



Costs Decision

Site visit made on 20 June 2017

by A A Phillips BA (Hons) DipTP MTP MRTPI

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

Decision date: 20 July 2017

Costs application in relation to Appeal Ref: APP/A0665/W/17/3171306 Home Farm, Burton Road, Burton, Chester CW6 0ER

- 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 Peter and Mrs Mary Lightfoot of JH Lightfoot and Sons for a full award of costs against Cheshire West & Chester Council.
 - The appeal was against the refusal of the Council to grant planning permission for the demolition of a single storey milking parlour and detached outbuildings, conversion of barns to form six dwellings, construction of a pair of semi-detached dwellings, construction of a three car garage and bin store and formation of associated parking.
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Decision

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

Reasons

2. 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.
3. The Guidance indicates that local authorities will be at risk of an award being made against them if, among other things, they prevent or delay development which should clearly be permitted having regard to its accordance with the development plan, national policy and any other material considerations. Costs may also be awarded if the Council fails to produce evidence to substantiate each reason for refusal on appeal or if it makes vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis.
4. The appeal followed the refusal on 19 September 2016 of an application made on 13 June 2016. The sole grounds for refusal related to the unsustainable form of development. My decision which accompanies this costs decision agreed with the Council's assessment and dismisses the appeal on similar grounds. However, my decision is also based on grounds relating to the harmful effect on biodiversity and that the proposal would not make appropriate provision for affordable housing.
5. The officer's delegated report, which recommended refusal of the application, commented in paragraph 6.5 on the benefits of the proposal and, in particular, concluded that the need for affordable housing in Burton is not acute to the extent that such a benefit did not outweigh more pressing policy conflicts. Based on the Council's view that the proposed development was unacceptable

on other grounds no further action on the matter of affordable housing was taken.

6. An appeal against the Council's refusal was subsequently made. In the appellants' appeal statement attention is drawn to the appellants' view that considerable weight should be given to the provision of affordable housing in the rural area. On site affordable housing could be delivered by the appeal proposal but not if the fall-back position was to be implemented in the future. This position is supported by viability appraisals. The Council's appeal statement returned to the issue of affordable housing and commented that its policy position regarding affordable housing has changed in response to the Court of Appeal judgement in overturning the High Court Decision in the case of *The Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council* which had effectively quashed the Written Ministerial Statement (WMS) of 28 November 2014 regarding contributions for affordable housing. The WMS states that '*for sites of ten units or less...affordable housing and tariff style contributions should not be sought.*' This approach is reflected in Planning Practice Guidance. One of the exceptions to this is for rural areas where the number of residential units proposed is between six and ten contributions will be required but these will be in the form of cash payments commuted upon completion of the units.
7. I do not consider that the Council acted unreasonably in raising the issue of financial contributions despite the single reason for refusal originally identified in refusing the original application not raising this matter. The officer's report was clear that the Council had taken account of the matter of affordable housing but the benefits associated with provision would not outweigh the conflict with the development plan as a whole. Therefore, the applicant could not be surprised to have to deal with affordable housing if planning permission was refused and an appeal was made.
8. However, the Council has changed its approach to affordable housing since the refusal of the original planning application. In accordance with the development plan at the time of determination and in spite of the effect of the WMS and changes to the wording of Planning Practice Guidance the Council sought up to 30% affordable housing provision on suitable sites. The justification for the Council's approach being that it had an up to date development plan. Therefore, the Council's argument relies on the provisions of Section 38(6) of the Planning and Compulsory Purchase Act 2004. However, Section 38(6) is quite clear that whilst the determination of planning applications must be made in accordance with the development plan, this approach is conditioned by '*..unless other material considerations indicate otherwise..*'. WMS are a material planning consideration that should carry substantial weight. It is reasonable for the appellant to have expected the Council to take account of the WMS in determining the application. It did not do so and, despite arguments put forward in its case I consider that the Council acted unreasonably in this regard.
9. It is my understanding that in November 2016, after the decision had been made to refuse the planning application, the Council decided to implement the WMS and associated PPG and to take a different approach to affordable housing in the light of appeal decisions nationally. I agree that the decision-maker is entitled to take a different stance in recognition of specific circumstances, but in this case I have seen insufficient justification for the Council's decision to

change its position and it is unclear why the Council did not afford greater weight to the WMS sooner. Therefore, whilst I consider that the appellant may not have been put to a large amount of additional expense in dealing with the Council's changed position, extra costs were incurred and an award in these specific respects is justified.

10. The Council's appeal statement clearly changes its position with respect to biodiversity and in view of this considers that the proposal does not accord with the requirements of Policy ENV4 of the Cheshire West and Chester Local Plan (Part One) with respect to the ecological impact. The Council accepts that an assessment of the three European Protected Species tests was only undertaken as part of the appeal process and not during the planning application stage as it should have been. Had it done so it would have constituted a second reason for refusal in the original decision, rather than an additional issue to be dealt with as part of the current appeal.
11. Therefore although I agree with the Council's position it is quite clear that its concerns regarding biodiversity should have been identified earlier. I consider that the Council has behaved unreasonably in this case. Again, the appellant may not have been put to a large amount of expense in dealing with the Council's position; however, extra costs were incurred and an award in this respect is justified.

Conclusion

12. I therefore find that unreasonable behaviour by the Council, resulting in unnecessary and wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs is justified.

Costs Order

13. In exercise of the powers under section 205(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 Cheshire West & Chester Council shall pay to Mr Peter and Mrs Mary Lightfoot of JH Lightfoot and Sons, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in arguing against the Council with respect to the additional works which were unanticipated at the outset of the appeal process concerning the provision of affordable housing and the effect on biodiversity.
14. The applicant is now invited to submit to Cheshire West & Chester 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for detailed assessment by the Senior Courts Costs Office is enclosed.

Alastair Phillips

INSPECTOR