mid Devon District Council.
6. Accordingly, the Secretary of State, in exercise of his powers under section 250(5) of the Local Government Act 1972 and sections 78 and 320 of the Town and Country Planning Act 1990, HEREBY ORDERS that Mid Devon District Council shall pay to JBM Solar Projects 2 Ltd its costs of the inquiry proceedings, such costs to be taxed in default of agreement as to the amount thereof.
7. You are invited to submit to Mid Devon District Council details of those costs, with a view to reaching agreement on the amount. Guidance on how the amount is to be settled where the parties cannot agree on a sum is at paragraph 44 of the Planning Practice Guidance on appeals, at <http://tinyurl.com/ja46o7n>

Right to challenge the decision

8. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.
9. A copy of this letter has been sent to Mid Devon District Council.

Yours faithfully,

MA Hale

Mike Hale
Decision officer

This decision was made by the Minister of State for Housing and Planning, the Rt Hon Lucy Frazer KC MP, on behalf of the Secretary of State, and signed on her behalf



Costs Report to the Secretary of State for Levelling Up, Housing and Communities

by Phillip J G Ware BSc DipTP MRTPI

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

Date 5 September 2022

TOWN AND COUNTRY PLANNING ACT 1990

MID DEVON DISTRICT COUNCIL

APPEAL BY JBM SOLAR PROJECTS 2 LTD

COSTS REPORT

Inquiry held on 14 – 17 June 2022

Land east of Langford Mill and Tye Farm, Langford, Devon

File Ref: APP/Y1138/W/22/3293104

File Ref: APP/Y1138/W/22/3293104

Land east of Langford Mill and Tye Farm, Langford, Devon

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by JBM Solar Projects 2 Ltd for a full award of costs against Mid Devon District Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for the construction of ground-mounted solar PV panels to generate up to 49.9MW (site area 60.78 ha) and battery storage facility together with all associated works, equipment and necessary infrastructure.

Summary of Recommendation: The application for a full award of costs be allowed.

Background matters

1. The Council refused planning permission for the proposal in September 2021. Three reasons for refusal were given relating to landscape impact, effect on a heritage asset, and the loss of agricultural land. This decision was taken against the advice of officers.
2. In March 2022, before the Case Management Conference, the Council confirmed that the authority was conceding the appeal on all grounds and would not be providing any evidence. This was further clarified in April 2022.
3. The appeal was recovered for decision by the Secretary of State in May 2022.
4. The Inquiry sat for three days, commencing on 14 June 2022. An accompanied visit was undertaken to properties adjoining the site on 17 June 2022, after which a further unaccompanied visit was made to agreed viewpoints around the area.

The submissions for JBM Solar Projects 2 Ltd

5. The application is made on the basis that by refusing permission the Council has delayed development which should clearly be permitted having regard to the development plan, national policy and other material considerations. By withdrawing from the appeal the Council failed to substantiate its reasons for refusal.
6. The application was reported to Committee in March 2021 and was recommended by officers¹. It was deferred to allow Members to make a site visit, though all but one Member failed to visit the site, and the application was reported back in July 2021, where it was deferred again – being finally determined in September 2021².
7. In the final Committee report officers noted that to refuse the application would not be justified and would be likely to lead to the loss of an appeal and a potential award of costs³.

¹ CD A47

² CD A51

³ CD A50

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8. The Committee was entitled to reject the professional recommendation of officers, but must have had a reasonable basis for doing so. There was no such basis for the refusal in this case.
 9. When, in March 2022, the Council advised the Inspectorate that it was conceding the appeal⁴, it was noted by the authority that it had gone to several consultants and, having spent time with the consultants and a QC, it was concluded that there was a weak case and the consultant team did not feel that they were in a position to defend the case robustly. This was reiterated in a further email⁵ and in the Council's Statement of Case⁶.
 10. The position was unchanged between the decision in September 2021 and the Council conceding in March 2022. The reasons for refusal did not stand up to scrutiny and Council Members should have heeded the advice of professional officers. In failing to defend the reasons for refusal the Council has implicitly accepted that the reasons do not stand up to scrutiny.
 11. The unreasonable behaviour has caused the applicant to incur unnecessary expense related to the instruction of Counsel, preparing the appeal, drafting evidence and the Statements of Common Ground and preparing for/attending the Inquiry.
 12. Full costs should be awarded – not just those up to the decision to withdraw. The applicant had no choice but to pursue an appeal at that point in order to obtain a timely permission.
 13. There are clear parallels to a Costs Decision in Leamington Spa⁷ related to the argument that costs should be awarded up to the date when the Council withdrew its objection, plus Inquiry time on conditions and obligations. In that case the Inspector found:
 - If the application had been permitted in the first place, the Inquiry could have been avoided.
 - The fact that the Council cooperated in relation to conditions and an obligation was no more or less than it should have done, and it did not absolve the obviously unreasonable behaviour.
 - Reviewing the case did not allow the Council to escape liability.
 14. The applicant's full costs are sought.

The response by Mid Devon District Council

15. The Council has acted promptly throughout the process.
16. In relation to the claim that the Council has prevented or delayed development which should clearly be permitted the reasons for refusal were subjective and were matters which the Committee were entitled to take into account. They all relate to material considerations and are matters covered by the adopted Local

⁴ CD C14

⁵ CD C15

⁶ CD C4

⁷ Costs doc 4

Plan. At the time of the decision, Members were acting reasonably and took account of policy and the views of members of the public.

17. The deferrals of the application were for different reasons:

- To enable a site visit to be made.
- To enable an 'implications report', which is normal Council practice, dealing with the consequences of overturning a recommendation.
- To enable an error in the previous minutes to be corrected.

18. The Leamington Spa case was a totally different situation:

- The current site is not an allocated site.
- The current site is not within a settlement boundary.

19. There has been further policy and guidance since the refusal. Specifically a new Planning Bill placing positive emphasis on renewable energy schemes and the publication of a new energy security strategy placing strong emphasis on solar energy.

20. Had CPRE Devon not been granted Rule 6 status it is unlikely that the appeal would have proceeded to an Inquiry.

21. The Statement of Common Ground noted that the Council had not honoured the PPA agreement and had refunded the fee. This was reasonable.

22. In relation to the claim that the Council failed to produce evidence, on being notified of the appeal the Council reviewed its case promptly in line with guidance and contacted consultants to defend the reasons for refusal. However the consultant team did not feel it was in a position to defend the reasons robustly. On receiving this advice the Council promptly advised Members, and advised the Inspectorate and the applicant immediately after the decision to concede was taken.

23. The Council does not accept the statement in the applicant's costs claim that the Council "...now accepts that the proposals should have been granted planning permission and, by extension, should have been granted planning permission in September 2021."

The final submissions for JBM Solar Projects 2 Ltd

24. The Council's response to the costs claim makes a number of disparate and unconnected statements, none of which amount to a persuasive response to the costs claim. The applicant's response to the Council's points are summarised as:

- The applicant does not criticise Members for taking account of material considerations.
- All planning decisions involve judgement but must be exercised reasonably. Even if subjective matters are engaged, a decision can still be unreasonable. This argument provides no explanation as to why the officers' recommendation was overturned.

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- The explanation of the three deferrals does not relate to the costs claim, and is therefore irrelevant.
 - The distinction which the Council seeks to draw related to the Leamington Spa case is a factual distinction without legal difference. That case dealt with an allocated site, whereas Mid Devon has not allocated any renewable energy sites. Councils do not only have to approve development on allocated sites – they must approve development when proposals comply with the development plan or where material considerations indicate that permission should be granted.
 - The reference by the Council to new policy and guidance is misleading. The Council refers to a Planning Bill – but this may refer to the Levelling Up and Regeneration Bill, which does not deal with renewable energy. In any case it was introduced after the Council conceded the appeal. At no time until the costs response has the authority said that it conceded the appeal due to new policy or guidance.
 - The reference to the Rule 6 party is misguided. The Council was the single cause of the Inquiry. If the application had not been refused there would have been no appeal and no Rule 6 party.
 - Whether the Council acted promptly on receiving advice from consultants is irrelevant to the question of whether the Council was substantively unreasonable in refusing permission. In any event it was still a year between the application first going to the Committee and the Council conceding the appeal.
 - The advice does not suggest that, in conducting a review in a case where the scheme has not changed, the Council is absolved from previous substantially unreasonable behaviour.
 - The Council seems not to accept that the proposal should have been granted permission by the authority. That is illogical and is not explained. The Council conceded the appeal and agreed that permission should be granted on appeal. There had been no substantive changes and it must be the case that planning permission should have been granted by the Council.
 - The fact that the Council has cooperated in producing a Statement of Common Ground and other matters is simply fulfilling the duties of a public authority. It does not negate the unreasonable behaviour.

Inspector's conclusion

25. 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.
26. Dealing with matters on a chronological basis, the length of time which the application was with the Council before a decision was made, and the various deferrals at the Committee, are not matters which are the subject of the applicant's costs claim and will not be considered further. Nor is the performance of the Council in relation to the PPA agreement of any relevance.
27. Moving to the Committee's decision to refuse planning permission, it is clear that Members have the discretion to make a decision contrary to the recommendation of their officers. The matters of concern to the Committee as reflected in the reasons for refusal - landscape, heritage, and agricultural land - are clearly material planning considerations and there is no suggestion from the applicant that the Committee considered irrelevant issues. However, and this is the key point, the Committee has to have a reasonable basis for departing from the recommendation and the reasons for refusal need to stand up to scrutiny on their planning merits.
28. In this case officers presented a very clear and comprehensive report to the committee on the planning merits of the case. In addition officers clearly warned that a refusal of planning permission would be hard to justify and that there could be an application for costs.
29. It has been suggested by the Council in their response to the costs claim that the matters considered by the Committee were 'subjective', and the implication could therefore be that the Committee's decision was not unreasonable. However, even leaving aside any discussion as to whether the matters in question can reasonably be described as subjective, it remains the case that even if the issues are subjective any decision still needs to be reasonable.
30. Between the refusal of planning permission by the Council in September 2021 and the Council's decision to concede the appeal in March 2022 there is no credible suggestion that any material matters have changed. In the Council's response to the costs application there is a reference to new policy in a 'Planning Bill'. However this is not explained and the applicant has suggested that it might refer to the Levelling Up and Regeneration Bill. But this does not deal with renewable energy and was in any case introduced after the Council conceded the appeal. In any event, whatever the Council's response to the costs claim actually means, it is important that at no time has the authority said that it conceded the appeal due to any emerging or adopted new policy or guidance. This suggestion, which has only emerged in the response to the costs claim, has not been explained and does not accord with the facts of the matter. It does not justify the Council's changed stance.
31. When the Council were notified of the appeal the authority said that it acted swiftly to appoint consultants to defend the reasons for refusal. It then emerged that the consultant team did not feel it was in a position to robustly defend the reasons for refusal. Leaving aside the length of time that this process appears to have taken, the Council's reversal of its position could not reasonably be said to justify its initial decision. The costs regime is intended to bring a degree of

rigour to the process and it cannot possibly be right that an authority which makes an unreasonable decision should then be exempt from costs simply because it then subsequently changes its position.

32. After the Council's decision to concede the appeal the authority makes the point that it cooperated in relation to conditions and the planning obligation. This is certainly the case and the authority played a useful role in relation to those matters at the Inquiry. However this is entirely proper and necessary and does not have any bearing whatsoever on the reasonableness of the Council's decision to refuse planning permission in the first place.
33. There is a reference in the Council's response to the costs claim to the existence of a Rule 6 party. But this is entirely irrelevant because if the application had been permitted in the first place there would have been no Inquiry and no Rule 6 party.
34. Finally in the Council's response to the costs claim the authority states that it does not accept the statement in the applicant's claim that the Council "...now accepts that the proposals should have been granted planning permission and, by extension, should have been granted planning permission in September 2021." This is tangential to the costs claim. But in any event it is not understood how, given that the authority has conceded the appeal, under unchanged circumstances, it appears to be taking a position that planning permission should still not have been granted in the first instance.
35. Both parties have referred to a costs decision in Leamington Spa. It is clear that this decision has considerable similarities with the current costs claim, although it is obviously not determinative. The Council has pointed out that, in that case, the proposal related to an allocated site within a settlement boundary and that this is clearly different from the current case. Whilst there are clearly differences in detail of the scheme, the principles of the costs award are strikingly similar.
36. Overall it is clear that the authority acted unreasonably in refusing planning permission in the first instance, as demonstrated by its subsequent decision not to contest the appeal. None of the matters put forward by the authority in defence of the costs application (either individually or cumulatively) justify its position.
37. It is considered that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and it is therefore concluded that a full award of costs is justified.

Recommendation

38. It is recommended that, 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 RECOMMENDED that Mid Devon District Council shall pay to JBM Solar Projects 2 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.

P. J. G. Ware
Inspector

COSTS DOCUMENTS

Costs Doc 1	Applicant's costs claim
Costs Doc 2	Council's costs rebuttal
Costs Doc 3	Applicant's reply to Council's costs rebuttal
Costs Doc 4	Costs decision APP/T3725/W/21/3270663