The Planning Inspectorate

Costs Decision

Inquiry Held on 26-29 November 3-5, 10, 11 December 2019 and 8 January 2020
Site visit made on 26 November 2019

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 March 2020

Costs application in relation to Appeals Refs: APP/A0665/C/18/3206873, APP/A0665/C/19/3232583, APP/A0665/W/18/3206746, APP/A0665/X/19/3227520
Land at Thornton Science Park, Pool Lane, Ince, Chester CH2 8NU

- The application is made under the Town and Country Planning Act 1990, sections 78, 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by the Health and Safety Executive (HSE) for a full or in the alternative a partial award of costs against The University of Chester.
- The inquiry was in connection with:
  - An appeal against an enforcement notice alleging without planning permission a change of use of the Land to a university faculty within Use Class D1 of the Town and Country Planning (Use Classes) Order, 1987 (as amended). (The EN1 appeal)
  - An enforcement notice alleging without planning permission a material change of use to a mixed use comprising a University science and engineering faculty providing undergraduate and postgraduate education, together with research and development (in connection with automotive/petrochemical/ aviation/ environmental and energy industries), laboratories, office use and industrial use (engineering workshops and blending plant). (The EN2 appeal)
  - An appeal against the refusal of planning permission for a change of use of buildings 38, 40, 58, 62, 304 and 305 to accommodate the University of Chester Faculty of Science and Engineering for the purposes of teaching, training and research as an integral part of the Science Park. (The section 78 appeal)
  - An appeal against the refusal in part of a certificate of lawful use or development for a sui generis mixed use, including elements of research and development, laboratory, teaching, workplace training, and including ancillary facilities such as offices and restaurant. (The LDC appeal)
- HSE's attendance at the inquiry was primarily in respect of the planning merit considerations, and more particularly those related to public safety in the EN1, EN2 and section 78 appeals.

DECISION

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

THE COSTS APPLICATION

2. The costs application by the HSE was submitted in writing. No significant additional points were made orally.

3. The response by the University of Chester was made in writing.

Reasons

4. The 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.

Attendance at the inquiry

5. As an initial point the appellant maintains that the HSE was always intending to appear at the inquiry. That is not apparent from the objection letter (CD2.1.7). "The necessary support in the event of an appeal" could well have taken the form of a more detailed written statement or providing a witness for the Council to call. The HSE's request for Rule 6 status was prompted by the appellant's statement of case dated July 2018 that sought to directly challenge the HSE statutory consultee public safety advice. Subsequently the HSE explained that its presence at the inquiry as a Rule 6 party and the high level of legal representation were considered necessary because of the challenge to the Consultation Zones and the Sensitivity Levels (SLs). Therefore the HSE's attendance was prompted by the behaviour of the appellant and the case the University said it would present.

Expertise and evidence

6. The appellant's detailed technical evidence was submitted at the proof of evidence stage in the proceedings. The first involvement of the author of the proof in the appeals was in early September 2019. He had not attended an earlier meeting in July 2019 between the HSE and ERM the University's consultants at the time, which had been arranged to narrow matters and to ensure the appellant fully understood the HSE's position. The appellant's explanation as to why ERM was no longer involved and did not provide a witness to present the public safety case at the inquiry was not convincing.

7. The witness, when cross examined, did not demonstrate the necessary understanding or grasp of all the technical content and appeared not to have questioned, scrutinised and checked the reports submitted as part of his evidence. No reference was made by the witness to the Government's Planning Practice Guidance on Hazardous Substances that includes the general principles on which the HSE's advice should be based. This was an important omission.

8. The inputs to the modelling of the catastrophic tank failure were not explained adequately and as a result the report and its findings were misleading – it was not representative of the type of catastrophic failure event envisaged by the HSE, which it was purported to be. It appears that the Council and Essar too were misled in this respect. The appellant now submits that the topographical modelling remains to serve a useful purpose but the HSE highlighted a number of matters that have gone unanswered and lead me to very seriously doubt the reliability of the modelling at all. The report on thermal modelling was withdrawn because of its deficiencies. It should not have been up to the HSE to identify so many fundamental failings of the modelling exercises that were essential to the appellant's challenge to the HSE's definition of the Inner Zone.

9. In short, the evidence was not sufficiently well researched and was totally unreliable. In my view it fell a considerable way short of what would reasonably be expected of expert evidence. An outcome was that the appellant was not able to substantiate its case that Thornton Science Park is located outside the

Inner Consultation Zone and should be considered to be in the Outer Zone. This was a key element of its case because it informed the planning balance addressed by other witnesses.

10. The appellant in closing made submissions on the public safety issue that were said not to rely on any of the points conceded by its consultant. Nevertheless, the use of the protection concept in this case and the representative worse case event selected by the HSE continued to be challenged, with reference to oral evidence of the public safety witnesses at the inquiry. The basic argument was the same as the theme running through the evidence of their consultant, although including and relying on arguments that were not particularised in advance of the inquiry. The continuation of the case in light of the concessions made by the appellant's witnesses in their evidence was unreasonable. The attempt to salvage matters does not overcome the unreasonable and misguided approach and the thrust of the case prepared for the inquiry.

Sensitivity Levels

11. The evidence on this matter was presented by the appellant's planning witness, which in itself is not unreasonable. Nor is it unreasonable to question whether the standard methodology is appropriate to the developments. However, the evidence did not sufficiently address let alone grapple with the philosophy, history and research underpinning the SLs. The appellant's witness accepted that comments were restricted to a planner's view of SLs and did not extend to a critique. The case was also based on the incorrect understanding that the Land Use Planning Methodology had not been subject to public consultation or independent scrutiny, which the HSE drew attention to in its Rebuttal.

12. A consequence was that the case presented was not directed sufficiently to the distinction between employees and the public. Furthermore, although the proof made a passing reference to scale, the written evidence did not take on board the importance of the size of the population to come to any conclusion. The witness accepted through cross examination by the HSE that the scale of the development and the numbers of people involved was integral to and affected the SL. Overall the challenge to the SLs was not substantiated.

Conclusions

13. The HSE is the expert body with statutory responsibility for providing advice on development proposals at and around hazardous installations. HSE's advice should not be overridden without the most careful consideration. Its methodologies are well established, tried and tested. In view of these factors a high bar is set in any challenge to its advice.

14. There was no reasonable prospect of the appellant's technical evidence and the evidence on sensitivity levels providing a credible basis to challenge the expert evidence of the HSE. Unreasonable behaviour occurred and this resulted in the HSE incurring unnecessary expense in defending its advice and scrutinising and rebutting the appellant's case on public safety.

Partial or full award

15. The Planning Practice Guidance, when explaining what counts as wasted or unnecessary expense, indicates that costs could be the expense of the entire appeal or other proceeding or be only for part of the process. A full award of appeal costs means the party's whole costs for the statutory process, including

the preparation of the appeal statement and supporting documentation. It also includes the expense of making the costs application. Where a local planning authority has relied on the advice of the statutory consultee in refusing an application, there is a clear expectation that the consultee in question will substantiate its advice at any appeal. Parties are encouraged to co-operate in providing information and in discussing the application or appeal.

16. Against this background the issue is whether the HSE should be awarded full costs dating back to the start of its involvement in the appeals, or whether costs should be limited to a more specific period in the proceedings.

17. The unreasonable behaviour is centred on the appellant's public safety case and evidence prepared for the inquiry. From what I have heard, a turning point came after the meeting on 29 July 2019 between the HSE and the appellant's public safety consultants at that time. The opportunity was not taken by the appellant at that time to withdraw, refocus or to narrow the case on public safety.

18. Accordingly, the costs incurred by the HSE up to that point in the proceedings were not unnecessary or wasted. The award should be limited to all costs incurred by the HSE after July 2019 in preparing for, attending and presenting its case at the inquiry and the expense of making the costs application.

Conclusion

19. Unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated. A partial award of costs to the HSE is justified.

COSTS ORDER

20. 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 the University of Chester shall pay to the Health and Safety Executive, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred by the Health and Safety Executive in the proceedings from 1 August 2019; such costs to be assessed in the Senior Courts Costs Office if not agreed.

21. The applicant is now invited to submit to the University of Chester, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Diane Lewis

Inspector