The Planning Inspectorate

Costs Decision

Inquiry held on 21 February 2017

Site visit made on 21 February 2017

by Cullum J A Parker BA(Hons) MA MRTPI IHBC

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

Decision date: 6th April 2017

Costs application in relation to Appeal Ref: APP/M1710/Q/16/3157060 Nodwood House, Land of Nod, Grayshott Road, Headley Down, Bordon GU35 8SJ

- The application is made under the Town and Country Planning Act 1990 (TCPA), sections 106A, 106B, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Howard Miller for a full award of costs against East Hampshire District Council.
- The inquiry was in connection with an appeal against the refusal of the discharge of a planning obligation, originally dated 23 July 2002 (LPA reference 28299/015), under Section 106A of the TCPA, which was refused by the LPA on 28 June 2016.

Decision

1. The application for an award of costs is refused.

The submissions for Mr Howard Miller

2. The submission was made in writing before the event. An oral response was also made at the Inquiry in rebuttal to the Council's response. The main points an award is sought are:

   a) application of wrong legal test;

   b) reliance on development plan;

   c) introduction of Policy H15 at the appeal stage, when dismissed as irrelevant earlier in the process;

   d) mis-application, mis-understanding or/and mis-interpreting legal precedent;

   e) failure to justify application of Circular 11/95;

   f) failure to justify requirement for marketing exercise;

   g) failure to address the unenforceability issue;

   h) failure to substantiate how a planning condition might be imposed;

   i) failure to substantiate why the removal of permitted development rights is justified.

The response by East Hampshire District Council

3. An oral response to the application was made by the Council at the Inquiry. In summary the response to the points above was:

   a) The initial point is to note that it is for the applicant to demonstrate that they are correct and that the Council had a case to answer. In this respect, the case has evolved over time and the appellant has only provided to points to justify their case; namely enforceability and likelihood of finding a new occupier. Also, the decision notice should not be read forensically.

   b) The development plan is of relevance, as applied in the Millgate caselaw and therefore not unreasonable.

   c) The references to Policy H15 misinterpret what the Council is saying has relevance.

   d) The applicant has been selective in the use of quotes from case law, and when read in context are properly applied.

   e) Whilst Circular 11/95 is no longer in force, it provides a contextual background to the case and when the decision was originally made.

   f) A marketing exercise is relevant if it is asserted by the applicant that Nodwood House would not be sold.

   g) Paragraph 6.1 of the Council's statement indicates that the test is the 'useful purpose' one set out in the legislation.

   h) & i) The Council accepts that the Inspector does not have the power to impose a condition, and this is the overall thrust of the costs application. However, it has taken little more than one paragraph in the Statement of Case of the LPA, and two paragraphs of the legal submission. The consequence of this is that this has involved minimal resources and is therefore not unreasonable.

Reasons

4. The application for costs was made and responded to on the basis of the national *Planning Practice Guidance* (the Guidance). The Guidance, advises that costs may only be awarded against a party who has behaved unreasonably and this has directly caused another party to incur unnecessary or wasted expense in the appeal process.

5. My thoughts on the above points are:

   i) The Council's decision notice was worded in a manner more akin to a 'normal' planning application concluding against Section 38(6) of the Planning and Compulsory Purchase Act 2004, as amended, rather than one that considered S106A and S106B of the TCPA. Both parties recognised the 'correct' legal test early on in the appeal process, and have subsequently presented their cases in light of this. I do not find that this constitutes unreasonable behaviour.

   ii) The references to the development plan were provided to give the planning context to the Council's decision. This is not unreasonable given the 'useful purpose' test set out in the legislation, which, when calibrated with

caselaw, relies upon a useful planning purpose either being served or not. In such circumstances, it would appear illogical for the local planning authority to not, at the very least, base its decision upon the relevant planning framework for the area.

iii) Policy H15 provides some contextual background. The Council did earlier dismiss this policy and did not include it within the reason for refusal. However, given that the test is set out in S106A of the TCPA and not 38(6) of the PCPA 2004, I am not convinced that alerting me at the appeal stage, as the decision maker, to this policy was unreasonable given that it is within the public realm. This reliance on this policy as a context to the appeal is not, therefore, unreasonable.

iv) There is little within the case presented by the Council that strikes me as a fundamentally flawed interpretation or misapplication of caselaw when it is read as a whole. In the absence of any perverse or 'at odds with common sense' interpretations, I find that there has been no unreasonable behaviour in this respect.

v) Circular 11/95, which dealt with the use of planning conditions and obligations before the Guidance was introduced, was offered as a background document. This is not unreasonable, when dealing with an appeal whose origins are from the early 1990s.

vi) The seeking of a marketing exercise is not unreasonable given that it is for the applicant to demonstrate that market conditions have change in terms of Paragraph 205 of the National Planning Policy Framework, and also for them to demonstrate the use purpose under S106A is no longer served. The Council did not act unreasonably in seeking evidence of this kind to help in its decision-making.

vii) The matter of enforceability has been dealt with in detail within the appeal decision. The Council explained its position as to why it considered that the likelihood of enforcement of the obligation through the Courts was an option open to the local planning authority. It was not, therefore, unreasonable for the Council to defend its case on this point.

viii) In terms of points h) and i) I agree that the Council's inclusion of a condition, and one that removed permitted development rights represented a misunderstanding of the S106A and S106B process. There is no provision for the decision-maker to impose conditions on the discharge of an obligation. The Council were wrong to suggest the use of a condition in this case. However, the Council quickly acknowledged that such a condition could not be imposed, and that it was not presenting this matter as an argument in the appeal. I do not, therefore, find that the Council's actions in this respect were unreasonable.

6. Having carefully considered the matters above, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has not been demonstrated, and therefore the application for an award of costs is refused.

Cullum J A Parker

INSPECTOR