



Costs Decision

Hearing Held on 23 July 2019

Site visit made on 23 July 2019

by Philip Major BA(Hons) DipTP MRTPI

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

Decision date: 02 August 2019

Costs application in relation to Appeal Ref: APP/P2365/W/18/3214555 Riverside Caravan Park, Southport New Road, Southport, PR9 8DF

- 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 Harrison Leisure Ltd for a full award of costs against West Lancashire Borough Council.
 - The hearing 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 the demolition of existing buildings and erection of new shops and on-site leisure facilities.
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Decision

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

The submissions for Harrison Leisure Ltd

The main points are:

2. The application is made pursuant to Planning Policy Guidance as set out in writing prior to the hearing.
3. The legal opinion provided before the hearing is the correct and sets out the basis on which the appeal should be determined. However, this has been ignored by the Council which has not addressed the fallback position and potential for lawful permitted development changes at the site, which change the approach to policy and sequential testing. In reaching a decision a balance is necessary, but the Council has elevated the element of policy relating to sequential testing above all others without taking into account proportionality or the making of an exception to policy.
4. In relation to the matter of the delay in dealing with the application it is hard to accept that a proposal of this nature would not trigger an automatic referral to the policy team. It is more likely that the referral was forgotten and not deliberate delay as the suggested changes to the scheme were minor and would not greatly affect the overall floorspace. If such a minor change would be capable of altering the Council's judgement on whether the proposal was small scale in itself it only emphasises the pedantic nature of the Council's approach.
5. Because the scheme must be close to being small scale in retail terms in the Council's judgement, and with the added fallback and permitted development

situation, and bearing in mind the Green Belt location and character of user behaviour at the site, it is clear that a retail sequential test would not apply here. But even if a sequential test was necessary it is apparent that an exception would be warranted on the grounds of proportionality. The Council has made no attempt to grapple with that concept.

6. The Council has provided scant evidence of any concerns regarding out of town competition. The only evidence is that the site is used principally by site residents. There is no realistic competition at all. The fears of the Council are speculative and there is nothing to show that the concern is justified.
7. The Council suggest that further engagement might have resolved the issue, but this is not borne out by the actions of the Council officers. They have not produced the legal advice which was reported as being received. The process of seeking planning permission cannot be endless and the Council approach was to seek more and more information and testing.
8. The Council has not engaged appropriately and has dodged the question of sustainability. Development plan Policy GN5 does not add anything and does not presume against development here. The Council has acted in a disproportionate and unreasonable manner leading to the appeal.
9. There have been no substantive objections to the scheme on flood risk and the Appellant was unaware of the Council's concern until the appeal stage. The Council has again taken a pedantic approach in this regard, which has necessitated the attendance of a specialist on behalf of the Appellant.
10. The Council has not been seen to be problem solving and would not have wanted this development to be anywhere else, and it is not realistic to suggest that it would have been better elsewhere. The Council has used a tick box exercise.
11. A full award of costs is justified, or in the alternative a partial award is sought.

The response by West Lancashire Borough Council

The main points are:

12. The costs response is partially in writing. The Council has tried throughout the process to adopt a problem solving approach and to provide time for the requested information to be collected and submitted, including extensions of time for determination of the application. The opportunity was also given for the application to be withdrawn and negotiations to be continued under the pre-application procedure of the Council. At no point did the Council indicate that the application would be refused.
13. The Council can show that there have been substantive reasons for not reaching a decision within the relevant time limit, including time extensions agreed by the Appellant followed by fruitless engagement with the Appellant.
14. There was insufficient information to enable the Council to determine the application within the relevant period. The Council is able to require a more sensible and uniform approach, including the consideration of a wider area. Proper assessments were required to enable the Council to make a policy backed decision. A retail sequential test is appropriate in accordance with

paragraph 86 of the National Planning Policy Framework (NPPF) and this must be accepted by the Appellant who submitted a sequential test.

15. The Council is simply indicating that it did not have sufficient information to determine the application and not that there were sequentially preferable sites. The answer would only be apparent after extended testing.
16. The non-determination route to a decision was not the only option – there was continued engagement and the Council felt there was movement towards a position where the application could have been determined. The Council acted in line with its published protocol, procedures and policies. It has acted reasonably at all times, including providing advice and in considering the application. The delay in decision making was justified, particularly as the appeal scheme has not been the subject of pre-application advice as recommended by the NPPF.

Reasons

17. Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.
18. It is clear from the PPG that a local planning authority might be at risk of an award of costs if it fails to determine an application without a proper explanation. In this case I am mindful of the substantial period which elapsed from submitting the application, to validation following the receipt of further information. There was a further delay following validation when the applicant indicated that the details of the scheme were being altered. Taken in the round it seems to me that much of the time expended resulted from the necessity or desire of the Appellant to provide more or different information. It does not appear to me that either party behaved in bad faith during that process, especially as communication was maintained and extensions to time limits were agreed.
19. I do have some concerns relating to the fact that the Council sought not to consult with policy colleagues until some months into the process, but can accept that this may have been an oversight rather than a deliberate delay. In any event what is crucial to this matter is whether the Council was unreasonable in seeking the information it did in relation to the retail sequential test.
20. Sequential testing is an important element of national policy in seeking to protect the vitality of town centres. However, in this case it must have been apparent that the primary focus of the proposals is to enhance the facilities for visitors to the holiday park. It seems illogical to envisage that such facilities should be located away from the park. In such circumstances the degree of detail required in a sequential test should surely be proportionate. I do not believe that the Council has been proportionate in this instance because it must have been obvious that, even allowing for a significant increase in retail floorspace, the customer base would come primarily from the holiday park.
21. Even so, there would be a valid concern that the proposed floorspace would increase competition and potentially weaken existing centres. It is essentially a matter of judgement as to what detail is required in a sequential test, but in

- this case I am satisfied that the Council operated in accordance with its own policy. Given that the delays to the application were occasioned by both parties I am not persuaded that the Council acted unreasonably in this case, despite that fact that I consider it was over-zealous in seeking such a comprehensive sequential test.
22. I also have concerns that the Council did not adequately address the fallback and permitted development issue. That said, it seems that not all of the floorspace to be demolished would benefit from permitted development rights to change to an alternative use. Likewise I have no definitive information relating to subdivision of the existing premises.
23. Taking these matters together I conclude that the Council has remained on the acceptable side of reasonable behaviour even though an element of criticism is justified in relation to its handling of the retail sequential test and the manner in which it considered the application. But neither side is blameless in relation to the time elapsed.
24. Turning to the matter of the sequential test for flood risk it was brought to my attention that the Appellant was unaware of the Council's concern until it received the response to the appeal. It is apparent that the relevant flood risk authorities had not raised objection to the proposed development subject to the imposition of appropriate conditions.
25. The essence of the Council's objection was that there was no formal sequential test, and no exceptions test. But that fails to recognise that none of the consulted experts took issue with the Appellant's submitted information. At least by implication it can be suggested that the sequential test information was contained within that information. The Council, in seeking a separate test, has gone beyond what is reasonable as the expense in preparing a formal sequential test would not have produced a different result.
26. In relation to the exceptions test the Council has acknowledged that part 2 is satisfied – that the development would be safe for its lifetime. Furthermore there has been no suggestion from the Council that there would be no benefit to the community from the proposed development. It is self-evident that there will be benefits.
27. In short, it is my judgement that the Council has been too zealous in suggesting that the lack of a formal sequential flood risk test in this case is material to the decision, given the lack of objection from the relevant authorities. There is acceptance of mitigation through the exceptions tests and there can be no doubt about the wider benefits of the development. The Council has been unreasonable in this respect and this has resulted in the Appellant incurring wasted costs relating to the attendance of an expert in flood risk matters at the hearing.
28. 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 partial award of costs is justified.

Costs Order

29. 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 West

Lancashire Borough Council shall pay to Harrison Leisure Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the attendance of the flood risk expert at the hearing; such costs to be assessed in the Senior Courts Costs Office if not agreed.

30. The applicant is now invited to submit to West Lancashire 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.

Philip Major

INSPECTOR