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## Costs Decision

Site visit made on 28 March 2017

**by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC**

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

**Decision date: 11 May 2017**

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### **Costs application in relation to Appeal Ref: APP/W1850/W/16/3161030 Land adjoining Kingsleane, Kingsland, Leominster, Herefordshire HR6 9SP**

- 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 Mr & Mrs Glynne Schenke for a full award of costs against Herefordshire Council.
  - The appeal was against the refusal of planning permission for 12 nos dwellings consisting of 4 nos affordable and 8 nos open market. Works to include new road and landscaping.
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### **Decision**

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

### **Reasons**

2. The Planning Practice Guidance (PPG) 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 directly caused another party to incur unnecessary or wasted expense in the appeal process. I acknowledge that although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviour and actions at the time of the planning application can be taken into account.<sup>1</sup>
3. The PPG advises that an award of costs against a local planning authority may be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal. It makes clear that a local planning authority is required to behave reasonably in relation to both of these elements and provides examples of unreasonable behaviour for both<sup>2</sup>. The application was made in writing and therefore there is no need to rehearse the detailed points made.
4. The main thrust of the applicants' case is that the Council has not determined similar cases in a consistent manner and that there were deficiencies and mistakes in the Council's evidence. I acknowledge that there is a protracted planning history on the appeal site and that as a consequence the applicants appear to have suffered financially.
5. In June 2014 planning permission was refused for 12 dwellings on the appeal site against Officer Recommendation. The reasons for refusal included that *'the proposed development by reason of its design and layout does not enhance or*

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<sup>1</sup> Paragraph: 033 Reference ID: 16-033-20140306

<sup>2</sup> Paragraph: 047 Reference ID: 16-047-20140306 and Paragraph: 049 Reference ID: 16-049-20140306

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*preserve the Conservation Area and therefore will have a detrimental impact on the setting of the settlement*'. I note that previous applications for affordable dwellings in 2008 and 2009 were refused for reasons that included the failure of the development to preserve or enhance the character and appearance of the conservation area.

6. In October 2014 the planning application that is subject to my appeal decision was submitted. This was initially recommended for approval in January 2015 subject to legal agreement, prepared under the provisions of Section 106 of the Town and Country Planning Act 1990, (S106 Agreement) and conditions. The decision notice was issued on the 1 October 2015. However, this decision was challenged through Judicial Review in the High Court.
7. I note that the Judge's decision from December 2015 in relation to the Judicial Review was that permission was granted to proceed with the application but that he was not persuaded that ground 3 of the challenge was arguable as it was plain that a careful assessment of impact on heritage assets was made leading to a conclusion that any impact was outweighed.
8. However, the Council decided to agree to a consent order after receiving legal advice from Counsel. Consequently, in February 2016 the decision of October 2015 was quashed due to the failure of the Council to discharge its 'heritage' duties under Sections 66 and 72 of the Planning (Listed Buildings & Conservation Areas) Act 1990. I acknowledge that the applicants consider that the Council should not have agreed to that consent order for a number of reasons but this is not a matter for my consideration in the context of this costs decision. The planning application was re-determined by the Council in July 2016 and at that stage the Council refused planning permission for the scheme before me.
9. The Officer's Report in relation to the July 2016 redetermination did state that the original planning decision had been subject to a Judicial Review. However, it did not expressly state that the consent order had been made on ground 3 of the challenge rather than all 3 grounds. Nevertheless, I am not persuaded that Members of the Planning Committee were ill informed. Furthermore, it is reasonable that the Officer's Report covered all 3 grounds covered by the Judicial Review to ensure that the subsequent decision would not be open to further challenge.
10. The July 2016 Officer's Report does interpret and consider the heritage issues in a different light to the previous Officer's Report in relation to the October 2015 decision. However, given that the Council had agreed to the consent order this is not unexpected or unreasonable. I acknowledge that the Council should have been aware of case law<sup>3</sup> in relation to the weight to be given to harm to heritage assets in the overall planning balance at the time of the previous decision. Nonetheless, the July 2016 Officer's Report does expressly cover those issues and highlights recent case law<sup>4</sup>.
11. Taking into account all of the above I can understand the applicants' frustration and anger in relation to the handling of the planning applications on the appeal

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<sup>3</sup> Barnwell Manor Wind Energy Limited v (1) East Northamptonshire District Council (2) English Heritage (3) National Trust (4) SSCLG [2014] EWCA Civ137 and R (Forge Field Society) v Sevenoaks DC [2014] EWHC 1895 (Admin)

<sup>4</sup> Forest of Dean District Council v Secretary of State for Communities & Local Government & Gladman Developments Ltd [2016] EWHC 421 (Admin)

site. However, in my opinion the fault stems from the approval of the October 2015 decision which was subsequently quashed rather than the July 2016 refusal. Had the case been handled in a manner that did not justify the decision being quashed it is reasonable to infer that the planning application would have been refused much earlier. Consequently, the inconsistency in determining the decisions derives from the issues arising from the handling of the quashed decision rather than the later refusal. I have agreed with the Council and dismissed the appeal and as such I do not consider that the Council were unreasonable to refuse the application.

12. The last sentence of paragraph 7.2 of the July 2016 Officer's Report does state that the proposal is representative of sustainable development and this is contradictory to paragraph 7.4 of that report. It would appear that a clerical error did not remove this sentence when the Officer's Report was rewritten as paragraph 7.6 of the October 2015 Officer Report mirrors that sentence. This is clearly a mistake by the Council. However, in all other respects the report is comprehensive and clearly substantiates the reasons for refusal. As such, I do not consider that the Council's evidence which explained the reasons for the Council's stance was materially deficient in its reasoning.
13. The applicants are clearly not satisfied with the Council's handling of the recent planning applications. However, other procedures exist, including the Council's own complaints procedures, to deal with such matters.

### **Conclusion**

14. I therefore conclude that for the reasons set out above, unreasonable behaviour resulting in unnecessary expense during the appeal process has not been demonstrated. For this reason, and having regard to all other matters raised, the application for an award of costs is hereby refused.

*D. Boffin*

INSPECTOR