



Costs Decision

Inquiry Held on 24 to 26 September 2019

Site visit made on 23, 25 and 26 September 2019

by Grahame Gould BA MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 November 2019

Costs applications in relation to Appeal Ref: APP/A1720/W/19/3230015 Land to the east of Downend Road Portchester

- 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).
 - Applications are made by Miller Homes for full and partial awards of costs against Fareham Borough Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for residential development, demolition of existing agricultural buildings and the construction of new buildings providing up to 350 dwellings; the creation of new vehicular access with footways and cycleways; provision of landscaped communal amenity space, including children's play space; creation of public open space; together with associated highways, landscaping, drainage and utilities.
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Decision

1. The application for a full award of costs is refused, while the application for a partial award of costs is partially allowed in the terms set out below.

Reasons

Background

2. Paragraph 030 of the Planning Practice Guidance's (the PPG) section on appeals advises that, irrespective of the outcome of an appeal, costs may 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.
3. As agreed at the Inquiry the applicant's applications for costs were made in writing after the Inquiry had finished sitting. As the applications for costs and the Council's response were made in writing, it is only necessary for me to briefly summarise the details of the applications.
4. The full award of costs has been sought on a substantive basis and with the applicant contending that it was unreasonable for the Council to have refused planning permission. The single reason for refusal was made up of two parts: a) that the proposed alterations to the Downend Road railway bridge (the railway bridge) would provide an unsafe facility for pedestrians and/or create conditions that would be harmful to the safety and convenience of other users of Downend Road; and b) the development would not afford its occupiers with good accessibility to local services and facilities by a range of modes of transport.

5. With respect to the application for a partial award of costs, the applicant contends that the way the Council put its appeal case has meant that it has unreasonably incurred expense concerning: the undertaking of further pedestrian and speed surveys; addressing the highway micro-simulation modelling relied upon by the Council; criticism of the vehicular access arrangements for the development; the effect on accessing 38 Downend Road (No 38); and the pedestrian use to be made of the routes that would rely on the Cams Bridge (route B) and Upper Cornaway Lane (route C).
6. It is argued that the decision to refuse planning was unreasonable, with it being made contrary to the officer recommendation and the advice provided by Hampshire County Council (HCC) as the highway authority. HCC having had extensive involvement with the consideration of the development prior to the Council's decision to refuse planning permission.

Full application for costs

7. The outcome of the appeal turned on two matters. Firstly, I have found that the 'option 2' alterations for the railway bridge would not provide a safe pedestrian means for crossing that bridge. The option 2 alterations involving a narrowing of the bridge's carriageway width to facilitate the installation of a 1.2 metre wide footway. Secondly, I have found that there would be an unacceptable effect on the flow of traffic on Downend Road were the bridge to be narrowed to facilitate shuttle working, as proposed under the 'option 3' alterations for the bridge. In concluding that the alterations to the bridge under options 2 and 3 would be unacceptable, it will be apparent from the appeal decision that I found the Council's evidence to be preferable to that of the applicant.
8. While much has been made of HCC raising no objection to either options 2 or 3, as explained in the appeal decision, I consider that HCC was misguided in accepting those options. With respect to option 3, I consider it particularly surprising that HCC accepted that the operation of shuttle working at a narrowed bridge could accurately be modelled using software specifically designed to model the operation of roundabouts. I also find it surprising that HCC incorrectly identified a fifth option tabled by the applicant as a shuttle working scheme, which may have resulted in that option being prematurely discounted.
9. I am therefore not persuaded that HCC's consideration of the alterations to the railway bridge was as rigorous as it should have been and that it was reasonable for the members of the Council's planning committee to treat the highway authority's advice sceptically. The rejection of that advice resulted in the inclusion of part a) in the reason for refusal.
10. In determining the appeal, I have acknowledged that there were potentially some shortcomings with the micro-simulation modelling of option 3 that the Council undertook, with some of those shortcomings possibly being due to the newness of the software that was being used. The applicant sought to critique the validity of the Council's micro-simulation modelling, through its own running of the micro-simulation software, using some modified input parameters relating to driver behaviour. However, those modified inputs were derived from findings contained in a Transport Research Laboratory (TRL) report of study dating from 1982 and concerning shuttle working at narrow bridges. However, I have explained in the appeal decision that I have

reservations about the currency of the TRL report's findings and their utility in setting parameters for the running of the micro-simulation software used in this instance.

11. The applicant was unaware of the Council's intention to model option 3 using micro-simulation software prior to the exchanging of proofs of evidence. While a meeting was held on 8 August between the applicant's and Council's transportation witnesses, Mr Wall and Mrs Lamont, it appears that there was only limited discussion about modelling techniques. However, that is something that I do not find particularly surprising given that Mrs Lamont was only instructed by the Council in 'late July'¹ and may therefore not have been fully familiar with both the site and the application documentation when she met with Mr Wall. That said I consider that as far as option 3 was concerned the applicant should not have been surprised that its use of software intended to model the operation of roundabouts would be likely to come under detailed scrutiny and that alternative ways of modelling option 3's operation might be explored by the Council.
12. Thereafter there appears to have been limited dialogue between Mr Wall and Mrs Lamont as they worked on concluding the topic specific statement of common ground (SoCG) and the preparation of their proofs of evidence. That was unfortunate, given that collaborative working between the applicant and the Council had been encouraged as part of the pre-inquiry case management for this appeal.
13. Limited collaboration appears to have persisted as Mr Wall and Mrs Lamont prepared their rebuttal evidence. Had there been more collaboration prior to and/or after the exchange of the proofs of evidence then it is likely that much less evidence relating to the modelling of option 3, in particular, would have been submitted either at the rebuttal stage and/or as Inquiry Documents. That in turn would almost certainly have meant that less Inquiry time would have been consumed in addressing the modelling of option 3.
14. The lack of collaborative working also appears to have pervaded the way in which HCC became engaged with the appeal, with only the applicant entering into a SoCG with HCC. That bipartite rather than tripartite approach did not accord with the preference I expressed during the pre-Inquiry engagement for this appeal. What appears to have been the playing-off of HCC's position against the Council's evidence I did not find to be particularly helpful and was likely to have affected the totality of the written and oral evidence I received in relation to part a) of the reason for refusal.
15. While the Council's modelling of option 3 may be subject to some shortcomings, I have nevertheless found that evidence to be preferable to modelling results gleaned on the applicant's behalf. In that regard I consider it highly significant that the TRL, as developer and supplier of the roundabout modelling software used by the applicant, provided the Council with written advice stating that its software was not suited to assessing the operation of option 3.
16. Given the outcome of the appeal I consider that the Council's evidence substantiated, in a reasonable manner, part a) of the reason for refusal and I do not accept the applicant's contention that the evidence of Mrs Lamont was

¹ Mrs Lamont during cross examination on day 2 of the Inquiry

'... commissioned to create a pretence that the reasons for refusal were soundly based'.

17. The Council's concern with respect to the accessibility to everyday services and facilities does appear to have been something of an afterthought introduced by members of the Council's Planning Committee. I say that because part b) of the reason for refusal was so very briefly stated and the printed minutes provide no explanation whatsoever as to how the members of the Planning Committee found that there would be poor access to local services and facilities. There apparently having been limited discussion about this during the committee meeting.
18. The Council's raising of an objection to the development on accessibility grounds is inconsistent with its identification of the site as a possible housing allocation in the consultation draft for its emerging local plan. That said the applicant took it upon itself to submit significant amounts of written evidence relating to the issue of accessibility. The Council also submitted quite a lot of written evidence relating to this issue and the upshot was that some Inquiry time was also devoted to it.
19. The fact that the applicant felt it necessary to submit so much evidence relating to the accessibility issue, perhaps portrays some lack of confidence in its original application submissions, given this issue seemingly was very much an afterthought when it was included in the reason for refusal. In determining the appeal, I have concluded that while there would be some conflict with the Chartered Institute of Highways and Transportation's walking distance guidance the level of accessibility did not warrant the appeal's dismissal. Any significant provision of new housing within the vicinity of Portchester being likely to involve a site or sites with a level of accessibility comparable with the appeal site.
20. In order to consider the issue of accessibility, I was not particularly assisted by the applicant's appeal evidence, with that evidence not significantly advancing my understanding of its case when compared with what was available in the application documentation. In that regard what would be the accessibility of the development's occupiers to employment, education, town centre and community locations, bus stops and railway stations was something that I was readily able to appreciate when I undertook my various site visits. To understand the issue of accessibility did not warrant anything like the volume of evidence that was presented to me.
21. So, while I consider the inclusion of the accessibility concern within the reason for refusal was not well founded, equally the applicant failed to recognise that it was a 'make weight' type matter and responded to it in a disproportionate manner. The consequence of that being that the applicant is likely to have incurred expense that it could have avoided, had there been a more proportionate response to the accessibility concern and I am not persuaded that blame for that should be placed wholly at the door of the Council.
22. I therefore consider the applicant has not demonstrated unreasonable behaviour warranting the making of a full award of costs against the Council. That is because the Council's refusal of planning permission did not prevent or delay a '... development which should clearly be permitted ...' (paragraph 049 of the PPG).

Partial application for costs

Micro-simulation modelling

23. In view of what I have said above about the micro-simulation modelling that was undertaken by the applicant and the Council, I consider there to be no grounds justifying the applicant's application for a partial award of costs in this regard.

Additional pedestrian survey

24. The first half of part a) of the reason for refusal contended that option 2 would have provided an unsafe facility for pedestrians. Given that I consider that in defending the appeal there was nothing unreasonable in the Council reviewing the evidence submitted in support of option 2, including the previously undertaken pedestrian survey. That survey was undertaken during an unusual weather event in February 2018, with the potential for the results from that survey to be unrepresentative.
25. Although the recent pedestrian surveys have shown that the results from the original survey were not unusual, I consider it was reasonable for the Council to have questioned the validity of the results from a survey undertaken during an abnormal weather event. Importantly as it was the Council that had questioned the validity of the applicant's original survey, I consider the onus was more on it than the applicant to demonstrate any deficiency in the original survey. I am therefore not persuaded that there was any compulsion on the applicant to undertake a new survey.
26. In practice both the applicant and the Council undertook surveys following the meeting held between Mr Wall and Mrs Lamont in August. That duplication of survey effort appears to have been symptomatic of the absence of collaborative working that I have previously referred to. I therefore consider that it has not been demonstrated that the Council's behaviour caused the applicant to incur unnecessary or wasted expense through the commissioning of an additional pedestrian survey. A partial award of costs in this regard has not been justified.

Additional speed survey

27. With respect to the applicant's commissioning of an updated speed survey that appears to have been unnecessary. That is because the concern raised by Mrs Lamont in her proof of evidence related more to whether a wet weather reduction factor should or should not be applied when calculating the design speed for Downend Road and that concern did not relate to the quality of the speed data obtained in November 2016.
28. The Council's questioning of the applicant's use of the originally collected speed survey data I consider was not unreasonable. That is because the second half of part a) of the reason for refusal raised a safety concern about option 3's operation. Had the applicant considered that its original calculation of the design speed was wholly without reproach, then it could have relied on that. I see nothing about the way the Council approached the matter of vehicle speeds that compelled the applicant to procure a new survey. The procuring of a new survey was something that the applicant seems to have done of its own volition. I consider it has not been demonstrated that the Council's behaviour caused the applicant to incur unnecessary or wasted

expense and a partial award of costs relating to the additional speed survey is unwarranted.

Use of the pedestrian routes via Cams Bridge (route B) and Upper Cornaway Lane (route C)

29. There was wide disagreement between the applicant and the Council as to what the pedestrian demand from the occupiers of the development would be for routes B and C, versus the route via Downend Road (route A), with this having some bearing on the overall pedestrian demand that would be associated with the development. In determining the appeal, based on the written and oral evidence I received and my own observations of the routes, the Council's evidence did not demonstrate to me that route B would be particularly unattractive. Equally the applicant's evidence did not persuade me that routes B and C would unquestionably be superior to route A.
30. The disagreement about the relative utility of routes A, B and C essentially boiled down to a difference of expert opinion. While some of the criticisms of routes B and C voiced by the Council were of a rather knit picky nature, I am not persuaded that in overall terms the way the Council approached the relative attractiveness of routes A, B and C was unreasonable. Accordingly, in this respect I consider it has not been demonstrated that the Council's behaviour caused the applicant to incur unnecessary or wasted expense and a partial award of costs relating to this matter is unwarranted.

The development's vehicular access and the use of No 28's access

31. The wording of part a) of the reason for refusal was quite specific in highlighting concerns about '... works to the bridge ...' affecting the safety of pedestrians and/or the convenience of other road users. The reason for refusal did not identify concerns about either the safe operation of the development's vehicular access or the ability of drivers emerging from No 38 to safely join the public highway (the access concerns). The introduction of the access concerns resulted in the applicant responding to them in its rebuttal statement and also took up some Inquiry time. I found the access concerns not to be of such significance as to warrant the withholding of planning permission. In that regard I would expect the access concerns to be subject to more detailed consideration as part of the process of either discharging conditions imposed on a planning permission or as part of any consenting procedure administered by the highway authority.
32. I therefore consider that it was unreasonable for the Council to have introduced the access concerns as part of its highways evidence, at what was a comparatively late stage in the appeal process, with their introduction causing the applicant to incur unnecessary expense in responding to them before and during the Inquiry. Accordingly, in this respect a partial award of costs against the Council is warranted.

Conclusions

33. Having regard to the provisions of the PPG, most particularly paragraphs 028, 030, 032 and 049, I conclude that with respect to the application for a full award of costs that it has not been demonstrated that the Council behaved unreasonably.

34. However, with respect to the application for a partial award of costs I conclude that it was unreasonable of the Council to have pursued safety concerns relating to the vehicular accesses for the development and No 38. That resulted in the applicant incurring some unnecessary and wasted expense in responding to the appeal case made by the Council with respect to the access concerns.

Costs Order

35. 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 Fareham Borough Council shall pay Miller Homes, the costs of the appeal proceedings limited to the applicant's preparation and presentation of its case with respect to the safety concerns relating to the vehicular accesses for the development and 38 Downend Road, such costs to be assessed in the Senior Courts Costs Office if not agreed.
36. The applicant is now invited to submit to Fareham 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.

Grahame Gould

INSPECTOR