

Costs Decision

Inquiry held on 17 January 2017

Site visit made on 26 January 2017

by S R G Baird BA(Hons) MRTPI

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

Decision date: 21 March 2017

Costs application in relation to Appeal Ref: APP/K0425/W/16/3146838 Land at Park Mill Farm, Princes Risborough

- 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 Halsbury Homes Limited for a partial award of costs against Wycombe District Council.
 - 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 the construction of up to 500 dwellings, open space and ancillary development.
-

Preliminary Matter

1. Halsbury Homes Limited submitted in writing an application for a partial award of costs at the inquiry. Due to time pressures the local planning authority (lpa) requested an opportunity to respond to the application in writing and following the setting of a timetable for the response, the inquiry was adjourned. The lpa's response was received on the 31 January 2017. The applicant made no further submissions and the inquiry was closed in writing on 14 February 2017.

Decision

2. The application for a partial award of costs is allowed in the terms set out below.

The submissions for Halsbury Homes Limited

3. This is a partial application for a costs award to be made against the lpa because it has behaved unreasonably in persisting with reason for refusal (RfR) 4, namely that the proposal "*fails to demonstrate that the quantum of development proposed, taking account of constraints, can acceptably fit on the site to achieve a high standard of design and layout that is compatible both with the existing character and appearance of the surrounding townscape and the proposed Princes Risborough expansion area*" (i.e. substantive unreasonableness relating to the issues arising from the merits of the appeal¹.)
4. This RfR simply cannot stand up to scrutiny and the lpa ought to have realised this prior to the exchange of evidence, written to the applicant to withdraw this RfR, and not served the evidence of its urban design witness. That would have been the reasonable course to have taken, and if taken it

¹ Planning Practice Guidance (PPG): Paragraph 031, Ref ID: 16-031-20140306.

would not have been necessary for the applicant to instruct an urban design witness to prepare evidence or appear at the inquiry.

5. The following PPG paragraphs are relevant:

- 030, costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. For the reasons set out above and below it is submitted that both parts of this test are met.
- 49, on substantive unreasonableness provides a non-exhaustive list, that includes "*not determining similar cases in a consistent manner*" and "*not reviewing their case promptly following the lodging of an appeal against refusal of planning permission*".
- 28, which provides that the aim of the costs regime is to "*encourage local planning authorities to properly exercise their development management responsibilities, rely only on reasons for refusal which stand up to scrutiny on planning merits of the case...*".

6. It is important to note that PPG provides a non-exhaustive list of examples of unreasonable behaviour. The unifying theme in the costs guidance is unreasonable behaviour, and the categories of unreasonableness are not closed. Here, whilst all of the above examples of unreasonableness are present in the lpa's behaviour, the fundamental unreasonableness of the lpa rests on the fact that it has put forward a RfR which simply lacks any respectability.

7. The starting point is the duplicate application that the lpa resolved to approve. The fact that the application was withdrawn, or that the present application was submitted with an Illustrative Masterplan different from that which supported the duplicate, cannot assist the lpa in resisting this costs application. Neither fact is relevant to the fundamental reason why the lpa's conduct has been unreasonable.

8. That fundamental reason is that the lpa, in resolving to approve the duplicate application, accepted that the site could respect all constraints and accommodate 450 houses. In putting forward that duplicate application, the applicant provided plans and documents showing that the nett developable area (NDA) of the site equated to 12.1ha. At no point did the lpa advise the applicant that it disagreed with its calculation of the NDA, or that the applicant had failed either to identify all relevant constraints or not deducted sufficient land from the gross development area to accommodate any individual constraint or the constraints as a whole. In fact, quite the opposite. The report to committee (RTC) for the duplicate confirms that all constraints had been respected, and that approval of 450 houses would equate to a density of 37dph. Simply as a matter of mathematics that, in itself, proves that the lpa agreed that the NDA equalled 12.1ha.

9. Given that the lpa does not dispute that a nett density of 41dph would be acceptable (indeed the draft PRTP, on which it bases the majority of its case, seeks a density of 40dph in the expansion area) there simply could not, as matter of simple logic, be any resistance to a proposal for 500 houses (because 41dph on a NDA of 12.1ha delivers 500 houses).

10. In light of those fairly straightforward facts, it is inexplicable why the lpa did not withdraw the RfR, or why it served urban design evidence, or why, having seen the applicant's evidence, it served rebuttal evidence, or why it decided to call an urban designer witness to give evidence. The lpa aggravated the situation by wasting inquiry time with 3 baseless arguments in a desperate attempt to justify its stance.

The School

11. The lpa argued that 2ha should be deducted for the school. However, there is no planning policy basis for insisting that a school be provided on the appeal site, not even in the draft Princes Risborough Town Plan, a point that the lpa witness accepted i.e. that expressly it was not one of the "fixed" elements listed in the plan. Not providing a school on the application site does not prejudice the wider expansion plans. If a school is needed it can be placed elsewhere in the wider expansion area. This latter point was accepted by the lpa when it resolved to approve the duplicate application with no school on the application site.
12. Neither is there any education-based reason, or education-related policy, that can justify an insistence that part of this site should be kept free for a school. The lpa's education witness agreed that there was no education based reason why a school had to be provided on the appeal site. The witness said, that "*ideally*" he was looking for a school either side of Longwick Road. In fact, the acceptance that there could be no education reason for refusal if there was sufficient school capacity or if such capacity could be created in the school planning area in and of itself demonstrates that there is no education reason for a school to be placed on the application site.
13. The lpa's insistence that this application is unacceptable without a school is misguided for other reasons, but even if the lpa were correct on this point, it cannot justify demanding a school on the application site and therefore cannot justify reducing the NDA.

The Link Road

14. The lpa's planning witness agreed in cross-examination that in deciding to recommend approval of the duplicate application she would have taken a precautionary approach to how much land would be needed for the link road, given that there was no detailed design. Given the earlier refusal of the present application partly on the ground of quantum (i.e. what could and could not fit on the site consistent with good design, layout. etc.) she would have applied careful thought to whether 450 units could fit on the site given the constraints that she wanted to see respected. She expressly accepted that in coming to her conclusion that the duplicate proposal would result in a density of 37dph she would have had to be satisfied that the applicant had deducted sufficient land for the link road.
15. In light of these facts there was an onus on the lpa, if it was going to run the point, to show why it had changed its mind as to how much land the link road would require. It provided no such explanation. The lpa's planning witness did not give any evidence to the effect that she had been wrong to accept that the NDA was 12.1ha, and the lpa's urban design witness did not say what had changed since the duplicate was considered to justify her

taking a different approach. In order for the point to have any respectability, the lpa had to accept that it had been wrong to accept a calculation of 12.1ha for the duplicate application. It has never made such an admission, which was a necessary starting point to saying something different in respect of this application.

Odour

16. The latest odour contour output was not known at the evidence exchange stage. The lpa's urban design witness wrote her evidence on the basis that the contour was in the same position as the applicant had assumed when putting forward 12.1ha NDA for the duplicate application. Therefore the change in the evidence relating to odour cannot be used to justify the lpa's urban design evidence. Moreover, that change, which the parties became aware of at the rebuttal stage, does not call for any expertise from either of the urban design witnesses. Best evidence on the extent of the 30u_E/m³ contour is a matter determined by reference to the scientific evidence. Whether any doubt over its extent can be left to be determined until the reserved matters stage, and whether in a "worst case scenario" the lpa could refuse reserved matters for 500 dwellings, is matter for legal submissions.
17. For all these reasons, the applicant requests a partial award of costs in its favour for all costs arising from, and occasioned by the need to refute, RfR 4.

The response by Wycombe District Council

18. The lpa has not acted unreasonably in continuing with RfR 4. Since the application was submitted in 2015, the lpa has been concerned that the proposed quantum of development for 500 dwellings on this site was too much. In particular lpa is concerned that given the site constraints relating to: the need for public open space; education provision; a link road and an odour buffer zone that the site would be too constrained and too cramped and would give rise to an unacceptable level of development. Clearly the applicant considered that there was some merit to this concern as in the duplicate application the overall quantum of the development was reduced from 500 to 450 dwellings and provided additional land within its ownership for a school. This produced a development of 37dph. Whilst the lpa was content with that quantum of development in urban design terms, and indeed resolved to grant permission for it, the applicant withdrew the application and all the documentation in respect of it and returned to its original proposal for 500 dwellings with no additional land provided for a school. In these circumstances it was reasonable for the lpa to pursue its original objection to the quantum of development of 500 dwellings.
19. In producing evidence on this matter the applicant's urban design witness, who had been specifically engaged on the duplicate application to address shortcomings in the appeal proposal, addressed the amount of land required for open space and the link road. The applicant's witness effectively relied upon the withdrawn Illustrative Masterplan 2016. He explained that density of development was not in fact the yardstick against which quantum it should be assessed and that it was unhelpful to carry out such an exercise. He considered that there was an NDA of 12.1ha. The applicant's witness also addressed the recent Odournet Report 2016 in his main proof of evidence and how that should be addressed in terms of phasing. In so far as it is

suggested in the applicant's cost application that this was not addressed by the witness at that time such a suggestion is incorrect.

20. The lpa's urban design witness also considered the amount of land required for open space and the link road and other land subject constraints that could be put to dual use e.g. SUDS and the odour buffer. She explained that 7.6ha is required for open space and 2ha is required for the link road.
21. At the time of exchange of evidence and subsequently, it was not accepted by lpa that there is a NDA of 12.1ha. The lpa made it clear that having had the benefit of the applicant's rebuttal evidence that it was agreed that 7.48ha of land or thereabouts was required for open space taking into account the matters that could be put to dual use and that the remaining outstanding differences appeared to relate to the amount of land required for the link road (2ha) and the need for a school. The lpa also addressed the location of residential development within the 30 μ E/m³ odour contour shown in the recently received 2016 Odournet report. That this land would potentially need to be excluded from the NDA could lead to an even more cramped form of development. This matter was pursued by the applicant with the lpa's planning witness in exploring the extent of control over quantum at the reserved matters stage.
22. The documentation provided by the applicant in respect of the quantities of land taken up by the Masterplan with open space and the link road has been confusing. The amount of land required for open space and the link road was identified as being 7.37ha and 1.31ha respectively in the document provided to the lpa following applicant's appointment of an urban designer on the duplicate application. In the applicant's proof of evidence those figures altered to 7.19ha and 1.49ha of land respectively. In the rebuttal evidence it changed again to 7.48ha for open space, a figure the lpa broadly agrees with, and 1.2ha for the link road, a figure the lpa disagrees with. In giving evidence the lpa explained what it thought were the outstanding issues having considered the various figures produced by the applicant, including the final figures put forward in rebuttal evidence. Whilst the lpa agree with the open space it disagrees with the link road figure and that the difference of 0.8ha broadly reflects an additional 30 dwellings (a not insignificant amount of housing) being placed on a smaller NDA. The lpa also explained that given the lpa's education witness's view that the development needed to provide for a school to meet its educational needs that area also needed to be factored into the NDA. Whilst these arguments and views may not ultimately be accepted by the Inspector they are all perfectly reasonable arguments and opinions.
23. The withdrawal of the duplicate application is a relevant consideration. That proposal was made to meet the concern of the lpa that the development was too cramped. As a result the proposal was reduced by 50 dwellings from 500 to 450. This followed the input of the applicant's urban design witness who had been specifically instructed for the purpose. No reliance can be placed upon the lpa's acceptance of that scheme in showing that it was unreasonable to pursue an objection to a larger scheme.
24. Whatever the lpa's position on the duplicate application, which is unclear given the reference to 11.9ha in the Committee report a figure the applicant focused on in cross-examination of the lpa's planning witness, not the

12.1ha, it is clear that in respect of the application before the inquiry the lpa did not accept a NDA of 12.1h. The lpa's reasons for assuming a NDA of 11.9ha are set out in its evidence. This is an assessment of the applicant's position in the 2015 Masterplan and the additional information which had been produced by the applicant's urban design witness in a situation where his figures had changed 3 times. The fact is that the applicant has sought to change the figures attributed to open space and the link road to always end up at a figure of 12.1ha. When lpa agreed the figure of 7.48ha for open space and which was a figure only produced in rebuttal evidence, it became clear that there was a difference in respect of the road. That arises out of the confusion with the applicant's presentation of its information and is not something for which the lpa can be blamed.

25. Whilst the figure relating to open space was eventually agreed the amount of land required for the link road was not. This difference of 0.8ha is material and amounts to an additional 30 dwellings meaning 500 dwellings being located on a smaller NDA than 12.1ha. Both urban design witnesses addressed these issues in a perfectly reasonable manner.
26. The issue of the odour buffer is relevant to urban design and the NDA. The applicant cannot claim that it is not a matter relevant to urban design as its own witness addressed this matter in evidence and rebuttal and suggested a phasing approach that would address the issue. There was no suggestion by the applicant at that time that this evidence was in any way unnecessary despite the lpa having completed its case at that stage. If the applicant considered that the matter should have been left to the expert witness on odour and legal submissions that is not a course the applicant chose to take or even suggested at the time it called its case.
27. If the lpa are right and the educational needs of the proposal give rise to a new school then the proposal needs to accommodate that in some way. The duplicate application overcame the issue by proposing a site for a school on other land owned by the applicant and for full funding of the school. This matter resolved the lpa's education objection. The current application makes no such provision. The lpa's urban design evidence refers to that fact, states that if the lpa are right and the application needs to make provision for a new school, this application does not do so and any such provision would inevitably affect the amount of houses delivered on this site.
28. The lpa has not behaved unreasonably in pursuing the fourth reason for refusal and the application for a partial award of costs should be refused.

Reasons

29. PPG advises that, irrespective of the outcome, 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.
30. Although the duplicate application was withdrawn, given that it sets the lpa's approach to issues relating to the potential expansion of Princes Risborough and how the application site relates to that potential, it is a material consideration. Whilst the Committee report does not specifically refer to a NDA figure, under the heading of Quantum of Development the report notes that, *"The proposal is for up to 450 dwellings which would represent a*

density of approx. 37 dwellings per hectare across the site...", which equates to a developable area of some 12.1ha. On the basis that the lpa took into account all the known constraints including the Movement Plan (Drawing No. DE235-003) and there was no indication in the lpa's evidence that the net density quoted above was an error it is not unreasonable to conclude, that the developable area of the site is some 12.1ha. Thus, taking an overall density of 41 dwellings per hectare which it is agreed would not have an unacceptable effect on the character and appearance of the area gives an overall quantum of 496 dwellings.

Primary School

31. The issues of (a) the location of a primary school and (b) whether the educational needs generated by the development mean that the applicants have to provide a new school on the site have to be separated. The Draft Princes Risborough Town Plan (PRTP) seeks the provision of 2 new primary schools within the Princes Risborough Expansion Area and the Illustrative Concept Plan (ICP) shows one school located to the west of Longwick Road within the application site and one school to the east of Longwick Road. That said the location of the schools do not fall within the 5 elements of the PRTP says fixed. Added to this, the terms "Illustrative" and "Concept" are high level descriptors which, in my view, indicate that other than the fixed elements the plan identifies the location of the remaining elements i.e. the location of the primary schools are fluid. The PRTP is not being progressed as a freestanding plan and proposals to expand Princes Risborough will be included within the emerging District Local Plan (DLP). The publication version of the DLP has yet to be published, consulted on and examined. In this context, the DLP is at an early stage and the weight to be attached to its policies and allocations is limited. Drawing all the above points together, very little weight can be attached to the ICP allocating the western school to the application site.

The lpa resolved to approve, subject to the resolution of several matters, residential development on the application site without the inclusion of a site for a school within the red line area. This is consistent with the evidence given at the inquiry by the lpa's education witness who indicated that other than seeking schools located to the east and west of Longwick Road there was no education reason that required the school to be located on the application site. Moreover, within the PRTP or indeed the lpa's evidence to the inquiry there is little or no urban design analysis that would support the specific requirement to reserve land on the application site for a school. There is nothing in that report to Committee which says or even suggests that a site outwith the application site was a sub-optimal location.

Link Road

In terms of the extant application, the lpa's calculation of the land requirement for the link road is based on a uniform 30m corridor through the site giving a requirement for 2ha. The fact that various figures for elements within the application changed during the submission of evidence that does not take away from the position that at the time of the duplicate application a reasonable interpretation of the lpa's position was that on the basis of a 30m corridor shown on Movement Plan the developable area equates to 12.1ha.

Odour Contour

32. It is agreed between the parties that there should be no residential development within the $30\text{ou}_\text{E}/\text{m}^3$ odour contour. When considering the duplicate application the lpa indicated that it was being assessed on the basis of an odour assessment report undertaken in 2010. When transposed onto the Illustrative Masterplan this showed that the contour was close to but did not extend into the area proposed for residential development. Whilst the report noted that the lpa had commissioned a further survey to assess whether the position of the contour had changed it was expected to confirm that the odour contour had not materially changed.
33. The applicant's Environmental Statement Supplement undertook an odour assessment to identify the $30\text{ou}_\text{E}/\text{m}^3$ odour contour. Again when the results of this study, which was based on a different model, are transposed onto the Illustrative Masterplan it shows the contour encroaching marginally into the area shown for residential development. However, given the relatively small area involved the requirement that there is no residential development within the $30\text{ou}_\text{E}/\text{m}^3$ odour contour could be addressed at the reserved matters stage without a material impact on the overall number of dwellings.
34. When the results of the lpa's 2016 odour report are transposed onto the Illustrative Masterplan this shows that the $30\text{ou}_\text{E}/\text{m}^3$ odour contour extends very significantly into the proposed residential area. The applicant's evidence drew attention to this but indicates that as this area would be one of the last areas to be developed and would be subject to further monitoring and if land had to be excluded it could be clarified at that stage. The lpa's rebuttal evidence clearly picked up on the reference to the extended area concluded that the developable area would need to be reduced. The applicant submitted rebuttal evidence indicating that, on the basis of further modelling, the $30\text{ou}_\text{E}/\text{m}^3$ odour contour would not extend as far south as shown either in the ES Supplement or the 2010. The lpa did not produce any technical evidence to challenge the results of latest modelling but relied on taking a precautionary approach to justify its approach that the $30\text{ou}_\text{E}/\text{m}^3$ odour contour would materially reduce the developable area.
35. Whilst I appreciate the latest scientific evidence only came in the week before the inquiry, by the time the inquiry heard the evidence there was a clear indication that, on the balance of unchallenged scientific evidence, the odour contour would not have a significant effect on the developable area. However, in pursuing its position I consider the lpa failed to justify its stance.

Conclusions

36. In light of all of the above conclusions, I consider the lpa acted unreasonably in pursuing putative RfR 4 and the applicant was put to unnecessary expense.

Costs Order

37. 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 Wycombe District Council shall pay to Halsbury Homes

Limited, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in addressing putative Reason for Refusal 4; such costs to be assessed in the Senior Courts Costs Office if not agreed.

38. The applicant is now invited to submit to Wycombe District 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.

George Baird
Inspector