The Planning Inspectorate

Costs Decision

Hearing Held on 23 November 2017

Site visit made on 23 November 2017

by J Wilde C Eng MICE

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

Decision date: 20 December 2017

Costs application in relation to Appeal Ref: APP/D0840/W/17/3175637 Rosslyn, 110 Kimberley Park Road, Falmouth, Cornwall TR11 2JJ

- 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 J Wells (Studious Building (Falmouth) Ltd) for a full award of costs against Cornwall Council.
- The hearing was in connection with an appeal against the refusal of planning permission for redevelopment of the former Rosslyn Hotel site for 128 managed bed spaces, ancillary accommodation and associated works, landscaping and vehicular access.

Decision

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

The submissions for Mr J Wells (Studious Building (Falmouth) Ltd

Procedural unreasonable behaviour

2. The Council's first reason for refusal was very lengthy and incorporated a considerable number of issues. Some of these issues were not identified by the case officer and were only introduced at the end of the determination process.

3. During the application process the Council had encouraged the appellant to amend and refine the proposed scheme in order to make it acceptable to the Council. This resulted in a reduction in the number of bed spaces and a communication from the case officer indicating that in their opinion the development was acceptable in planning terms and that they intended to recommend to committee that planning permission be granted. This was confirmed in an email dated 6 December 2016.

4. The appellant therefore worked closely with the Council, and took heed of comments made by the Cornwall Design Review Panel whilst developing the scheme. They also agreed to multiple extensions of time, some of which were necessary for the appellant to produce extra information and some of which were requested by the Council. In the end the case officer changed their mind and decided to refuse the application under delegated authority. This was due, in the main, to the number of objections received, and was a political and not a planning decision.

5. The Delegated authority route was taken in order for the Council to allow its lawyers time to devise reasons for refusal in an attempt to justify their decision. This also deprived the appellant of the opportunity to present their

case to the planning committee. The Council have deliberately delayed determination of the planning application in order to allow the draft Development plan document (DPD) to progress.

6. The Council's second reason for refusal refers to required planning obligations. These could have been secured by the Council entering into a Section 106 legal agreement with the appellant, which the appellant offered to negotiate, during the application process and did not need to constitute a reason for refusal.

7. The Council have therefore acted unreasonably in adopting a procedure which gave the appellant clear assurances about the acceptability of the proposed scheme during the application stage and informing the appellant that they would receive approval before changing their mind and introducing new reasons for refusal at a late stage. The Council have not therefore acted positively or proactively in determining the planning application.

Substantive unreasonable behaviour

8. There are no merits behind the Council's two reasons for refusal. The first reason for refusal relies on a draft DPD which is only emerging policy and should not therefore be attributed any weight as it is an early stage. The draft DPD is also the subject of a judicial review claim which has not yet been determined. The Council were asked to withdraw the first reason for refusal in light of this claim but refused to do so.

9. Nor is it necessary, as claimed by the Council in this reason for refusal that the application site needs to be allocated under a local plan to receive planning permission. Furthermore the reason for refusal refers to the scale of the proposed development, but this is not mentioned within the delegated report at all. In fact the case officer had indicated that the scale was satisfactory.

10. The reason for refusal also refers to a lack of effective control on adjacent amenity. However, the delegated report concludes that there would be no adverse impact in terms of overlooking, overshadowing or visual impact. Any potential problems from noise and anti-social behaviour from students have not been justified by reference to any substantive evidence.

11. The claim by the Council that granting planning permission would prejudice the Neighbourhood Plan (NP) process in Falmouth in terms of prematurity is clearly unfounded when considered against the relevant criteria in the Planning Practice Guidance.

12. In summary, the Council has sought to prevent or delay a development which should clearly have been permitted. The Council has also failed to produce any evidence to substantiate its two reasons for refusal. These actions constitute unreasonable behaviour.

The response by Cornwall Council

13. The first reason for refusal was not drafted by lawyers and was not a last ditch attempt to justify refusal of the application. It is a perfectly valid reason for refusal.

14. The progress of the NP and the DPD is set out in the case officer's report and the Council's appeal submissions. Planning decisions are made on the situation on the day that they are determined and on 29 March 2017 when the

application was refused, the DPD was at the preferred options stage and the NP was undergoing changes as a result of completing its December 2016 consultation.

15. The email of 6 December 2016 notes that at officer level the Council were supportive of the scheme but also draws attention to the issues surrounding student accommodation and advises that feedback will be provided once received. There was also an email sent by the case officer on 19 December 2016 that confirmed that the application would not be considered until the Council's student accommodation strategy within the DPD had been considered by the Planning Policy Advisory Committee. A further email (28 February 2017) sent by the case officer confirmed that the Council's strategy in the emerging DPD did not support ad-hoc student accommodation within the towns.

16. It is not therefore correct to say that that the NP and DPD were not identified by the Council during the determination process. Furthermore the manner in which applications are processed is a matter for the Council, and the appellant was kept informed of the progress of the application at all times.

17. The scale of the proposed development is so substantial that it would prejudice the Council's strategy for student accommodation, and this information was conveyed to the appellant before determination of the application.

18. Any requests for an extension of time were not to allow the DPD to progress, and the appellant could have lodged an appeal against non-determination if they were concerned over the delays. The Council do not therefore accept that the appellant has demonstrated unreasonable behaviour on procedural grounds.

19. In respect of the second reason for refusal, the Council did not have a completed Section 106 agreement before them at the time that the determination was made.

20. As regards the DPD and the NP, the weight to be given to them is a matter of planning judgement. As to the scale of the proposed development, the appellant has misunderstood the meaning of this is the reason for refusal. Furthermore, the Council raise no issue with overlooking, overshadowing or visual impact in their reasons for refusal. This is a misunderstanding by the appellant.

21. The Council have produced evidence to show why the development should not be permitted and have not prevented, inhibited or delayed development which could have reasonably been permitted. The proposed development is not in accordance with the development plan, and this has been demonstrated by a logical and reasoned justification.

Reasons

22. I have considered this application for costs in the light of the Planning Practice Guidance (PPG). This 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 are required to behave reasonably in relation to both of

these elements and provides examples of unreasonable behaviour for both elements[1]. I will deal firstly with the matter of procedural behaviour.

Procedural behaviour

23. The application was lodged with the Council on 19 April 2016, validated by the Council on 20 May 2016 and determined by the Council on 29 March 2017. It therefore took nearly a year for the Council to deal with the application. During this time there was a great deal of correspondence between the two parties, with the appellant making several significant changes to the design of the proposed building, and submitting further evidence when requested to do so.

24. The email from the Council dated 6 December 2016 states that the application will be put to the Planning Committee on 16 January with a recommendation to approve. The email makes clear that *at officer level we are supportive of the amendments you have put forward*. There are caveats attached to the email, but these do not relate to planning matters, with the main one referring to *the political sensitivities that surround student accommodation*.

25. On the 29 March the application was refused by the Head of Planning under delegated powers without going to committee. The first reason for refusal is very lengthy and brings in such things as scale, amenity and prejudice to the emerging plans. It is not at all clear from the references to scale and amenity exactly what the Council's concerns are, and I tend to agree with the appellant that at that stage, without further clarification, which came in the Council's statement, scale could easily have been deemed to be the size and mass of the proposed building.

26. None of these factors are mentioned in the email of 6 December, and from the reference to *political sensitivities* in the email, it could very well be construed that that was the reason for the about turn by the Council The Council have therefore changed the way of reaching a decision from that indicated to the appellant and have also given reasons that have come out of the blue as far as the appellant is concerned. This is after nearly a year when they have requested a series of extensions and in doing so failed to reach a decision in the timescales laid down.

27. The PPG makes clear that costs cannot be claimed for the period during the determination of a planning application, but goes on to state that behaviour and actions at the time of the planning application can be taken into account in the Inspector's consideration of whether or not costs should be awarded. In light of my findings above I consider that the Council have acted unreasonably in their determination of the application and in so doing have made the appeal necessary. For the Council to suggest that the appellant could have appealed for non-determination earlier in the process is to my mind somewhat disingenuous.

Substantive behaviour

28. The Council's first reason for refusal was, as I have already stated, very lengthy. The major strands of this reason were amenity, in terms of noise and

[1] Paragraph: 047 Reference ID: 16-047-20140306 and Paragraph: 049 Reference ID: 16-049-20140306

disturbance to local residents, the scale of the development in terms of the number of bed spaces and prejudice to the plan lead system. I will deal with these in turn.

29. As regards noise and disturbance, the appellant produced substantive evidence in the form of noise reports and management arrangements to show that the occupiers of the proposed development would not cause undue noise and disturbance. The Council's main argument at the Hearing related to noise and disturbance produced by occupiers of the proposed development outside of the actual development. To this end the Council provided very little evidence. The Council's argument relating to scale was in effect a re-run of the noise and disturbance argument, and the Council's own Environmental Health Officer had concluded, on the matter of noise and disturbance, that *while I believe that the concerns are justified there remains the possibility that there may be little or no impact due to this issue*.

30. In respect of prejudice to the plan lead system I acknowledge that the Council did provide some evidence relating to this, although I have found differently. I do note however that none of these matters appeared in the Council's email of 6 December 2016, and had the application been determined within allotted timescales the emerging plans would have been at a far earlier stage. Furthermore, the Council continued with this strand of argument after the issuing of the decision relating to the Ocean Bowl student accommodation[2] in which the Inspector concluded that little weight could be given to the emerging plans.

31. The second reason for refusal related to the absence of a Section 106 agreement to ensure the payment of contributions. The appellant maintains that the Council were requested to enter into such an agreement during the prolonged application process. Whilst I have no definitive proof of this it does seem to me that the Council, by asking for amendments to the proposed scheme, were indicating that there was a good probability that the scheme would eventually be viewed in a positive light. There was also easily enough time for an agreement to be drafted and agreed. Equally, the appellant could have provided a Unilateral Undertaking. Overall on this matter, from the facts before me, I am not persuaded that the Council have acted unreasonably.

Conclusion

32. I have found that the Council has acted unreasonably in the way that it has determined the application and has provided no substantive evidence to back up their reason for refusal relating to noise and disturbance. Furthermore the Council continued with a prematurity argument after an appeal decision had concluded that little weight could be given to emerging plans.

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

Costs Order

34. 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

[2] APP/D0840/W/3182360

Cornwall Council shall pay to Mr J Wells (Studious Building (Falmouth) Ltd), the costs of the appeal proceedings described in the heading of this decision such costs to be assessed in the Senior Courts Costs Office if not agreed.

35. The applicant is now invited to submit to Cornwall 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.

John Wilde

INSPECTOR