

Costs Decision

Site visit made on 18 October 2016

by **Stephen Hawkins MA MRTPI**

Decision date: 9th November 2016

Costs application in relation to Appeal Ref: APP/U3935/W/16/3156260 Market Street, Swindon SN1 1RZ

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by CIP (Leonard Street) Limited for a full award of costs against Swindon Borough Council.
 - The appeal was against the refusal of planning permission for demolition of existing tented market and erection of a two storey building comprising four Class A3 (food and drink) units, one Class A1 (shop) unit and associated works.
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) 'Appeals' section advises that parties in planning appeals should normally meet their own expenses. However, costs may be awarded where a party has behaved unreasonably and that behaviour has caused another party to incur unnecessary or wasted expenditure in the appeal process (paragraphs 028 and 030). Guidance on what is meant by 'unreasonable' is in paragraph 031. The application for costs was made in writing, in accordance with the guidance at paragraph 035.
 3. The application for an award of costs is made on substantive grounds. In summary, an award is sought on the basis that the Council's decision to refuse permission was unduly influenced by objections from interested parties. The Council has not challenged the applicant's evidence concerning the viability of the market or the availability of alternative retail floor space in the town centre. The Council did not produce any evidence of its own at appeal to substantiate its case that the market facility is viable and sustainable. In refusing permission on design grounds, the Council did not properly consider the architectural merits of the appeal scheme and it has not substantiated its case at appeal with expert evidence.
 4. Council officers concluded that the appeal scheme was acceptable and they recommended approval of the planning application. The Council is not bound by the advice of its officers. Nevertheless, the Council has to produce evidence to substantiate its reasons for refusing permission, which must be founded on material planning grounds, not just the extent of local opposition. Paragraph 049 of the PPG clearly advises Councils that they will be at risk of costs being awarded against them on substantive grounds, where they prevent or delay development which should clearly have been permitted, they fail to produce
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evidence to substantiate their reasons for refusal at appeal or they make vague, generalised assertions about the impact of a proposal, which are unsupported by any objective analysis.

5. Planning permission was refused for two reasons. The first reason for refusal concerns the adverse effect of the loss of the market facility, together with an overconcentration of non-retail uses within the appeal scheme on the vitality and viability of the town centre. The Council says that the applicant did not submit a viability appraisal or independent analysis and that the levels of occupancy in the market can be deduced from a site visit. However, it has not challenged the applicant's evidence concerning the viability of the current market operation and the availability of alternative retail space in the town for businesses that would otherwise occupy the market hall. Moreover, the Council has not provided any detailed, objective evidence of its own which might support the conclusion that the loss of the market hall would adversely affect the vitality and viability of the town centre.
6. The Council has referred in its evidence to paragraph 23 of the National Planning Policy Framework (the Framework), which supports retaining and enhancing existing markets. However, this is one of a number of matters set out in paragraph 23 which have the overall objective of ensuring the vitality of town centres. Taken as a whole, paragraph 23 of the Framework cannot realistically be read as providing a measure of support for retaining a market facility where there is substantial evidence casting doubt on its viability.
7. Further, the Council has not explained how a concentration of non-retail uses at the appeal site would cause harm to town centre viability. It has referred to Policy EC3 of its adopted Swindon Borough Local Plan 2026 (LP) as providing support for its case in this regard. This policy aims to protect the shopping function of the town centre by restricting the percentage of non-retail uses in the primary and secondary shopping frontages. However, the appeal site is not in either the primary or secondary shopping frontage. Consequently, Policy EC3 would not restrict the percentage of non-retail uses at the appeal site. The Council has also referred to text at Section 7 of the adopted Swindon Central Area Action Plan (AP) concerning the guiding principles for redevelopment of the market hall being based on primarily retail uses. However, that text does not reflect the up to date policy position in the LP or the Town Centre Master Plan document.
8. The second reason for refusal focussed on the design of the proposed building. In its evidence, the Council has criticised the quality of some aspects of the proposed building's design including its roof form, elevational appearance and an overall lack of distinctiveness, together with the legibility of the entrance and seating areas and links to public open space. The Council say that the design of the proposed building was the subject of a debate by Councillors at the Planning Committee. I accept that assessing matters of design and reaching a conclusion involves an element of judgement and a lack architectural or urban design expertise does not preclude legitimate criticisms.
9. Even so, the Council does not expand on its objections to the design of the proposed building in any great detail. Overall, the Council's objections to the design of the appeal scheme appear to me to show little understanding of the overall design concept behind the appeal scheme or to be based on a full contextual analysis. There is no systematic assessment of the proposal against

the relevant Development Plan policies or the Planning Policy Framework (the Framework) at section 7, to demonstrate how, in the Council's view, it would not achieve a high quality design.

10. As a result, I find that both reasons for refusal largely amount to assertions which are not underpinned by a body of evidence. Consequently, the Council's reasons for refusing planning permission do not withstand objective scrutiny and they lack substance.
11. Therefore, for the reasons given above I am led to the conclusion that having regard to the Development Plan, national policy and other material considerations, the proposal should clearly have been permitted. Accordingly, the refusal of planning permission constitutes unreasonable behaviour as defined in paragraph 049 of the PPG and the applicant has been put to the unnecessary expense of making an appeal.

Conclusion

12. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has been demonstrated and that a full award of costs is justified.

Costs Order

13. 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 Swindon Borough Council shall pay to CIP (Leonard Street) Limited 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.
14. The applicant is now invited to submit to Swindon Borough Council to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Stephen Hawkins

INSPECTOR