



Costs Decision

Hearing Held on 3 September 2019

Site visit made on 3 September 2019

by Martin Chandler BSc MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 November 2019

Costs application in relation to Appeal Ref: APP/Z4718/W/19/3229696 Land off Carr Top Lane, Golcar, West Yorkshire HD7 4JB

- 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 Brierstone Carr Top Ltd for a full award of costs against Kirklees Metropolitan Borough Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for erection of 19 dwellings pursuant to outline permission 2015/90507 for outline application for residential development (within a conservation area).
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Decision

1. The application for an award of costs is refused.

The submissions

2. The costs application was submitted by the appellant in writing in advance of the hearing. The Council's response to the application was made orally.
3. In response, the appellant made some additional oral points and the details of these submissions are set out in the Annexe at the end of this decision.
4. Subsequent to the hearing, additional time was provided to the parties to enable the completion of a Section 106 agreement. This was not possible, and as a consequence, the appellant has requested that the activities after the hearing are also added to the costs application. For clarity, and to ensure that the two sections are distinct, the submissions will be dealt with separately in this decision.

Reasons

Original submission

5. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably, and that the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Awards can be based on either procedural or substantive matters.
6. In relation to procedural matters, the appellant considers that the Council failed to co-operate during the application process. To substantiate this claim, details are provided in relation to correspondence during the application. It is also suggested that it was not possible to track the progress of the application for

the first five weeks of the determination process. Whilst details of numerous emails have been provided, a perceived lack of correspondence does not automatically imply that the Council has acted unreasonably. Indeed, the Council consider that they did engage with the applicant in an appropriate manner and the applicant was advised of the likely decision in advance of the application being refused.

7. Whilst Councils are encouraged to proactively engage with developers during the application process, they are not obliged to. However, I note their willingness to conduct pre-application discussions for the proposal. Consequently, in my view, they did want to engage with the process. Moreover, based on the evidence before me, I am not satisfied that the Council acted in an obstructive manner or in a way that needlessly delayed the process. I therefore conclude that on this point, the Council has not acted unreasonably.
8. The appellant also refers to the production of the statement of common ground as an indication of procedurally unreasonable behaviour on behalf of the Council. Whilst work may have had to be re-prioritised by the appellant, I have no evidence before me in relation to the consequences or otherwise of this. Moreover, the statement was provided by the required deadline. Consequently, I am satisfied that unreasonable behaviour has not been demonstrated in relation to this matter.
9. The first reason for refusal relates to the effect of the proposal on the character and appearance of the conservation area (CA). Although the Council's Conservation and Design Officer did not provide a consultation response, based on the evidence before me, I am satisfied that the proposal was appropriately scrutinised. Furthermore, although the character area appraisal does not make explicit reference to the layout of buildings and their relationship with the contours of the CA, the Council have provided sufficient evidence to substantiate its concerns in this regard. I am therefore satisfied that the Council have not provided vague or inaccurate assertions in relation to the affect of the proposal on the CA. In addition, although reference has not been made to substantial or less than substantial harm, in accordance with the Framework, the decision has been suitably articulated through the appeal process.
10. The second reason of refusal is concerned with the financial viability of the proposal. As identified in the main decision, the Council did not accept the findings of its consultant in relation to the financial appraisal of the development. Despite this, the Framework is clear at paragraph 57 that the weight given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case. Although the latest viability evidence was not independently reviewed, and the figures in the 2 appraisals are different, the Council have articulated the reasons behind this decision. Based on these reasons, I am satisfied that even had the Council reviewed the second appraisal, they would not have arrived at a different conclusion. Consequently, whilst I have found the development to be unviable, I am satisfied that the Council gave appropriate weight to matters of viability and suitably articulated their conclusions.
11. Since granting outline planning permission, the Council has adopted a new local plan and the 2012 Framework has been superseded. These have brought with them more significant requirements in relation to biodiversity. Consequently, in

refusing planning permission, the Council referred to the need to provide a net gain in biodiversity rather than relying on the requirements of the outline consent. Within the evidence, the Council have identified the reasons behind this decision and I am satisfied that their reservations regarding the use of a condition have been substantiated.

12. The site currently has permission for the erection of 16 dwellings. However, that scheme originally proposed 19 units and was presented to the planning committee with a recommendation to approve. Despite the similarities of that original proposal with the appeal scheme, this development did not meet with similar officer approval. The Council state that officers are not beholden to assessments in respect of previous applications but regardless of the advice that has been given, the planning committee did not endorse the previous officer recommendation and the Council's decision relates to a development for 16 dwellings.
13. Whilst consistency in advice is important, I have no compelling evidence before me to suggest that the planning committee would have supported a 19 dwelling development on this occasion. Consequently, whilst the expectations of the appellant are understood, I am not satisfied that the behaviour of the Council has put the appellant to unnecessary cost in the submission of this appeal. Regardless of officer advice, the Council as decision maker have determined the 2 applications in a comparable manner.

Post hearing submission

14. Although time was given after the hearing specifically to enable the completion of the legal agreement, this was not possible. A draft agreement was presented to the Council but this brought with it concerns regarding the phasing of payments for the public open space contribution. In addition, the suggested plot numbers for the proposed affordable housing were amended which raised additional concerns.
15. The plot numbers for the affordable housing were originally common ground between the parties. Consequently, changing the plot numbers required the Council to revisit the matter in a short timeframe. In my view, the proposed amendments strayed beyond what was expected after the hearing. In addition, the affordable housing provision is a matter that should have been agreed in advance of the event. Therefore, raising additional matters after the hearing placed the Council in a difficult position. As a consequence, whilst I have found that the concerns in relation to the affordable housing do not have a policy basis, I am not satisfied that the behaviour of the Council amounts to unreasonable behaviour as described in the PPG.

Conclusion

16. For the reasons identified above, on both the procedural and substantive grounds advanced by the appellant, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated and that an award of costs is not justified.

Martin Chandler

INSPECTOR

Annexe: Submissions made orally at the Hearing

Council in response

1. The appellant has referred to 6 grounds of appeal with reference to the Planning Practice Guidance. The first point relates to lack of co-operation. What is set out at paragraphs 2.2 to 2.9 is not a complete account of the communication that went on between the Council and the applicant during the life of the application and it is certainly not evidence of a lack of co-operation.
2. The appellant refers to various emails that are included at question 10 of the appeal questionnaire. This puts the Council at a disadvantage; what were they, were they accurate, what responses were received? This point is crucial; what responses were provided? The responses are not set out in Mr Stott's submission.
3. To give an idea of the communication, 10 emails were sent during the lifetime of the application, 1 from the line manager and 2 attempted phone calls. Of these emails, not all were substantive and some were holding. But the Council's handling of the case is unfairly portrayed as a catalogue of failure to communicate.
4. Paragraph 2.3 refers to the incorrect description of development but it is not stated how that qualifies as a lack of co-operation.
5. Paragraph 2.6 refers to an email response dated 15 November 2018 but the case officer did not send an email. A holding response was sent on 23 October, a voicemail on 24 October and another email on 24 October.
6. Paragraph 2.7 suggests that the Council failed to provide an update after 5 to 6 weeks of the application. Unfortunately, consultation requests were sent out in the first week of October so there was nothing to update at this stage. Reference is also made to a response in loose-terms. However, without reference, is it an accurate characterisation of the response?
7. At paragraph 2.8 the appellant responds to the Council's suggestion that the appeal was unnecessary and that they could have gone for pre-application advice despite the unfortunate experience in 2014. The Council maintains that a pre-application would have been appropriate and that the Council has got better. A bad experience does not mean that it would be replicated. Recruitment also ensures a much better service.
8. Paragraph 2.9 suggests that advice in relation to the previous reserved matters submission is binding on the Council. However, advice can vary over time, between different proposals and in light of more thorough analysis of context. But in terms of pre-application advice, managers are very keen that advice is adhered to at application stage.
9. Paragraphs 2.2 to 2.9 do not therefore demonstrate a lack of co-operation. I refer to the statement of case in relation to communication. Consultee responses were provided on-line and the appellant was told of the recommendation and given the reasons before determination.
10. In relation to the second point, we acknowledge the statement of common ground delays. Although work was re-prioritised in response, no evidence is provided in this regard.

11. In relation to the third matter, the Council received no advice but the proposal was assessed by a qualified urban designer capable of assessing matters in relation to conservation areas. We therefore did take into account the character and appearance of the area. We are also yet to hear an assertion that the orientation of buildings is not a contributor to the character and appearance of the conservation area.
12. The adjacent 2 sites are highly relevant to the assessment of this proposal. They are located on the same hillside and have a very similar relationship with the rest of the CA. Furthermore, paragraph 193 of the Framework does not require the Council to substantiate alleged harm. Local Plan policy also does not have such a requirement but the report did identify substantial or less than substantial harm. It is reasonable to identify harm so significant to warrant refusal without using those terms. Not using those terms does not affect the balance, and therefore the conclusion that the scheme is harmful is the same regardless.
13. The Council did not 'simply dismiss' the advice from the viability consultant. The advice was considered against paragraph 57 of the Framework and not lightly rejected. There was a good reason to make the decision that was made in relation to viability particularly due to similarities with the consented scheme for 16 units.
14. In relation to paragraph 2.26, it is surprising that words such as 'might' and 'may' are being used. But the Council is justified to raise such questions.
15. At paragraph 2.37, concerns are raised in relation to net gain and how it could be enforced given the wording of condition 23. However, a subsequent submission could be made that does not achieve a net gain. So to summarise the fifth ground, it is unsound. As explained, the biodiversity reason for refusal could not be addressed by way of a condition.
16. In relation to ground 6, the design concerns were raised by the committee not the officer. Please refer to Appendix 1 of our statement of case. The Fullwood Drive committee reports are also appended. Officers are not beholden to assessments in respect of previous applications. The 3 applications have been considered in the same way.
17. In conclusion, the Council stands by everything it says at paragraphs 7.1 to 7.3 of its Statement of Case.

Appellant in response

18. There is an error in the number of emails and they do not tally. We accept this error.
19. We also do not want to dwell on past experiences but because the head of service assessed the context, we had a reasonable expectation that there would be no difference in recommendation.
20. Paragraph 2.39 was alluded to earlier but we are not interested in other sites. The analysis for those might be correct but we are concerned with this site and the fact that the Council have not taken due account of comments made on the previous scheme which was the same.

21. We have already complained to the Council in relation to appendix 1. This is the subject of a separate complaint and the Council have acknowledged the shortcomings. Despite paying for advice, nothing was received in writing. We would also add that consultation comments based on 91174 were supportive, considering the scheme to be a well-considered response to the constraints of the site.

22. In respect of other matters, we are happy with the application content.