

Costs Decisions

Hearing held on 9 February 2017

Site visits made on 8 and 9 February 2017

by John Felgate BA(Hons) MA MRTPI

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

Decision date: 3rd April 2017

Costs application relating to Appeal A

Appeal Ref: APP/W0340/W/16/3159722

Land known as 'Lakeside', off The Green, Theale, Berkshire

- 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 Central Corporation Estates Ltd, Central Corporation Securities Ltd, Alliance Security (The Green) Ltd, and Insistmetal2 Ltd, for a full award of costs against West Berkshire Council.
 - The hearing 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 "residential development of up to 325 houses and apartments (including 70 extra-care units), with associated access, parking, amenity space and landscaping".
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Costs application relating to Appeal B

Appeal Ref: APP/W0340/W/16/3163215

Land known as 'North Lakeside', off The Green, Theale, Berkshire

- 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 Central Corporation Estates Ltd, for a full award of costs against West Berkshire Council.
 - The hearing 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 "residential development comprising the erection of 25 dwellings with associated access, parking, and landscaping works".
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Decisions

1. In relation to Appeal A, the application for a full award of costs is refused, but a partial award is granted, in the terms set out below.
2. In relation to Appeal B, the application for a full award of costs is granted.

Submissions for the applicants

3. In relation to both Appeals A and B, it is argued on behalf of the applicants that the Council showed a lack of urgency in dealing with the applications, and should have determined them within the prescribed time limits. It is contended that one of the reasons why the Council delayed its decisions was because of a concern about landscape impact, but ultimately this was dropped, showing that there was no substance behind the objection. It is also argued that the Council failed to take account of the change in the Theale settlement boundary, which made the Lakeside site part of the village.
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4. In addition, with specific regard to Appeal A, the applicants also argue that the Council procrastinated in dealing with the issue of viability; that discussions with Education and Housing officers were unreasonably prevented; that information relevant to the education contribution was withheld; and that insufficient weight was given to the extant planning permissions on the site.
5. In the case of Appeal B, it is argued that at no time was any significant harm or valid objection identified, and therefore the application should have been approved without needing to wait for the outcome of the Appeal A application.

Response on behalf of the Council

6. On Appeal A, the Council argues that it has acted proactively throughout. As originally submitted, the application was unacceptable, because of conflict with draft Policy HSA14 of the emerging HSA DPD; and because of the initial lack of affordable housing; and because of landscape and visual harm; and unacceptable illustrative plans. The Council sought through negotiation to resolve these issues, and the complexity justified the length of time that this took.
7. The application process was also protracted due to a number of changes of circumstances: the appeal decision in respect of the North Lakeside site, off St Ives Close, in February 2016; the abandonment of draft Policy HAS 14, and the change to the settlement boundary, in July 2014; the resolution to grant planning permission for the new Theale Primary School, in July 2016; and a change of case officer due to maternity leave, in January 2016. These were all outside the control of the officers dealing with the application.
8. With regard to affordable housing and viability, the Council considered that discussions should remain at arms' length, for reasons of probity.
9. With regard to the education contribution, the Council explained its position adequately, and responded appropriately to the applicants' questions. It also reduced the sum requested. At no time did it refuse any request for a meeting with education officers.
10. With regard to landscape impact, the Council's position was based on the advice of their independent consultant. In the end, the issue was partly overcome by the submission of amended plans, but officers were justified in considering that some residual harm would arise. In any event, this harm was given limited weight in the final balance.
11. In the case of Appeal B, the Council considered that permission should not be granted in advance of the Appeal A scheme, in case there was a need for consequential amendments.

Relevant Guidance

12. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The Guidance provides a non-exclusive list of examples of unreasonable behaviour by planning authorities. These include: lack of co-operation, delay in providing information, withdrawing a reason for refusal, preventing or delaying development which should clearly be permitted, requiring an obligation that does not accord with the law or national policy, and failing to review their case following the lodging of an appeal.

Appeal A

13. The Appeal A application was originally submitted in October 2015, and the appeal against the Council's lack of a decision was made on 29 September 2016. Having regard to the correspondence and other documented evidence before me, it appears that at that point in the process, the remaining issues between the parties related to the education contribution, affordable housing, and landscape and visual impact. At the hearing, the only issue contested by the Council was that relating to the education contribution.

Education contribution

14. For the reasons set out in my decision on the appeal, I have found that the Council's request for an education contribution through a S.106 obligation failed to meet the relevant legal and policy tests, under both Regulations 122 and 123.
15. With regard to Regulation 122 the tests for obligations under that regulation should have been very well known to the Council, and it is reasonable to expect that those tests would be well understood by all of those involved in the administration of such obligations. Before issuing a request for such a large sum of money, in addition to the necessary CIL payment, the Council should have taken steps to ensure that the need for the contribution, and for the specific amount, could be fully justified on the evidence actually available.
16. In the present case however, there was a significant gap in the evidence, in terms of the acknowledged anomaly in the figures used to forecast future pupil numbers in Theale. There was also a lack of transparency with regard to the assumptions regarding out-of-catchment pupils. In addition, there was an evident mis-match between the pupil numbers generated by the development and the size of the contribution that was sought. And most importantly, there was a failure to recognise at least the perception of double-charging.
17. All of these issues were brought to the Council's attention by the applicants on numerous occasions, and it was incumbent on the Council to provide a full explanation for their position, with disclosure of the relevant evidence. However, the Council's response was simply to assert that it considered the contribution was required. In the end, the evidence to support their position was only made available after the appeal had been lodged, and then only in response to Freedom of Information requests.
18. In all these respects, the Council's handling of the education issue leaves a lot to be desired. Had they taken the trouble to explain their position more fully at an early stage in the application process, it is likely that the weaknesses in their case would have come to light before matters proceeded to an appeal, and it is possible that the issue might have been resolved through a more informed discussion. Alternatively, once the appeal had been put in motion, had the Council reviewed their case objectively, in the light of the evidence, it would have been open to them to concede the point rather than continuing to fight a case with so many potential flaws.
19. In summary therefore, and having regard to the relevant Guidance, the Council failed to properly consider or apply the tests in Regulation 122, or to substantiate its case for a contribution. It also failed to co-operate in explaining its position, or making available relevant information, and it then

failed to review this aspect of its case or to assess realistically the prospects of success. In all these respects, the Council's behaviour was unreasonable.

20. In the case of Regulation 123, although the Council's approach was flawed, the point on which the issue turned was a fairly novel one, and indeed one which prior to the appeal stage was not argued with as much force or clarity as some of the other points. In the circumstances, it was not wholly unreasonable for the Council to give weight to its own interpretation of the Regulation 123 List, despite the ambiguity of that document. On balance therefore, their failure with regard to Regulation 123 would not on its own have justified an award of costs in this case. But nevertheless, the Council should have taken greater care to ensure compliance with all aspects of relevant law and policy, and on a cumulative basis their behaviour in this respect reinforces my finding that their handling of the education issue as a whole amounts to unreasonable behaviour.
21. I have taken account of the timing of the resolution to grant permission for the new school, and the reduction in the amount of the contribution sought, and also the unavoidable change of case officer. None of these affects my conclusion as to the unreasonableness of the Council's conduct of this issue.
22. Overall therefore, I conclude that in delaying the grant of planning permission because of the lack of a S.106 contribution to education, the Council acted unreasonably. The result of that unreasonable behaviour was that the applicants were forced to incur the costs of an otherwise unnecessary appeal. An award of costs in relation to this issue is therefore justified.

Affordable housing

23. Prior to the lodging of the appeal, the Council did show a marked lack of urgency in dealing with the issue of affordable housing, and related evidence of financial viability. This behaviour was unreasonable. Subsequently however, there was a greater level of engagement, and discussions took place at a reasonable pace, leading to broad agreement on the key points regarding numbers and tenure mix, a few weeks in advance of the appeal hearing. Consequently, it was not necessary for the applicants to present evidence on these matters at the hearing.
24. Although some of the applicants' costs in negotiating on the affordable housing issues were undoubtedly incurred after lodging their appeal, these were costs that would have been necessary in any event. They were therefore not a direct result of the Council's tardiness at the application stage. In these circumstances, no award of costs is justified in relation to affordable housing.

Landscape and visual impact

25. Landscape and visual impact was one of the issues that the Council identified at an early stage of the application process, and discussions on the point led the applicants to submit a succession of amended and re-amended illustrative and parameter plans. There is some force in the applicants' view that much of this work was unnecessary, given the outline nature of the application, and the fall-back permissions for a larger overall number of dwellings. However, the alternative of appealing against non-determination was available to the applicants from January 2016 onwards, and thus the decision to engage in these protracted discussions, and to submit amended plans, was their own choice.

26. But nevertheless, in response to the applicants' final set of amended plans, the Council's case officer wrote on 26 August 2016 that although he did not propose to pursue the landscape issue any further, "*...any differences between you and our landscape evidence will go into the planning balance*". This clearly gave the impression that the Council considered that the landscape impact was an adverse factor, counting against the development. In the light of this position, the applicants were evidently led to prepare evidence on this issue, which formed part of their grounds of appeal and their statement of case for the hearing.
27. Subsequently, in the officer's report to the Planning Committee meeting in January 2017, it was conceded that the landscape and visual harm was limited and did not outweigh the benefits of granting permission. This was also reflected in the statement of Common Ground agreed shortly before the hearing. In the circumstances, this change of position amounted to the retraction of what had previously been presented as a potential ground of objection. As such, it was akin to the withdrawal of a refusal reason.
28. This change of position was not justified by any change of circumstances. The Council cites the changes that were made to the draft HAS DPD, which included deleting proposed Policy HAS 14, which previously sought a specific allocation for open space on part of the appeal site, and the change in the village boundary. But these changes occurred in July 2016, well before the Council declared its position on 26 August. And in any event, if this explanation were correct, it would suggest that prior to this the Council had acted unreasonably in relying on draft policies which had yet to complete the examination process.
29. It seems to me that there was no reason why the conclusion drawn in the officers' report in January 2017 could not have been reached several months earlier, and certainly before the appeal was lodged in September 2016. The Council's change of position was therefore in effect an admission that the landscape objection could not be substantiated.
30. In coming to this conclusion, I have taken account of the timing of the St Ives Close appeal decision in February 2016, and I also acknowledge that the Council's concern was based on advice received from their independent landscape consultant. But neither of these factors alters my conclusion.
31. It follows that the Council acted unreasonably in pursuing this objection and persisting in it for as long as they did. In the circumstances the applicants had no choice but to deal with it as part of their case for the appeal, and thus they incurred unnecessary additional costs in the appeal process. An award of costs in respect of this issue is therefore justified.

Conclusions on the costs application relating to Appeal A

32. For the reasons explained above, I conclude that unreasonable behaviour has been demonstrated, leading to unnecessary costs being incurred in respect of the issues relating to education and landscape and visual impact. A partial award of costs is therefore justified.

Costs Order – Appeal A

33. 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 West

Berkshire Council shall pay to Central Corporation Estates Ltd, Central Corporation Securities Ltd, Alliance Security (The Green) Ltd, and Insistmetal2 Ltd, the costs of the 'Appeal A' proceedings described in the heading of this decision, limited to those costs incurred in contesting the issues relating to education and landscape and visual impact; such costs to be assessed in the Senior Courts Costs Office if not agreed.

34. The applicants are now invited to submit to West Berkshire 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.

Appeal B

35. In Appeal B, the Council has not at any stage identified any valid planning objections to the development. Accordingly, there is no justification for the Council's failure to grant permission within the prescribed period.
36. The suggestion that the application might somehow need to be amended in the light of decisions to be made regarding the Appeal A application is entirely misconceived. The applicant was entitled to a decision within the required period, and in the absence of any valid objection, that decision could only have been to grant permission. Any amendment to reflect issues raised in relation to Appeal A would be a matter for the applicant alone, and in this case they have not indicated a desire to make any such amendment.
37. In the circumstances, and in the light of the Council's own explanation, the failure to determine the Appeal B application was clearly unreasonable behaviour. That behaviour led directly to an additional appeal which would otherwise not have been necessary.
38. In these circumstances, I can come to no other conclusion than to make an award of costs in favour of the applicant, for their full costs in respect of Appeal B.

Costs Order – Appeal B

39. 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 West Berkshire Council shall pay to Central Corporation Estates Ltd, the costs of the 'Appeal B' proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
40. The applicant is now invited to submit to West Berkshire 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.

John Felgate

INSPECTOR