
Costs Decision

Site visit made on 25 July 2017

by Robert Mellor BSc DipTRP DipDesBEnv DMS MRICS MRTPI

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

Decision date: 29th August 2017

Costs application in relation to Appeal Ref: APP/B1930/W/17/3171063 Grasshoppers Nursery, 20 York Road, St Albans AL1 4PL

- 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 Childbase Partnership Ltd for a full or partial award of costs against St Albans City & District Council.
 - The appeal was against the refusal of the Council to grant planning permission for: 'Single storey side, first floor side and two storey rear extension and demolition of garage to create additional parking'.
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DECISION

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

PROCEDURAL MATTERS

2. The applicant made a first application for an award of costs in a statement from Hives Associates Ltd that accompanied the appeal submission in March 2017 (the Hives statement). This was supplemented by a further application made by Anthony Crean QC on the applicant's behalf in July 2017 (the Crean statement).
3. The Council responded to the Hives statement in a letter dated 2 June 2017 and there was a response to that letter from Hives on 12 June 2017. The Council responded to the Crean statement by a letter dated 25 July 2017.
4. This decision addresses both parts of the application.

The Case for Childbase Partnership Ltd

The Hives Statement

5. The Hives statement first recites events which preceded the subject planning application and seeks recompense for expenses incurred by the Applicant in relation to previous planning applications and enforcement action.
6. The Hives statement then claims 'in the light of the Planning Policy context' that the Council acted unreasonably by providing subjective grounds for the refusal of both the subject application and a previous application. The Applicant considers that the Council are unreasonably being over-sympathetic to the subjective concerns of neighbours. The Applicant is seeking the costs of professional fees, of advice from Queens Counsel in relation to a breach of planning control and the statutory fees which I take to relate to be the costs of making one or more of the planning applications.

7. In its response to the Council's costs rebuttal letter Hives clarified their view that the Council's highways reason for refusal was made on subjective grounds because there was no highway authority objection. The traffic statement and the noise assessment were submitted by the Appellant at the appeal stage after these matters had been raised in the reasons for refusal.

The Crean Statement

8. The Crean statement refers to national Planning Practice Guidance (PPG) concerning the award of costs in planning appeals. The statement alleges 3 instances of unreasonable substantive behaviour and 2 instances of unreasonable procedural behaviour.

Substantive Behaviour

9. The Council is said to have failed to produce evidence to substantiate each reason for refusal. In particular the highways reason for refusal is said to relate to a different scheme for intensification of the use that is not relevant to the appeal. Also there is said to be a lack of evidence to corroborate the reason that there would be harm to the amenities of neighbours.
10. Secondly, in relation to noise evidence, the Council is said to have misapplied case law by seeking incorrectly to use the Wheatcroft principles to turn away noise evidence submitted by the Appellant at the appeal stage.
11. Thirdly when there was no substantive evidence to support the reasons for refusal in relation to amenity and highways matters the Council failed to review its case in these respects.

Procedural Behaviour

12. The Council is said to have unreasonably introduced new issues '*at the determination of the appeal*' [sic] that were not in contention, specifically the noise reason, and then to have unreasonably sought to preclude the Appellant's noise evidence which would have resolved that concern.
13. Secondly the Council had unreasonably failed to respond to or agree a statement of common ground, contrary to published guidance.
14. The Applicant is seeking either a full award of the costs of the appeal or a partial award of costs in relation to the Council maintaining reasons for refusal 2 (amenity) and 3 (highways).

The Case for St Albans City and District Council

Rebuttal of Hives statement

15. In their rebuttal of the Hives statement the Council rejects the claim in respect of the costs of historical actions and decisions that preceded the appeal. It points out that the legal costs and statutory fees referred to in the application were not part of the appeal expenses.
16. In relation to the allegation that the Council had been unreasonably subjective the Council refutes this with reference to parts of the officer report. The Council considers that its reasons for refusal were objective. The Council notes that the Applicant's Traffic Statement was only received after the refusal and therefore could not have been taken into account in the decision. Neither had

the Applicant submitted technical evidence in support of the extraction and ventilation system before the application was determined or at the appeal stage.

Rebuttal of Crean statement

17. The Council refutes the claim that it did not substantiate the highways reason for refusal and states that there was no highway authority objection because no highway works were proposed. Neither did the Appellant submit a Transport Statement at the application stage as claimed. Parking is said to be a matter for the planning authority to assess. The Council considers that it was entitled to consider additional pupil and staff numbers owing to the *'inevitable difficulty of resisting attempts to increase child numbers once the extensions have been constructed.'*
18. In relation to outlook from the neighbouring property the Council has submitted evidence in relation to the impact of the scale of the extension notwithstanding the undisputed compliance with the 45 degree rule.
19. In relation to noise, smells and vibration, the Council contends that it was for the Appellant to demonstrate there would be no harm rather than for the Council to demonstrate that there would be harm. The Appellant had submitted no evidence in relation to smells and vibration and the noise assessment had only concluded that the new fixed plant was unlikely to result in an adverse impact on residents.
20. In the Council's view the presentation of such additional noise evidence at the appeal stage meant that the proposal differed from that which was before the Council when it determined the application. The Council did not seek to prevent the inclusion of noise evidence and had responded to it.
21. The Council considers that it has substantiated its reasons and that there was no need to review its case further.
22. The Council did not introduce new issues that were not previously in contention. The Council had raised similar concerns in its refusal of the previous application which the Appellant had not addressed until the appeal stage.
23. A statement of common ground was not needed for the written representations procedure.
24. Overall the Council considers that it has behaved reasonably in the determination of the application and in its approach to the appeal and the Inspector is requested to dismiss the application.

Reasons

25. A costs award may be made where the application is timely and where a person applying was put to unnecessary or wasted expense in the appeal and this was because of the unreasonable behaviour of the other party.
26. In relation to the Hives statement, expenses incurred prior to the determination of the subject planning application or in relation to other planning applications or matters do not qualify as unnecessary or wasted expense in this appeal.

27. Planning decisions often require subjective judgements, especially in relation to matters of character and appearance and of amenity. This is clear in the wording of relevant planning policies.
28. In this case the decision making required a combination of objective and subjective judgements. It was not unreasonable for the Council to reach similar judgements on matters to those made by local residents. However it remained necessary for the Council to adequately substantiate its reasons at the appeal stage. In my decision on the appeal I have concluded that the impact on the character and appearance of the building and the conservation area would be adverse and contrary to the development plan. The appeal would likely have been dismissed for that reason alone in which case most of the same expenses would have been incurred. The Council acted reasonably in relation to that issue and there is no basis for a full award of costs. I address matters relating to the other reasons for refusal below.
29. I turn next to the Crean statement and the Council's response.

Procedural Matters

30. As the appeal was dealt with by the written representations procedure there was no need for the parties to agree a Statement of Common Ground. The Council did not act unreasonably in failing to respond to the draft statement.
31. The Council did not act unreasonably in including a noise issue in the reasons for refusing the application. Noise, vibration and smells due to the position of the extraction and ventilation system were reasons for refusal of the previous scheme for a similar development. They had not been addressed in evidence submitted by the Applicant prior to the determination of the subject planning application.
32. The Council did misapply the Wheatcroft principles when addressing the noise assessment which the Appellant submitted with the appeal. That assessment did not alter the submitted scheme but rather provided evidence to support the submitted scheme and to respond to the reason for refusal. There was an opportunity for interested persons to inspect the appeal papers (to which their attention was drawn) and which included the noise assessment and to comment on them. The conclusion of the noise assessment that noise was 'unlikely' to harm the living conditions of neighbours did not amount to evidence that there would be harm and the Council submitted no contrary evidence. In those circumstances it was unreasonable for the Council to maintain this reason for refusal and to seek to give very little weight to the Appellant's evidence. However the appeal would have proceeded in any event and this did not cause the Applicant material additional expense.
33. In relation to other impacts on the amenity of neighbours the Council explained its position on the effect on outlook from No 19. Whilst I do not agree that this would be unacceptably harmful the Council was not unreasonable in including harm to outlook in its reasons for refusal.
34. The Council did not substantiate its reason for refusal in relation to vibration and smells and was not clear as to how the neighbour would be affected. That was unreasonable. However, as the Appellant also omitted to present any substantive evidence on this point this did not cause unnecessary expense.

35. Turning to the highways issue the lack of a highway authority objection need not prevent a planning authority from reaching its own judgement on the traffic and parking impacts, especially in relation on residential amenity. However these need to be substantiated. The subject nursery has always had far fewer off-street parking spaces than the (maximum) standard sought by the Council's standards but that has been accepted by the Council when previous relevant applications on the site have been determined, including the recently permitted increase in children numbers.
36. The subject application did include a proposed increase in staff numbers which could be expected to have some effect on the demand for on-street parking space. In the event I have concluded that this would be suitably addressed by the modest increase in on-site provision, even after allowing for the impracticality of providing all of the parking spaces indicated by the Appellant and after addressing the need to consider cycle parking provision.
37. There was understandable concern in representations from local residents about the significant expansion of the numbers of children at the nursery which had already occurred through the Appellant's contravention of the original planning condition. That expansion would already have had a direct effect on the number of vehicle movements associated with the use of the property. It is clear that the 3rd reason for refusal was based on an assumed further increase in the numbers of children attending the nursery even though this was explicitly denied in the Applicant's Planning statement. However the Council has already permitted a variation of the relevant planning condition (subject to a Green Travel Plan) to allow up to 57 children to be on the premises and no further expansion of pupil numbers is sought in the subject proposal.
38. In these circumstances it was unreasonable for the Council to assume that a further increase in children numbers could not be prevented and to judge the impacts of the development on that basis. The variation of the planning condition to limit numbers should not have been permitted if the Council believed it to be unenforceable. Had the application been permitted attention should have been concentrated on how to monitor that condition to ensure compliance.
39. This unreasonable behaviour caused the Applicant the unnecessary expense of preparing and submitting the Transport Statement in March 2017 together with the unnecessary expense of preparing that part of the Crean costs application statement that relates directly to highways matters.

Costs Order

40. 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 St Albans City and District Council shall pay to Childbase Partnership Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in preparing and submitting the Transport Statement in March 2017 together with the unnecessary expense of preparing that part of the Crean costs application statement that relates directly to highways matters; such costs to be assessed in the Senior Courts Costs Office if not agreed.

41. The applicant is now invited to submit to St Albans City and District 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.

Robert Mellor

INSPECTOR