The Planning Inspectorate

Costs Decisions

Inquiry Held on 14-15 May 2019
Site visit made on 15 May 2019

by David Reed BSc DipTP DMS MRTPI

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

Decision date: 25th June 2019

Costs application in relation to Appeal A Ref: APP/M3645/W/18/3198090
17 Copthone Road, Felbridge, East Grinstead RH19 2NR

- 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 Andy Morehen, Abbey Developments Ltd for a full award of costs against Tandridge District Council.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for an access road from Copthorne Road to serve permitted residential development within Mid Sussex District.

Costs application in relation to Appeal B Ref: APP/M3645/W/18/3205537
15 and 39 Crawley Down Road, Felbridge, East Grinstead RH19 2PP

- 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 Wates Developments Ltd for a full award of costs against Tandridge District Council.
- The inquiry was in connection with an appeal against the refusal of outline planning permission for the demolition of the existing buildings at Nos 15 and 39 Crawley Down Road and the erection of 63 dwellings with associated new access.

Decision

1. Both applications for a full award of costs are allowed in the terms set out below.

The submissions for the two appellants

2. The applications of both Abbey Developments Ltd (Appeal A) and Wates Developments Ltd (Appeal B) were made verbally at the inquiry but written copies of these applications were also provided.

The response by Tandridge District Council

3. The response of Tandridge District Council to both applications was made verbally at the inquiry but a written copy of the response was also provided.

Reasons

4. Planning Practice Guidance advises that, irrespective of the outcome of an appeal, costs may only 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.

5. In the case of Appeal A, the appellant argues that the Council delayed making a decision without good reason, in particular after the highway authority had reached a firm recommendation, and this forced the appellant to appeal against non-determination after 15 months. In both cases the appellants argue the Council had no reasonable basis for its primary reason for refusal[1] which was contrary to the advice of its officers, had no professional advice at the time to support that reason, failed to properly apply NPPF paragraph 109, failed to carry out any planning balance, failed to take account of the Hill Place Farm decision, failed to provide adequate proofs of evidence to make a respectable case, withdrew its opposition to the appeals just one working day before the inquiry and ultimately offered no evidence to justify its refusals.

6. The Council, acting in its role as local planning authority, should not unduly delay decision making but in any particular case it is difficult to pinpoint the moment when delay becomes unreasonable. In the case of Appeal A the highway authority made its final comments by December 2017 after which it would appear the application could have been determined. In any event, the right of appeal against non-determination is the appropriate remedy for excessive delay, after which the Council may be liable for costs.

7. The Council is not bound to accept the advice of its officers providing there are good grounds for taking a contrary decision and evidence is produced at appeal to substantiate the reason(s) for refusal. To take a decision against officer advice is not therefore unreasonable in itself.

8. To agree a reason for refusal without first obtaining professional advice that it can be substantiated is unwise rather than unreasonable as it runs the risk that it may not prove supportable in due course and this may lead to an award of costs. In these cases the Council took that risk on 26 April 2018 when the schemes were refused on highway grounds without expert advice. In the light of difficulties securing professional support the Council was recommended to withdraw the reasons for refusal on 25 July 2018 but it was resolved to proceed unless a consultant that had been identified advised that the Council did not have a defendable case. In the event further surveys were carried out and a proof of evidence produced but this was not presented at the inquiry.

9. Be that as it may, it is unreasonable behaviour when, as here, the Council chooses to pursue an appeal that has no realistic prospect of success and subsequently withdraws its opposition at the last minute.

10. The Council's written statement for Appeal A (when it was initially being dealt with by written representations) reveals two fundamental errors which it should have known made its decision to refuse the application unsupportable (and by extension also its refusal of Appeal B).

11. The first is the statement that 'it is not sufficient for a development to simply mitigate it's impact on the highway network when the network is already at or over capacity, instead the test is the development should not be permitted unless effective measures are taken to relieve or counter the existing overloading of the highway network'. This is simply wrong, and an incorrect interpretation of both Policy DP5 of the Tandridge Local Plan Part Two 2014 and the severe residual cumulative impact test now in paragraph 109 of the

[1] In the case of Appeal B, one reason for refusal relating to residential amenity was withdrawn well before the inquiry but this is not the subject of any complaint.

National Planning Policy Framework. The Council's proof of evidence for the inquiry maintained this mistaken approach, claiming that current traffic conditions were severe so any extra traffic would be unacceptable. No assessment was made of the impact of the additional traffic on current traffic conditions which is the test required by policy.

12. The second fundamental flaw was the failure to recognise that any impact on the highway network, even a severe one, should be balanced against the benefits of the proposal. Whilst there was a comment that the loss of the site would not render Mid Sussex unable to meet its housing commitments, there was no assessment of the positive benefits of the proposal and no balancing exercise undertaken. Subsequently, the proof of evidence only referred to highway issues. The Council failed to provide any planning evidence to the inquiry and consequently had no basis on which to undertake the necessary planning balance.

13. It was unreasonable for the Council to pursue such a fundamentally flawed case that had no realistic prospect of success.

14. In relation to the Hill Place Farm decision, it was not unreasonable to consider a different approach to traffic light queues as that case related to queuing on the A22 through East Grinstead which can be distinguished from that on the A264 through Felbridge. However, it was unreasonable not to take into account the improvement to the A264/A22 junction which would be delivered as part of that development and result in a significant reduction in delays.

15. The length and detail of the Council's proof is not evidence in itself of unreasonable behaviour, a respectable case may be both short and simple.

16. The Council's argument in defending the prosecution of these appeals was that the cases were of great concern locally and it was only when the appellant's detailed proofs of evidence were submitted on 16 April 2019 that the strength of the appellants' cases became clear. However, both appellants submitted detailed transport statements with their applications which together with subsequent iterations were thoroughly assessed over many months by Surrey County Council as highway authority. In both cases clear advice was provided that any traffic impacts would not be severe and there was no highway reason to withhold permission. The appeal statements in both cases also set out the appellants' evidence and arguments in full. Although the appellants' proofs contained further, updated evidence this did not change the two cases in any substantive way and did not justify the late change of position of the Council. The email sent at 4.48 pm on Friday 10 May – well after 16 April and only one working day before the inquiry opened – contained no explanation other than the Council had carefully reviewed the appellant's evidence. This should have been done at application stage or at the outset of the appeal process.

17. The Council's other arguments relate to the quantum of any costs award but this is not a matter for me. I make no comments on the strength of these arguments.

18. In essence, in the face of clear officer advice, the Council pursued two appeals that had no realistic prospects of success. The Council delayed development which should clearly have been permitted, misapplied policy, failed to carry out a planning balance, failed to keep the cases under review until the last minute and failed to present any evidence to substantiate the reasons for refusal at the

inquiry. The appellants therefore had no option but to pursue their appeals to an unnecessary inquiry, incurring wasted expense in doing so.

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

Costs Order

20. 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 Tandridge District Council shall pay to Abbey Developments Ltd and Wates Developments Ltd the costs of the respective appeal proceedings described in the heading of this decision.

21. In the case of Abbey Developments Ltd the appeal proceedings commenced on 15 March 2018, the date the appeal against non-determination was lodged, and in the case of Wates Development Ltd the appeal proceedings commenced on 27 April 2018, the date the application was refused.

22. The two applicants are now invited to submit to Tandridge 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 respective amounts.

David Reed

INSPECTOR