

Costs Decision

Inquiry held on 16 & 17 May 2017

Site visit made on 18 May 2017

by R J Jackson BA MPhil DMS MRTPI MCMi

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

Decision date: 19 June 2017

Costs application in relation to Appeal Ref: APP/R3650/W/16/3164050 Wheeler Street Nurseries, Wheeler Lane, Witley, Godalming GU8 5QP

- 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 Mr Michael Stephens, Castle Land and Development LLP for a full award of costs against Waverley Borough Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for outline application with all matters reserved for demolition of all existing buildings and clearance of all previously developed land and redevelopment with up to 20 dwellings (30% affordable (up to 6 dwellings)) with access from Wheeler Lane.
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Decision

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

Procedural matter

2. The application for costs, the response by the Council and the final response by the applicant were made in writing. There is thus no need for me to set those out as they are known to the parties.

Reasons

3. The Planning Practice Guidance (the PPG) 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.
4. The grounds of the application for the award were based on both substantive and procedural matters. I will consider the substantive elements first, because if justified, then issues of procedure are largely irrelevant. I will also consider the application against each of the reasons for refusal in turn.

Reason 1 – Green Belt

5. This reason for refusal alleged that insufficient information had been provided to the Council to demonstrate that the site was made up of previously developed land.
 6. As was agreed by the main parties under the terms of the National Planning Policy Framework (the Framework) in the context of an appeal such as this a starting point of the assessment requires a decision as to whether a site represents previously developed land. There was no Certificate of Lawful
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- Development or Use under either Section 191 or 192 of the Town and Country Planning Act 1990 (as amended) to allow the use of the land to be conclusively presumed, but there was a planning permission from 1981. There was no dispute that this permission had been implemented and no dispute that there had been no lawful material changes of use subsequently.
7. This permission was clear on its face that it permitted an "Intensification of existing retail use to include the sale of imported fruit and vegetables and horticultural products". This indicated that the use of the land did not, as a minimum, solely fall within the definition of "agriculture" and the only plan related to the whole of the appeal site (and adjoining land). It is clear that this meant that the appeal site represented previously developed land within the terms set out in the Framework.
 8. To seek to show that the site was not previously developed land was thus unreasonable. Had the Council had concerns about the status of the land, these should have been resolved prior to the Council making its decision rather than refusing the application in the terms that it did. This meant that the appellant was put to unnecessary expense in this regard.
 9. However, if it had been accepted that the appeal site consisted of previously developed land the exception under the sixth bullet point of paragraph 89 of the Framework involves a judgement of whether the proposal would have a greater impact on openness of the Green Belt and the purpose of including land within the Green Belt. As can be seen from my decision on the appeal I concluded that the proposal did have a greater effect than the current situation. Therefore I consider that the appellant was not put to unnecessary expense as regards dealing with that eventuality, which inevitably flowed from that part of its case that the appeal site did represent previously developed land.
 10. In addition, once the application had been refused, whether in the terms that it did or otherwise, it was up to the applicant to decide how it wished to pursue its case. It could have set out evidence that the proposal was not inappropriate development as it complied with the sixth bullet point of paragraph 89 of the Framework and gone no further. Thus expense in this area was, at least in principle, a matter of choice for the applicant.
 11. With the submission of the Waverley Borough Local Plan Part 1: Strategic Policies and Sites (the LPP1) to the Secretary of State for examination by an Examining Inspector (the ExI) it is clear that matters would change. The presumption is that the plan as submitted is sound, but where the ExI has raised matters of concern it is reasonable for the Council to respond to them. It is also reasonable to give weight where the ExI has expressed preliminary findings. In addition the Council should update its Five Year Housing Land Supply (the 5YHLS) calculation in response to appeal decisions and the passage of time. Reassessing the 5YHLS as of 1 April in any year is to be expected.
 12. Therefore, while the Council could be criticised for asserting that it had a 5YHLS and then not, and then back again, the reasons for this were understandable and explainable. To not advise the applicant that its position had changed could lead to the criticism that it had failed to keep the applicant informed. The timetable was a product of when the ExI issued his note and the timeframe he gave for response.

13. I therefore consider that while the Council acted unreasonably leading to unnecessary expense as regards the status of the appeal site it did not act unreasonably as regards its position on the remaining parts of that reason for refusal.

Reason for Refusal 2 - Employment

14. This reason for refusal related to the loss of employment land. While the reason for refusal was withdrawn the issue is whether it should have been so refused in the first place. The Waverley Borough Local Plan 2002 (the WLP) makes clear that employment uses are those which fall within the 'B' classes of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended). The policy referred to in the reason for refusal in the emerging LPP1 also relates to these uses.
15. Firstly, to assert that the proposal would represent the loss of employment land is illogical as regards the first reason for refusal. For the cited policies to apply the site would need to be in a "'B' employment use". Had that been the case then the site would have fallen within the definition of previously developed land as it would not have been solely used for agriculture.
16. Secondly, there was no actual evidence provided to support his reason for refusal. It was not withdrawn at the first opportunity, being maintained in the Council's Statement of Case. The appellant was therefore put to unnecessary expense of preparing grounds of appeal and thereafter up to the time the reason for refusal was withdrawn.

Reasons for Refusal 3 and 4 – Infrastructure and Affordable Housing

17. These two reasons can be considered together. Where appropriate mechanisms are not in place to secure either affordable housing or infrastructure at the application stage it is normal practice that these topic areas are included as reasons for refusal to ensure that they are properly addressed; without being secured it is likely that an appeal would be unsuccessful.
18. The evidence I have indicates, initially at least, the appellant was intending to deal with both matters in a Planning Obligation under Section 106 of the Town and Country Planning Act 1990 (as amended). It then decided that it wished for the affordable housing element to be dealt with by condition. That the Council expressed a continued preference to secure the affordable housing by Planning Obligation was not of itself unreasonable. In any event, while the Council accepted that affordable housing could be dealt with by a condition it has not been demonstrated that the appellant was put to any additional expense in this regard, particularly as there were discussions to be had over the wording of that condition.
19. Similarly, as regards infrastructure the applicant accepted that contributions could be appropriate but queried the justification. While the PPG indicates¹ that refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead, or requiring a Planning Obligation which does not comply with the terms of the law or national policy in the Framework, it has not been demonstrated to me that the applicant was involved in any wasted expense in this regard.

¹ Reference ID: 16-049-20140306

Other procedural matters

20. The applicant indicates that it believes that the Council should have reviewed its position at the lodging of the appeal, but the evidence does show that it did re-consider the matter. The real criticism was that it did not change its position; but that was a matter relating to the substance of the reasons for refusal which I have considered elsewhere in this decision.
21. Rule 4(4) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiry Procedure) (England) Rules 2000 (as amended) (the Rules) require that within 1 week of the starting date the local planning authority to send to "the Secretary of State and the appellant a copy of the completed questionnaire and a copy of each document referred to in it". Not to do so represents unreasonable behaviour.
22. The applicant indicates that it considers the Council failed to provide copies or explanations of required information and policies, which the Council refutes. The applicant has provided an email exchange with the Council when it asked for documents not included, which the Council declined to provide stating it is "only required to send additional documents not yet available". This is not what the Rules require. The Council indicated that the other documents were available from its website. The appellant was put to the otherwise unnecessary expense of having to ask for that information, and having to obtain it from the Council's website.
23. The applicant has made various points about what it sees as a lack of co-operation by the Council including the completion of the Statement of Common Ground. In response the Council asserts that the applicant was itself less than co-operative with it being unable to include certain aspects within the same document.
24. While it would have been ideal if the Statement of Common Ground had been concluded earlier, the reality was that with the consideration of this appeal being against the background of the emerging LPP1 and a number of appeal decisions that any earlier agreement would have been nugatory at best.
25. Overall, my conclusion is that except where identified above, the discussions and disagreements are part of the, inevitable, dialogue that are involved in an appeal and it has not been demonstrated that the applicant was involved in any other unnecessary or wasted expense.

Conclusion

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

Costs Order

27. 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 Waverley Borough Council shall pay to Mr Michael Stephens, Castle Land and Development LLP, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in responding to reason for refusal 1 in respect of whether the site represented previously developed land,

in responding to reason for refusal 2 up to the time the reason was withdrawn by the Council, and for seeking and obtaining the omitted documents that should have been included with the Questionnaire; such costs to be assessed in the Senior Courts Costs Office if not agreed.

28. The applicant is now invited to submit to Waverley 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.

RJ Jackson

INSPECTOR