The Planning Inspectorate

Costs Decision

Hearing Held on 20 June 2019

Site visit made on 20 June 2019

by Andrew Dawe BSc(Hons) MSc MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 September 2019

Costs application in relation to Appeal Ref: APP/G3110/W/18/3213179
4 Lime Walk, Oxford OX3 7AE

- 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 Biggin Morrison Investments Ltd for a full award of costs against Oxford City Council.
- The hearing was in connection with an appeal against the refusal of planning permission for the demolition of vacant former MOT facility (Class B2) and the erection of 6no. flats (Use Class C3), associated landscaping and ancillary works.

Decision

1. The costs application is dismissed.

Procedural Matter

2. I have taken into account the Government's Planning Practice Guidance (PPG) in reaching my decision.

The submissions for Biggin Morrison Investments Ltd

3. The application for costs is made because of unreasonable behaviour in the context of both procedural and substantive matters relating to the Appeal. These are addressed in turn below.

Substantive

4. The planning application subject of the Appeal was determined prior to the introduction of the National Planning Policy Framework (NPPF) in July 2018. The NPPF introduced the Government's national planning policy that small development sites should not contribute to affordable housing contributions - see NPPF paragraph 63.

5. The Appeal was submitted to the Planning Inspectorate in October 2018 arguing that the site should not contribute to affordable housing owing to paragraph 63 of the NPPF. The City Council were aware of the Appellant's position regarding paragraph 63 upon submission of the Appeal because the Appellant's Statement of Case made a clear argument in this respect. The City Council were also fully aware of the Appellant's argument in this respect owing to the submission of a 'free go' planning application for the same development subject of this Appeal in September 2018. That free go planning application argued that the reason for refusal subject of this Appeal could not be maintained due to paragraph 63 of the NPPF.

6. A meeting was held between Officers of the City Council, the Appellant and their agents on the 22 November 2018. That meeting was to discuss the submitted Appeal and the 'free go' planning application. A letter submitted to the City Council following the meeting of the 22 November sets out clearly that, at the meeting, it was discussed with Officers paragraph 63 of the NPPF. It was confirmed at the meeting that the City Council's position with regards to paragraph 63 of the NPPF would be to effectively ignore it. It was made clear to the City Council at that meeting that should Officers accept that paragraph 63 of the NPPF to be a material consideration that outweighs adopted Local Plan policy (and therefore approve the free go application) then the Appellant would withdraw the submitted Appeal.

7. The above demonstrates that the City Council were fully aware of the Appellant's position with regards to paragraph 63 of the NPPF and was provided with the opportunity to approve a second 'free go' planning application and avoid the need to deal with this Appeal. That offer was not accepted by the City Council and the Appellant has needed to proceed with the Appeal – despite the overriding evidence that demonstrates that the City Council's policy position in respect of paragraph 63 is flawed.

8. The Appellant considers this to be unreasonable behaviour and has led to the additional cost of an Appeal that could have been avoided.

Procedural

9. The planning application subject of this Appeal was refused planning permission by Oxford City Council by way of its Decision Notice dated the 1 June 2018. The Decision Notice referenced only one reason for refusal relating to a lack of affordable housing contributions. The Appellant's Statement of Case submitted for this Appeal includes at Appendix 2 and 3 Proof's of evidence by Carter Jonas that addresses this reason for refusal.

10. In accordance with the City Council's adopted Development Plan (see paragraph A2.24 of the adopted Sites and Housing Plan 2011-2026 and Appendix 4 of the Sites and Housing Plan) an Applicant has the right to argue that an affordable housing contribution would render a site unviable. The Appellant proposed such an argument within the refused planning application through the submission of a Viability Appraisal prepared by Carter Jonas. Again, in accordance with the City Council's adopted Development Plan the Appellant has the right to appoint an independent viability consultant (through the City Council) to review and provide a professional view on the submitted viability assessment.

11. Carter Jonas have set out within their Proof of Evidence considerable frustrations in terms of the process for discussing viability that was undertaken with the City Council's appointed viability consultant (Chris White from White Land Strategies) during the determination of the refused planning application. This includes the considerable time it took to receive viability information from White Land Strategies during this process. It was this advice that was produced by White Land Strategies that was used by the City Council to inform and make their recommendation to refuse the planning application subject of this Appeal. Within the Council's Statement of Case (paragraph 5.33) they state that 'It was advised that the LPA could also get a third party to review the viability and if significant discussions were required, this should take place through pre-

application and the application stage was not an opportunity to have these discussions'.

12. This statement by the Council that the 'application stage was not the opportunity to have these discussions' shows their unwillingness to enter into meaningful dialogue with the Appellant and goes against the provision within the adopted Development Plan for applicants to enter into dialogue with the Council regarding viability matters during the application stage.

13. In respect of the Council's unreasonable behaviour in this matter the Appellant raises two significant concerns.

14. Firstly, the independent viability advice that informed the Council's decision to refuse planning permission was prepared by a consultant that was not a RICS Member (Royal Institute of Chartered Surveyors) or a RICS Registered Valuer – both of which are required by the Oxford City Council Affordable Housing SPD.

15. Secondly, the advice that was produced by White Land Strategies and informed the City Council's decision to refuse planning permission has not been submitted by the City Council to this Appeal. The Inspector in determining this Appeal has not been provided with the opportunity to review both the content and quality of the advice that was seen by the City Council and used as the basis to refuse planning permission.

16. It is completely unacceptable that the Appellant is in a position to defend this Appeal without the opportunity to highlight the deficiencies of the White Land Strategies assessment to the Inspector.

17. The email correspondence contained within the appendices to the Carter Jonas Proof of Evidence highlight the significant concerns that were raised in respect of the White Land Strategies assessment during its preparation – but this assessment has not been made available to the Inspector. It was ultimately this failing in process that led the Appellant to Appeal.

18. This procedural matter significantly compromises the Appellant's position with regards to this Appeal.

The response by Oxford City Council

19. Five points in response to the substantive matters relating to the appeal:

    i) As our written material explains the law allows local planning authorities (LPAs) to seek to justify an exception to national policy by putting forward evidence that an exception is justified on the facts of a particular case.

    ii) The decision letters that we have adduced show not only that that can reasonably be done by reference to national policy on affordable housing contributions for small sites but also that it has successfully been done in a number of cases both in Oxford and elsewhere including decisions post dating the change in the National Planning Policy Framework (the Framework).

    iii) It follows that there is nothing intrinsically unreasonable about Oxford City Council's (the Council) approach in this case.

iv) The Council has submitted substantial and we say persuasive evidence to demonstrate why local circumstances do justify an exception within its area. That evidence is of a type and quality that is at least reasonably capable of being accepted.

v) The Council has therefore put forward evidence to substantiate its reason for refusal in the light of the Framework and thus its position on the substantive merits is plainly not unreasonable.

20. Five points in response to the procedural matters relating to the appeal:

i) Policy HP4 puts the onus of proof squarely on the applicant to demonstrate that a policy compliant contribution would make the development unviable. It is not for the LPA to prove the opposite.

ii) As we have explained the LPA changed its advisor in this case in response to the appellant's encouragement. Given the role of its current advisor in dealing with viability in the emerging plan the change in any event had some natural logic to it. It was clearly not unreasonable in itself.

iii) The evidence that Mr Hayes has produced as a result of that change has shown two things. Firstly that the appellant's viability evidence has failed to discharge the onus of proof because it is flawed for the reasons he explains. Secondly it has shown that the development is viable and can make a contribution pursuant to HP4. Therefore, whatever the reasons may have been for the Council's previous advisor not reaching agreement with the appellant it makes no difference to whether the appellant would have to have produced viability evidence for this appeal and thus the costs associated with it.

iv) With regards to the final page of the costs application where complaint is made that the Council's previous advisor was not a RICS member – the response to that is we say the evidence that the Council has given in this appeal has been given by a member of the RICS. The qualifications of the Council's previous advisor are not material.

v) With regards to the second concern on the final page, the short answer to that is that I have been given the WLS advice and the appellant has been able to say what it will about that assessment to me. But the key issue is the evidence the Council has given not the merits of advice it no longer relies upon.

21. For those reasons we say there was no unreasonable procedural conduct and in any event it has not led to unnecessary costs being incurred.

Reasons

22. Notwithstanding my conclusions in the appeal decision, the Council in deciding the planning application and pursuing the appeal were acting reasonably in seeking to demonstrate that over-riding weight should be afforded to its Sites and Housing Plan policy HP4 in light of the affordable housing issues referred to. The presence of paragraph 63 of the National Planning Policy Framework is a material consideration which is weighed in the balance but does not mean that policy HP4 should be ignored despite the conflict between the two. The Council had legitimate cause to present a case in light of evidence that it has

produced including its Position Statement dated March 2017 relating to Exceptional Affordable Housing Need in Oxford. In coming to my conclusions, I also weighed up the various factors, including the proposal's benefits, albeit finding in this case that paragraph 63, together with those benefits, outweighs the proposal's conflict with policy HP4.

23. In respect of the appellant's frustrations in seeking viability information and advice from White Land Strategies during the application stage, the evidence of the subsequent new consultant was clearly providing updated evidence that was reasonable to rely upon instead, regardless as to the dispute between the parties in relation to viability.

24. In respect of the claim that the White Land Strategies consultant was not a RICS member or a RICS Registered Valuer, importantly the subsequent new consultant, whose evidence was ultimately that which was relied upon by the Council, is a member of the RICS.

25. Although the advice from White Land Strategies was not included in its appeal submissions initially, I have nevertheless had the benefit of seeing it, albeit upon request. Furthermore, it is clear that of late the Council has relied on updated evidence from a different consultant, which was included in the submissions.

Conclusion

26. For the above reasons, I find that the Council did not behave unreasonably either substantively or procedurally. As such, the appellant's costs in pursuing the appeal were not unnecessarily incurred or wasted. For these reasons, and having regard to all other matters raised, neither a full or partial award of costs is justified.

Andrew Dawe

INSPECTOR