Costs Decisions

Inquiry held on 2-26 February 2010 and 6-15 September 2010

Site visits made on 2-4 March 2010 and 9 and 22 September 1020

by Philip Major BA(Hons) DipTP MRTPI

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

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Decision date:
27 October 2010

Costs application A in relation to Appeal Ref: APP/W0530/A/09/2108277
Land at Little Linton Farm, south of Cambridge Road, Linton, Cambridgeshire.

- 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 South Cambridgeshire District Council for a full award of costs against Enertrag UK Ltd.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for installation of seven wind turbines and associated infrastructure (to include access tracks, crane hardstandings, temporary construction compound, switch house and cables) on land to the south west of Linton, Cambridgeshire.

Summary of Decision: The application is allowed in the terms set out below in the Formal Decision and Costs Order.

Costs application B in relation to Appeal Ref: APP/C1570/A/09/2108275
Land at Little Linton Farm, south of Cambridge Road, Linton, Cambridgeshire.

- 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 Uttlesford District Council for a full award of costs against Enertrag UK Ltd.
- The inquiry was in connection with an appeal against the refusal of planning permission for installation of one wind turbine with access track, crane hardstanding and cable on land to the south west of Linton, Cambridgeshire.

Summary of Decision: The application is allowed in the terms set out below in the Formal Decision and Costs Order.

Costs application C in relation to Appeal Refs: APP/W0530/A/09/2108277 and APP/C1570/A/09/2108275
Land at Little Linton Farm, south of Cambridge Road, Linton, Cambridgeshire.

- 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 NATS (En-Route) Plc (NERL) for a full or partial award of costs against Enertrag UK Ltd.
- The inquiry was in connection with an appeal against the failure of the South Cambridgeshire District Council to issue a notice of their decision within the prescribed period on an application for planning permission for development as described in costs application A above, and against the decision of the Uttlesford District Council to refuse planning permission for development as described in costs application B above.

Summary of Decision: The application is allowed in the terms set out

below in the Formal Decision and Costs Order.

Costs application D in relation to Appeal Ref: APP/W0530/A/09/2108277 and APP/C1570/A/09/2108275
Land at Little Linton Farm, south of Cambridge Road, Linton, Cambridgeshire.

- 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 Stop Linton Wind Farm Action Group (SLWFAG) for a full award of costs against Enertrag UK Ltd.
- The inquiry was in connection with an appeal against the failure of the South Cambridgeshire District Council to issue a notice of their decision within the prescribed period on an application for planning permission for development as described in costs application A above, and against the decision of the Uttlesford District Council to refuse planning permission for development as described in costs application B above.

Summary of Decision: I refuse the application for an award of costs.

Costs application E in relation to Appeal Ref: APP/W0530/A/09/2108277 and APP/C1570/A/09/2108275

Land at Little Linton Farm, south of Cambridge Road, Linton, Cambridgeshire.

- 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 Pampisford Estate for a full or partial award of costs against Enertrag UK Ltd.
- The inquiry was in connection with an appeal against the failure of the South Cambridgeshire District Council to issue a notice of their decision within the prescribed period on an application for planning permission for development as described in costs application A above, and against the decision of the Uttlesford District Council to refuse planning permission for development as described in costs application B above.

Summary of Decision: I refuse the application for an award of costs.

Costs application F in relation to Appeal Ref: APP/W0530/A/09/2108277 and APP/C1570/A/09/2108275

Land at Little Linton Farm, south of Cambridge Road, Linton, Cambridgeshire.

- 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 Linton Parish Council for a full award of costs against Enertrag UK Ltd.
- The inquiry was in connection with an appeal against the failure of the South Cambridgeshire District Council to issue a notice of their decision within the prescribed period on an application for planning permission for development as described in costs application A above, and against the decision of the Uttlesford District Council to refuse planning permission for development as described in costs application B above.

Summary of Decision: I refuse the application for an award of costs.

PRELIMINARY MATTER

1. In making and responding to the costs applications reference was made to the advice on the treatment of third parties in the Costs Circular (CLG Circular 03/2009). The third parties who have applied for costs in this instance are NERL, SLWFAG, the Pampisford Estate, and Linton Parish Council. By reference to Part D of the Circular each argues that it is entitled to costs as it is a party 'entitled to appear' at the inquiry by virtue of being awarded Rule 6 status. The appellant, on the other hand, argues that paragraph D5 of the Circular applies to each of the third parties here, and in accordance with the Circular awards should only be made in exceptional circumstances.

2. However, it seems to me that the intention of paragraph D4 of the Circular is to draw a clear distinction between, for example, a local resident who chooses to appear at an inquiry, and those third parties entitled to appear, as is the case here. The subsequent paragraph relied upon by the appellant appears to me to refer back to third parties in general (the local resident perhaps) whilst paragraph D6 deals with those who are entitled to appear.

3. D6 indicates that the discipline of the inquiry process will apply to such parties, and that costs may be awarded either to or against them on procedural matters. On a plain reading of the Circular it is my view that Rule 6 parties are therefore entitled to apply for costs without the limitation of being required to demonstrate exceptional circumstances as described in paragraph D5. However, paragraph D6 is clear in that it refers to procedural matters. It says Rule 6 parties may have their costs awarded to them in relation to another party's procedural misconduct. But there is no reference to Rule 6 parties possibly being awarded costs based on the substance of the case put by the appellant (and vice versa).

4. One final matter here is that NERL has argued that it appeared, in essence, as a principal party, as it was presenting technical evidence which the planning authorities could not address. Paragraph A14 defines the term "principal party" as referring to the local planning authority (or other relevant responsible authority) and the appellant. A15 and D1 state that all other interested parties, including statutory consultees, are defined for the purposes of the Circular guidance as third parties, with the only stated exception (at A16) not applying here. In this case, I see no reason why the planning authorities responsible for defending the appeals could not have requested NERL to provide technical witnesses on their behalf and be represented by their own advocates. Hence there was no need for NERL to be separately represented, though it was clearly NERL's choice to be so. The reference to paragraph D7 in NERL's submission does not support the view that NERL should be treated as a principal party, but D7 is clear in that a statutory consultee who is separately represented will be regarded as a third party (except in circumstances which do not apply here).

5. I turn, therefore, to the applications and the response but do not report in full those sections which deal with the matters above which can be seen in the submitted texts. All the applications, except that by Linton Parish Council were made at least in part in writing, with added oral input. I summarise all

the applications in the following sections. The full texts of the written submissions can be found in the relevant inquiry documents[1].

THE SUBMISSIONS FOR SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL AND UTTLESFORD DISTRICT COUNCIL

6. These applications were made jointly on the same basis, but in respect of one or other of the two conjoined appeals, as set out in the heading.

Background

7. Guidance on costs is found in the Circular. It states (amongst other things) that "the costs regime is aimed at ensuring as far as possible that:

- Taking into account the statutory period for making an appeal, appeals are not entered into lightly or as a first resort, without prior consideration to making a revised application which meets reasonable local authority objections
- Planning authorities and applicants enter into constructive pre-application discussions consistent with PPS1, paragraph 12
- Unsuccessful applicants exercise their right of appeal responsibly"

8. The Circular deals with "awards against appellants – unreasonable pursuit of an appeal" as below:

"The right of appeal should be exercised in a reasonable manner. It should be used as a last resort, with the appellant being ready to proceed with the appeal once it is submitted. An appellant is at risk of an award of costs being made against them if, on the basis of the available evidence, the appeal or ground of appeal plainly had no reasonable prospect of succeeding on the basis of the application submitted to the planning authority. This may occur when:

- The proposal is clearly contrary to or flies in the face of national planning policy and no, or very limited, other material considerations are advanced with inadequate supporting evidence…
- Development is proposed which is obviously not in accordance with the statutory development plan and no, or very limited, other material considerations are advanced to justify determining otherwise
- The appellant has refused to enter into or provide a planning obligation in appropriate terms, which the Secretary of State or Inspector considers is clearly necessary to make the proposed development acceptable

In accordance with the Planning Inspectorate Guidance, the appellant should be confident in the strength of their case without commissioning substantial new evidence which was not made available to the planning authority at the time of their consideration of the planning application. An appellant who acts otherwise will risk an award of costs for unreasonably introducing such evidence if, in dealing with it, the planning authority incurs additional expense

[1] Documents 81 - 84

in the appeal process which would not have been incurred if the evidence had been made available at application stage."

Submissions

9. The success of the application (for costs) is contingent on the dismissal of the conjoined appeals on the basis of, at least, the radar objection raised and maintained by NERL. The Councils rely on the evidence of NERL to sustain their reasons and putative reasons for refusing planning permission in respect of radar.

10. The appellant's witness on aviation matters accepted that there was no reason to doubt the proofs of evidence brought by NERL witnesses; accepted NERL's assessment of technical and operational impacts of the proposal; accepted that NERL was best placed to assess technical and operational impacts; and accepted that suitable mitigation was essential for the proposed development to be allowed.

11. NERL gave unchallenged evidence that the proposal would have a major detrimental impact on NERL's operations and safety margins; that it had complied with the relevant requirements of CAP 765 with regard to the assessment of the appraisal; and that it had fully engaged in the planning process in a co-operative manner.

12. An objection on the grounds of radar is not like any other. PPS22 (at paragraph 25) sets out the steps which must be taken before a planning application is made. The reason is clear; if mitigation is not acceptable to the relevant statutory consultees, the implications for aviation safety, the operation of airports, and for air traffic controllers are likely to be serious enough to compel refusal of the proposal.

13. NERL's unchallenged evidence was that no objection is raised to 96% of the wind farm applications which are referred to them (on average at the rate of about 50 per month). Radar should have been the uppermost priority for the appellant since the pre-application stage. However, based on the chronology of events it seems that radar has been at the bottom of the appellant's priorities. The appellant has failed to get to grips with the objection raised by NERL in respect of the identified and severe harm which would be caused to the safety and efficacy of its operations in the sensitive airspace around the site of the proposed wind farm.

14. As early as September 2007 the appellant was made aware, by Uttlesford District Council (UDC), that NERL should be included on the list of bodies to be consulted in response to the appellant's request for a scoping opinion. In July 2007 South Cambridgeshire District Council (SCDC) had written to the appellant confirming that the proposed Environmental Impact assessment should specifically consider conformity with civilian en-route radar requirements, as part of air safety and airspace considerations.

15. The appellant's witness at the inquiry accepted that it was the appellant's responsibility to address objections on aviation issues where they were raised in accordance with paragraph 25 of PPS22 and paragraph 96 of the PPS22 Companion Guide. It was also accepted that the developer needs to ensure

that mitigation is addressed and agreed before a planning application is submitted. That was not done in this case.

16. The appellant did not ensure that NERL, the Ministry of Defence (MoD) and British Airports Authority (BAA) Safeguarding had no objections to the proposal before it submitted its application. The appellant's witness accepted that this was contrary to the terms of paragraph 25 of PPS22. The explanation given by the appellant was that commercial pressure meant that planning applications had to be made in order to avoid competition. That is not a reasonable excuse for irresponsibly engaging the planning process contrary to government guidance. It is not a justification which finds any support in any document before the inquiry.

17. The Environmental Statement (ES) Volume 1 has a single reference to site selection. It does not confirm that no objections have been raised, or that any objections raised have been dismissed. The Supplementary Information Document submitted with the ES with the title 'Aircraft Routes and Airspace' makes no reference to NERL. It identifies objections from the MoD and Cambridge Airport, and states no objections had been received from Duxford, Stansted or BAA.

18. The planning application was submitted contrary to policy. Having done that, and having been refused by UDC, it was incumbent on the appellant to act to resolve the radar objections raised before exercising its right of appeal. There is a period of 6 months in which to appeal and the appellant chose to exercise that right before making any further contact with NERL. The appeal was lodged on 27 July 2009, and first contact was made with NERL by the appellant on 15 October 2009. NERL had confirmed its objection to SCDC in September 2009. At that stage no further investigation into the feasibility of resolving the objection raised had been made.

19. At the pre-inquiry meeting on 21 October 2009 NERL raised the concerns about the lack of mitigation measures proposed.

20. Mitigation in the form of infill radar from RAF Honington was first raised in the proof of evidence of the appellant's aviation witness. This was late in the process and was subject to rebuttal by NERL. After the inquiry was adjourned in February 2010, when aviation evidence had been heard, no further contact with NERL was made by the appellant until August 2010. The appellant has now accepted that infill from RAF Honington is not a solution to the objection raised.

21. The conclusion is that the planning application should not have been made and the appeal should not have been lodged. Having been lodged it was incumbent upon the appellant to pursue, with utmost expedition, possible mitigation measures. The appellant has not exercised the right of appeal responsibly and has acted unreasonably in all the circumstances.

THE SUBMISSIONS FOR NATS (EN-ROUTE) PLC [NERL]

22. The application is for a full, or in the alternative, a partial award of costs.

23. The appellant acted unreasonably and in clear conflict with national policy in pursuing the appeal. The adverse aviation impacts the development would create are clear, and always have been. The appellant has failed to address those impacts or to substantiate its case in challenging them. As a result the appellant has unreasonably caused NERL to incur significant expense in appearing at the inquiry. This is an appeal which should never have been pursued. In pursuing the appeal the appellant should not have behaved in the way it did.

24. NERL does not make the application lightly and has never before made such an application. But the unreasonable behaviour of the appellant merits it. The Costs Circular seeks to increase the discipline of the parties through financial consequences for those behaving unreasonably and who cause unnecessary expense.

25. Examples of unreasonable procedural behaviour by an appellant include the failure to produce required information in support of a ground of appeal resulting in work being carried out that turns out to be fruitless; lack of co-operation with the other party, not completing a timely statement of common ground, or not agreeing factual matters common to witnesses of both parties, resulting in wasted inquiry time.

26. Unreasonable substantive behaviour includes unreasonable pursuit of an appeal (that is, not as a last resort) and pursuing an appeal where on the basis of the evidence the ground of appeal had no reasonable prospect of succeeding, such as when it is contrary to or flies in the face of national planning policy. The Circular indicates that the appellant should be confident in its case without having to bring new evidence which was not available at the time of the planning authority's consideration of the application; acting otherwise risks an award of costs for the expense in the appeal proceedings which would otherwise have been avoided.

27. The appellant failed to consult with NERL at all before making an application in February 2009 for the wind farm, although the site lies within a pre-identified zone where there is likely to be interference with NERL infrastructure. The application itself also fails to carry out any assessment of the aviation impacts which relate to NERL.

28. There was no attempt to consult with or discuss the proposal with NERL, even after the NERL objection letters of March 2009 and June 2009, before the appeal was lodged in July 2009. The appellant indicated that it was challenging everything.

29. The appellant's first meeting with NERL took place on 15 October, shortly before the pre-inquiry meeting (PIM). The PIM notes record NERL appearing, indicating that it would call 4 witnesses, and seeking clarification from the appellant as to whether and on what basis the NERL assessments were being challenged. A need for discussion and a statement of common ground was identified.

30. There was no meaningful mitigation proposal suggested until late December 2009, shortly before proofs of evidence were to be submitted. It

was included within the appellant's aviation proof, prompting a rebuttal from NERL.

31. Following the exchange of evidence NERL continued to seek common ground and sought to narrow issues, as witnessed by the letter of 20 January 2010 and draft statement of common ground. The appellant failed to agree, but each of the proposed statements was subsequently conceded in evidence by the appellant's witness when under cross examination.

32. This conduct was unreasonable for a number of reasons:

(a) The planning application was pursued in conflict with the requirements of paragraph 25 of PPS22. The appellant did not assess the potential impact on NERL before the application, after it was made, or before appealing. In the absence of mitigation the appeal was bound to fail and should not have been pursued.

(b) The appellant failed to bring any evidence to discharge the obligation to prove that there would be no adverse effects either in the application or in the appeal, where evidence was wholly inadequate.

(c) The appellant failed to comply with other clear guidance which emphasises the need for early consultation and liaison in *'Wind Energy and Aviation Interests: Interim Guidelines*[2]*'* or in *'CAP 764 – CAA Policy and Guidelines on Wind Turbines'*[3]

(d) The appellant stated that it was going to challenge NERL's technical and operational assessment even though it had not discussed them with NERL. NERL had little choice but to call evidence. The appellant's challenges were only abandoned in cross examination at the inquiry.

(e) The appellant failed to agree common ground despite invitations to do so. All items in the draft statement were subsequently agreed in cross examination.

(f) It was unreasonable to wait until October 2009 before consulting NERL and to produce proposed mitigation as late as December 2009. The appellant then accepted that the proposed mitigation required further investigation.

(g) The appellant failed to produce any other evidence of how technical mitigation could be provided despite some 7 months of inquiry adjournment, only then falling back on a position of suggesting a 'Grampian' condition, a position it had previously disavowed and on which no evidence had been called.

(h) The appellant has used the appeal not as a last resort but as a way of pursuing a misconceived application which was not properly investigated.

33. This unreasonable behaviour has caused NERL to incur unnecessary or wasted expense as a result of the direct challenge to NERL's assessment and the failure to investigate technical mitigation beforehand, as follows:

[2] CD 85
[3] CD 87

(a) NERL was required to produce expert evidence on matters which could have been accepted by the appellant.

(b) NERL had to appear at the inquiry, call witnesses, and cross examine on the ill conceived mitigation.

(c) The appellant should not have proceeded at all in the absence of technical mitigation to overcome the accepted aviation impacts.

34. This kind of speculative challenge is not a reasonable use of the appeal system. It is proper and fair that NERL should be able to recover its costs in full where the developer has failed to support its case. A full award is sought because the appeal should not have proceeded at all in the light of the policy in PPS22 and the Companion Guide.

35. In the alternative, even if the appellant was entitled to ignore the policy, NERL seeks a partial award in respect of preparing evidence and appearing at the inquiry in respect of those matters which were challenged by the appellant but then abandoned.

THE SUBMISSIONS FOR STOP LINTON WIND FARM ACTION GROUP

36. The main basis of the application is that the appellant is in blatant breach of the clear and important guidance of PPS22, and failed to resolve the issue of air safety before the application was submitted, let alone before making an appeal. The reason for the guidance is to prevent the time and cost of processing an application when a fundamental issue is not resolved. The thrust of the guidance is repeated in other documents, and the appellant's witness accepted that the guidance had been flouted.

37. The appellant hoped that something might happen to resolve matters before the end of the inquiry, but in the end the hope was in vain. There is no reason why the community should bear the costs of the appellant's speculative exercise conducted in breach of national guidance.

38. The following matters should be taken into account:

(a) The experience and professional representation of the appellant.

(b) The appellant's knowledge that this was a serious objection to the proposal as shown in the consultation response to Uttlesford DC, and in Uttlesford DC's third reason for refusal. It is extraordinary to note that the site is in the zone of likely interference to air traffic control services, and that it is 3 years since the appellant was made aware that NERL should be consulted.

(c) The lack of any excuse for proceeding in direct contravention of national guidance.

(d) The formal status of the Action Group as Rule 6 Party.

(e) The explicit reference to PPS22 in the Action Group's objection.

(f) The central role played by the action group during proceedings, including deployment of the blimp, production of photomontages, and instruction of a main witness on a central issue.

(g) The responsible conduct of the local community's case by the Action Group.

39. An award of costs would be consistent with the guidance of the Circular; in particular the following paragraphs are relevant:

(a) A2 – *the proper use of the right of appeal* – in this case the appeal system was used to try to resolve a matter which should have been resolved at or before application stage.

(b) A3 – *appeals not a first resort* – the advice was flouted and the appeal procedure used as a mechanism to try to resolve an application which should have been resolved earlier.

(c) A3 – *responsible use of the right of appeal* – the appellant had no justification for submitting an appeal when aviation matters were not resolved.

(d) A23 – *appellant's experience and representation* – the appellant is highly experienced and has first class representation.

(e) A24 – *expense unnecessary or wasted if an appeal could be avoided* – this appeal could and should have been avoided.

(f) B13 – *appeal unreasonably pursued in the face of national planning policy* – pursuit of the application and appeal flew in the face of national policy.

(g) B14 – *Appellant should be confident of the strength of case without substantial new evidence not available at application stage* – the appellant could not be confident because the problems raised by NERL had not been overcome, and never were.

(h) D4 – *third parties in general and those entitled to appear* – the Action Group is a Rule 6 Party and thus a full participant in the inquiry.

(i) D5 – *awards to third parties in general only to be made in exceptional circumstances, and not where unreasonable behaviour relates to the substance of the case* – here the circumstances are exceptional. The appellant failed to ascertain the safety of aircraft using one of the main UK airports before the application, let alone the appeal, in flagrant breach of national guidance. The failure does not relate to the merits of the issues but to the failure to proceed in the order and manner required by national guidance.

40. The anxiety, time and cost of appearing at the inquiry cannot be overemphasised. There is no reason for the community to bear the costs when it was the appellant who was responsible for bringing the appeal prior to matters not being resolved.

THE SUBMISSIONS FOR THE PAMPSIFORD ESTATE

41. An application is made for full costs on the basis of the aviation issue and the submissions of the Action Group are adopted, with the exception of specific reference to actions of the Action Group. The Estate seeks an award for having to appear at the inquiry at all as it has incurred unnecessary expense as a result of the appellant's behaviour.

42. The application for a partial award in respect of the costs involved in presenting its case on ecology is made. The application is in accordance with

paragraphs A30 to A35 of the Circular. The appellant has been informed of the Estate's intention to apply.

43. The information on ecology submitted by the appellant in the Environmental Statement (ES) was inadequate. The appellant has a statutory duty to provide in the ES the data required to identify the main effects which a project was likely to have on the environment. South Cambridgeshire District Council had requested further information but this had not been forthcoming.

44. The Estate had produced evidence of Barbastelle bats in Hildersham Wood in November 2009 and this suggested that it was a breeding site. It was indicated that further surveys in the summer months were needed to confirm this. This information was available to the appellant well before the start of the inquiry. That the appellant's evidence was incomplete and deficient was apparent before the start of the inquiry.

45. At the start of the inquiry the Estate raised concerns about the ES and its inadequacy to provide the survey data required to identify and assess the effects of the proposal. The appellant did not intend to carry out further survey work. The Estate felt obliged to call expert evidence from 2 witnesses as it seemed that there would be no further opportunity to deal with the ecology topic. Subsequently the appellant decided that further survey work would be carried out in the summer months.

46. There was nothing in the oral evidence given on behalf of the Estate or South Cambridgeshire District Council which justified the appellant's change of attitude at that late stage. The criticisms of the surveys to date were well known before the inquiry started.

47. The result was that it was unnecessary for the Estate's 2 witnesses to have given evidence in February. Time and effort was expended that turned out to have been abortive as a large part of the matters they raised and were cross examined on have been superseded by summer survey work resulting from the appellant's unreasonable behaviour. Paragraph A24 of the Circular is relevant here. The Estate was exposed to unnecessary, identifiable expense in calling witnesses and instructing counsel on that day.

48. During the adjournment the appellant's consultants were advised to coordinate their work with the Estate's consultant. They acted unreasonably in not doing so. The onus is on the appellant to provide the necessary environmental information. There was also no statement of common ground forthcoming despite the appellant being given the opportunity to bring this forward.

49. As a result it was again necessary for the Estate's consultant to give evidence again at the resumed inquiry in September. Had the appellant adopted a coordinated approach no live evidence on ecology would have been necessary. So the Estate was again exposed to unnecessary expense as a result of the appellant's unreasonable behaviour.

50. The Circular indicates at paragraph B4 that costs may be awarded when late evidence is adduced which results in extra inquiry time. The inadequacy

of the appellant's original survey work, which failed to meet the requirements of the EIA Regulations, has resulted in the need for 2 further tranches of surveys by the appellant, the latter of which resulted in additional inquiry time, and which has caused unnecessary expense.

51. Rule 6 parties are entitled to have costs awarded to them in circumstances of another party's procedural behaviour at inquiry, as indicated in paragraph D6. The appellant's late U-turn on carrying out additional survey work over the summer of 2010, and the need to have carried out the surveys at all, amounts to sufficiently unreasonable behaviour to justify an award of costs.

52. It is submitted that the second bullet point of paragraph D4 of the Circular refers to paragraph D6 though this is not entirely clear. If this is wrong then the exceptional circumstances test of paragraph D5 is met in any event.

THE SUBMISSIONS FOR LINTON PARISH COUNCIL

53. The Parish Council was awarded Rule 6 status in relation to highway matters. Full costs are therefore requested on highway issues.

54. The appeal should not have taken place, and full costs are therefore sought on the same basis as submitted by the Action Group, with the exception of the specific references to the Action Group.

THE RESPONSE BY ENERTRAG UK LTD

55. It is suggested that it was unreasonable to go ahead without having resolved the objection from NERL, which is said to be contrary to the advice of paragraph 25 of PPS22 and the Companion Guide. Therefore it would be unreasonable for any developer to proceed with an appeal where any aviation objection is not resolved. But that is misconceived. There is nothing in Circular 3/09 or in PPS22 or the Companion Guide which says that the developer must have resolved objections before appealing. The developer is required to show a solution is available, but may not be able to persuade NERL or the decision maker. But it is not logical to conclude that it is unreasonable to appeal. It depends on the facts of the case.

56. The appellant has sought to argue that a solution was available and is entitled to put the case on its merits, whether or not it is accepted. The case was brought on the advice of its technical expert that there was a technical solution reasonably capable of overcoming objections in an acceptable way within a reasonable period. It is not necessary to show that the solution is acceptable now so that NERL can withdraw its objection, but within the lifetime of a permission granted. The developer is entitled to proceed on that basis.

57. The decision maker may or may not accept the merits of the case, but it does not follow that the behaviour was unreasonable. The appellant was entitled to argue a case based on the technical advice received. That is consistent with the spirit and purpose of the guidance in bearing the burden of showing the merits of the case.

58. The Government seeks to promote renewable energy. It would be surprising if, faced with the commercial realities, developers were then under

a constraint of it being unreasonable to prosecute an appeal unless a solution to an aviation problem had first been secured. It is better to go ahead and try to persuade the decision maker that a solution exists. The appellant was entitled to proceed in the light of the evidence. Hence no party has been put to unnecessary expense in attending the inquiry.

59. The costs applications are made on a false premise of policy requirements. If this is wrong then there is no limitation on the circumstances in which Councils can recover costs. In part D of the Circular there is a powerful limitation on other parties' ability to recover costs based on substantive issues.

60. Principal parties are the Councils and the appellant. The others are Rule 6 parties and there is a distinction drawn in paragraph D4 between Rule 6 parties and third parties in general. The distinction is to inform of the limited provisions in paragraph D6. This paragraph is to do with procedural reasonableness and not to do with the entitlement of Rule 6 parties to recover costs relating to the substance of the case.

61. In principle it is accepted that a partial award to NERL would be possible as it would be a procedural matter. There are no exceptional circumstances here and no costs can be awarded on the substance of the case. The advice of the Circular is categorical and the limitation imposed to limit the exposure of parties to costs applications. Claims for costs by the Rule 6 parties based on the substance of the case are outwith the guidance. The appellant relies on that for rejecting the applications made by third parties for full awards.

62. If it is found otherwise then as a matter of judgement it would be wrong to award costs to the Action Group, Pampisford Estate and the Parish Council for several reasons. First it is reasonable to expect that the task of defending the public interest would fall principally on the Councils concerned and in the case of technical matters on bodies such as NERL.

63. Secondly, although third parties have a right to appear at the inquiry it does not follow that they should expect to recover costs of attending from the developer. The Action Group suggests it would be compensation but that is misconceived. The costs regime is there to impose discipline.

64. The application by the Action Group has no place in the logic of the costs regime. It does not follow that costs can be recovered where the case is also taken on by the Councils, even though it is acknowledged that the Action Group raised issues not raised by the Councils. It is the Action Groups choice to raise those matters and does not bring it within the ambit of the costs Circular.

65. The applications for full awards should therefore be rejected.

66. The Parish Council was granted Rule 6 status only in respect of highway matters. Those matters were agreed and evidence withdrawn. So the Parish Council should not be considered for an award of costs.

Partial Applications

67. NERL. It is an attractive proposition for a party to seek agreement to avoid calling witnesses and it is acknowledged that it may save time. But it does not follow that it is unreasonable not to take up the invitation to draw up an agreement.

68. In this case there was sufficient degree of connection between the evidence of NERL's witnesses for the appellant to wish to hear that evidence and to seek to cross examine the witnesses. That is what happened and the process elicited the nature of the differences between the parties. There was no wasted time or costs as a result.

69. Concessions made under cross examination do not indicate that it was unreasonable not to make those concessions earlier. Due allowance must be made for process. The application for a partial award by NERL should be rejected.

70. Pampisford Estate. South Cambridgeshire District Council could, and did, make a sound and persuasive case in support of the 'reason' for refusing the development on ecological (bats) grounds. It would be wrong to expose the appellant to the costs of the Estate's appearance in support of the Council's own evidence and submissions.

71. In relation to further survey work, it is the case that both the Council and the Estate cast doubt on the evidence in the early part of the inquiry. An opportunity to carry out further surveys arose with the adjournment and the appellant took that opportunity. That was a responsible course of action. It does not follow that it was unnecessary for the Estate's witnesses to appear at the inquiry in February. They gave evidence and the view was taken that it would be useful to use the adjournment time to add to knowledge on bats. It would send out a poor message if the appellant was now penalised for doing that. The application for a partial award should be rejected.

FURTHER SUBMISSIONS

NERL

72. On a factual point it was said that the appellant proceeded on the basis of advice from its expert. But he was not instructed until October 2009 when the appeal was already in. The appellant then proceeded to try to find mitigation, rather than the other way around.

73. The appellant did not address the examples of unreasonable behaviour in the application made. In essence the appellant decided to 'put us to proof' and hear our witnesses. That is contrary to the Circular advice and the conduct expected.

Action Group

74. PPS22 says two things. That it is the responsibility of developers to address aviation impacts prior to submission, and for planning authorities to ensure impacts are addressed before consideration of the application.

75. Paragraph D4 of the Circular contains key words. It distinguishes between third parties in general and those entitled to appear. 'In general' in paragraph D5 refers back to paragraph D4. Paragraph 5 does not apply to Rule 6 parties. Even if that is wrong this is an exceptional case; it does not relate to the substance of the case but to whether the case should have been brought at all.

76. The appellant's advocate says that if he is wrong then discretion should be exercised. But discretion does not stem from the Circular.

77. The Action Group brought significant matters to the inquiry, and was not just there to duplicate matters.

78. The application has been made on the basis of the Circular advice.

Parish Council

79. It was because the Parish Council was a Rule 6 party that agreement was able to be reached on highway matters. So there is no reason to single out the Parish Council.

CONCLUSIONS

80. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only 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.

81. First, I consider the basis upon which the applications have been made. I refer in the early paragraphs of this decision to the provisions of Part D of the Circular. It is my view that the Circular is clear, and that in the light of what is said in Part D, it is difficult to justify awarding costs to Rule 6 Parties based on the substance of the case put. I consider that my discretion to award costs should be used fairly, so that there would need to be exceptional and clear reasons for departing from published policy or being unable to cite plainly a specific paragraph of the Costs Circular in support of an award to and against a party. The Court's judgment in the case of *Manchester City Council –v- Secretary of State for the Environment and Mercury Communications Limited [1988]* JPL 774 is authority for the view that examples of unreasonable behaviour in published guidance are important to determining costs applications.

82. For these reasons I am not persuaded by the submissions made by NERL, SLWFAG, Pampisford Estate and Linton Parish Council that full awards should be made to them. It would have been possible for each of those parties to seek to join forces with and support the case put by the Councils, as the local planning authorities with statutory responsibilities for development control in their areas. I do not accept that NERL of necessity was required to present its case separately with its own advocate. The technical matters could have been dealt with by the same witnesses under the umbrella of the Councils' cases. As such, substantive costs could then have been sought which would have included all contributions to the Councils' cases. It seems to me that it would then have been open to the Councils to acknowledge the benefit to them of

those contributions by reimbursing relevant costs to the various contributors, at their discretion.

83. That other matters were raised, for example by the Action Group on health and by the Parish Council on highway safety, was essentially a matter of their choice. I do not see that the appellant should be required to pay the costs of bringing that evidence which was not relied upon by the Councils themselves in defending the appeals. The appellant did nothing unreasonable which directly led to that evidence being brought forward. Therefore, I am not satisfied that the causation tests in paragraph A12 of the Circular (bullets 2 and 3) have been met in respective of that evidence..

84. Although it has been argued that there are exceptional circumstances in this case I do not regard the circumstances here as exceptional, justfifying a different approach from that I have explained above. The appeal and inquiry followed the usual format, and although there were great differences between the parties, that is not in itself exceptional.

85. Given that the Parish Council was granted Rule 6 status to deal with highway matters only, it follows that for the remainder of its contribution it acted as a 'third party in general'. I see no exceptional circumstances here to justify an award of costs to the Parish Council in respect of that part of its contribution.

86. I turn then to consider if unreasonable behaviour on behalf of the appellant has been shown. This centres on 2 principal matters; aviation and ecology.

87. Aviation: Substantive matters. With regard to aviation the advice of PPS22 is clear. It is the responsibility of developers to address any potential impacts before planning applications are submitted. It does not say that the potential impacts must be eliminated prior to the application being lodged, and nor are planning authorities advised not to consider the application in the absence of a solution. But it must surely be a reasonable expectation that the matter has been addressed, that a solution is in mind, and that it is reasonably likely to be available.

88. In this case, however, there is no real evidence that the appellant had given any thought at all to the potential impact on NERL's infrastructure prior to the application being submitted. This despite being advised to consult with NERL during 2007, and the fact that the site lies within the zone where interference is likely. No assessment is made of any likely effects of NERL's interests in the application documents, including the ES. The appeal was also submitted prior to the appellant contacting NERL, and before it had instructed its technical expert.

89. By that stage an objection had been raised by NERL and was known by the appellant. The Companion Guide to PPS22 indicates that where an objection has been raised the onus is on the applicant to prove that the proposal will have no adverse effect on aviation interests. That is a high standard of evidence which is required and as will be noted from the appeal decision, the appellant has not provided the required proof.

90. Taking these matters to a conclusion I have no doubt that the appellant (a) did not follow the advice of PPS22, (b) did not provide the proof required by the Companion Guide, and (c) did not seek to engage with NERL until a late stage in the proceedings. When it did engage it was on the basis of speculative and unproven mitigation.

91. Circular 03/2009 makes it very clear that the right of appeal should be exercised in a reasonable manner and that appellants should be ready to proceed with an appeal once it is submitted. But given that the appellant had not followed the advice of national policy in relation to addressing potential impacts (and then proving its case as required by the Companion Guide) it is clear that the appellant was not in a position to proceed with the appeal. In proceeding anyway it was flying in the face of national policy and, as has been made clear in the appeal decision, it did not back up its case with adequate supporting evidence.

92. I am therefore satisfied that unreasonable behaviour has been demonstrated as described in paragraph B13 (bullet 1) of the Circular. I am satisfied that the appeal was made as a first, not second, resort, and it was then unreasonable to pursue the appeal in circumstances where there was no credible evidence dealing with the aviation interests of NERL.

93. Furthermore, following the submission of the appeal the appellant then commissioned further evidence which the planning authorities had not seen. This adds to my view that the appellant acted unreasonably in relation to the substance of the case.

94. Aviation: procedural matters. In relation to procedural matters it seems to me that there is a degree of overlap with the substantive matters. The appellant did not consult with NERL until late in the day; did not respond to requests to seek common ground or identify areas of disagreement in more detail; and did not agree a statement of common ground. As a result it was necessary for NERL to call its witnesses.

95. However, in the light of the concessions made by the appellant's witness at the inquiry it appears that much common ground was available to be agreed. That it was not seems to me to have been a result of the appellant pressing on with the case without having proper regard to the expectations of the procedure rules. In my judgement there was scope for much inquiry time to have been saved if the appellant had responded adequately to requests to agree common matters. The appellant chose not to do so, and this amounts to unreasonable behaviour as described in paragraph B4 (bullet 6) of the Circular.

96. Ecology. The application by Pampisford Estate in part reruns the criticism it made early in the inquiry relating to the information in the ES. That is dealt with elsewhere and it has been ruled that the ES was adequate. I do not intend to revisit that matter and I do not find that the evidence produced by the appellant was lacking to the extent that it amounted to unreasonable behaviour requiring the Estate to produce its own witnesses. The fact that the estate chose to appear at the inquiry and call witnesses to deal with ecology does not indicate unreasonable behaviour on the part of the

appellant. In the event the evidence produced by the appellant has been found to be less than compelling, but nonetheless the appellant has brought a case with substantive evidence.

97. The fact that an opportunity for further survey work was taken assisted me in reaching a decision on the proposal. The undertaking of those surveys added to knowledge, but did not indicate that the appellant had behaved unreasonably earlier in the process. Though results of the experts differed, the appellant continued to make its case and back it up with its evidence.

98. Coordinated working on ecological (bat) surveys during the adjournment would clearly have been useful. That said, based on the papers submitted at the inquiry I observe that there was no direct request to do so, but just a suggestion that it would be sensible to work collaboratively on data gathering. I do not criticise the appellant for not acceding to this request. It seems to me that the nature of the data results obtained independently by each expert would in any event have necessitated each to attend the inquiry to explain the findings. So I do not find that the appellant behaved unreasonably in respect of ecological matters, resulting in unnecessary or wasted expense.

99. I therefore turn here to each of the remaining applications. These are the full applications from the Councils, and the partial applications by NERL, SLWFAG and Pampisford Estate.

The Councils' Applications

100. I can deal with these in few words. I have found that the appellant acted unreasonably in bringing an appeal which flies in the face of national policy. The appeal should not have been pursued. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009 has been demonstrated and that a full award of costs is justified to each Council.

NERL

101. This is a procedural matter. The appellant was advised to contact NERL at an early stage but did not do so. When it did engage with NERL the application/appeal process was well advanced. Had there been earlier contact and discussions it is more likely than not that the appellant would have had the opportunity to explore possible mitigation prior to submitting either the application itself, or the appeal.

102. It is for developers to address potential impacts, and the appellant did not do so in relation to NERL infrastructure until late in the proceedings. Although perhaps not required to solve any impacts before making an application, it is the clear implication of PPS22 that developers should at least be addressing impacts with an expectation of them being successfully dealt with. In addition to the Companion Guide advice of the need to prove no adverse effects in the event of an objection, it must be wrong in principle to continue with a proposal without the necessary expectation that mitigation can be achieved. Hence in this case I see no good reason for the appellant to have a) proceeded to submit an application without adequately addressing likely

aviation impacts in relation to NERL; b) following the receipt of an objection to have proceeded to appeal before exploring mitigation.

103. The appellant's behaviour in this respect closely resembles part of the example of unreasonable behaviour noted in paragraph B4 (bullet 3) of the Circular. There was a lack of co-operation with NERL, and it was not until the appeal had been submitted that any discussions took place. Additionally there was a failure to agree common ground or factual matters with NERL, which is an example of unreasonable behaviour cited in the 6th bullet of the same paragraph. This is patently not the behaviour which is expected of developers and does not follow national advice. It is procedurally unreasonable behaviour.

104. In such circumstances I can appreciate that NERL was put to some expense, outside of the preparation of evidence and appearance at the inquiry to deal with the substantive case (dealt with above), which might have been avoided. I am satisfied that there is quantifiable wasted or unnecessary expense arising from the procedurally unreasonable behaviour which ought to be recoverable from the appellant.

105. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Circular 03/2009 has been demonstrated and that a partial award of costs is justified.

SLWFAG

106. The application by the Action Group did not seek to address a partial award, but in fairness I address whether such an award would be reasonable. I have noted above that it was the Action Group which chose to lead evidence on those matters not covered by the Councils and on which it had concern. I have also already indicated that I do not see anything in the appellant's behaviour which was unreasonable per se and led to that evidence necessarily being brought forward.

107. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Circular 03/2009 has not been demonstrated.

Pampisford Estate

108. Again, I have indicated above that I do not consider that in relation to procedural matters the appellant has behaved unreasonably. As a result I do not find that a partial award of costs is justified.

109. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Circular 03/2009 has not been demonstrated.

DECISIONS

110. I set out below the formal decisions.

South Cambridgeshire District Council

The application is allowed in the terms set out below in the Formal Decision and Costs Order.

Formal Decision

111. In exercise of my 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 powers enabling me in that behalf, I HEREBY ORDER that Enertrag UK Ltd shall pay to South Cambridgeshire District Council the costs of the relevant appeal proceedings, such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned appeal 2108277 more particularly described in the heading of this decision

112. The applicant is now invited to submit to Enertrag UK Ltd, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Uttlesford District Council

The application is allowed in the terms set out below in the Formal Decision and Costs Order.

Formal Decision

113. In exercise of my 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 powers enabling me in that behalf, I HEREBY ORDER that Enertrag UK Ltd shall pay to Uttlesford District Council the costs of the relevant appeal proceedings, such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned appeal 2108275 more particularly described in the heading of this decision

114. The applicant is now invited to submit to Enertrag UK Ltd, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

NATS (En-route) Plc

The application is allowed in the terms set out below in the Formal Decision and Costs Order.

Formal Decision

115. In exercise of my 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 powers enabling me in that behalf, I HEREBY ORDER that Enertrag UK Ltd shall pay to NATS (En-route) Plc the costs of the appeal proceedings, limited to those costs incurred in seeking to engage with and

agree factual matters prior to the conjoined appeals inquiry taking place, such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned appeals more particularly described in the heading of this decision

116. The applicant is now invited to submit to Enertrag UK Ltd, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Stop Linton Wind Farm Action Group

Formal Decision

117. I refuse the application for an award of costs.

Pampisford Estate

Formal Decision

118. I refuse the application for an award of costs.

Linton Parish Council

Formal Decision

119. I refuse the application for an award of costs.

Philip Major

INSPECTOR