



Costs Decision

Hearing held on 11-12 December 2019

Site visits made on 5 and 12 December 2019

by Katie McDonald MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 February 2020

Costs application in relation to Appeal Ref: APP/R2330/W/19/3224695 Devine Fisheries, Broad Oak Road, Accrington BB5 2DG

- 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 Mrs Cath Whelan (Windmill Rise SPV Ltd) for a partial award of costs against Hyndburn Borough Council.
 - The hearing was in connection with an appeal against the refusal of outline planning permission for 110 housing development incorporating 26 affordable homes and associated access and site infrastructure.
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Decision

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

The submissions for Mrs Cath Whelan (Windmill Rise SPV Ltd)

2. The claim was made on the basis that the Local Planning Authority (LPA) had acted unreasonably in terms of delaying the Hearing by introducing additional matters not raised in the reason for refusal (RfR).
3. The Development Management Procedure Order¹ (DMPO) requires a LPA's RfR to be full and precise. The RfR makes no reference to the impact on trees, the Christ Church Conservation Area (CA) or matters of heritage.
4. At the application stage, the applicant provided a full detailed assessment of the access road with an Arboricultural Impact Assessment (AIA), and this was assessed by the LPA's ecology officer who was satisfied with the impact, as detailed in the LPA's committee report.
5. For heritage, the LPA was satisfied that the proposal resulted in less than substantial harm to the CA, but during the Hearing, this was questioned by the LPA and an attempt was made to elevate the harm. There has been no material change in information available to the LPA between determination of the application and consideration of the appeal; and these matters are not specifically raised in the RfR. Therefore, the LPA has failed to comply with the DMPO, and this has put the appellant to additional costs of addressing these matters at the Hearing.
6. For trees, the LPA's RfR relates to the impact on the character and appearance of the countryside, yet the area of woodland identified for the majority of tree loss is within the urban area of Accrington as identified by the LPA during the

¹ The Town and Country Planning (Development Management Procedure) (England) Order 2015

Hearing. This adds to the imprecise nature of the decision notice. The LPA has provided vague and generalised assertions about the effect of the development, unsupported by any objectional analysis that would counter the findings of the AIA.

7. The matters in dispute referred to in the Statement of Common Ground (SoCG) do not cover those referenced in the costs claim. The effect of the additional matters raised has unnecessarily extended the Hearing.

The response by Hyndburn Borough Council

8. The Hearing was scheduled for 2 days and this is what it has taken. The appellant has not called any additional witnesses to address the points raised.
9. The Inspector is under legal obligation to consider the effect on heritage assets and she would need to fully understand this. The woodland clearly forms part of the countryside and associated landscape; and the loss of trees across the site has a clear impact on landscape character whether in a rural or urban area.
10. The matters in dispute in the SoCG refer to the access and layout along with the character and appearance of the countryside. For those reasons it is reasonable for the LPA to raise issues in relation to trees and the heritage assets. Finally, the Inspector must consider the appeal as a whole, not just the LPA's RfR.

Final submissions for Mrs Cath Whelan (Windmill Rise SPV Ltd)

11. The Hearing was scheduled for 2 days, and although it has not gone beyond, this does not suggest that the applicant has not been put to additional time and expense if these matters were not raised.
12. It should be noted that the applicant was unaware of these issues until 2 weeks prior to the Hearing as a result of the LPA's delayed submission of evidence.
13. It is acknowledged that the Inspector must consider the impact on heritage assets, but this does not justify the comments made by the Conservation Officer in respect of his perceived impact during the Hearing.
14. In respect to woodland, it is a matter of fact that this forms part of the urban area of Accrington. It is not countryside. Therefore, it is reasonable to anticipate that following the RfR, this would not be raised by the LPA as part of the appeal.

Reasons

15. Planning Practice Guidance (PPG) sets out that where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.
16. One of the aims of the Costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case. Another aim is to encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay.

17. The statement produced by the LPA did appear to include more detailed harms than the applicant may have been aware of following the RfR and what was contained in the Committee Report or SoCG. This was particularly in relation to trees and heritage. This seems to be mainly owing to the evidence produced by the Council's landscape expert, who contested some of the landscape character and appearance evidence presented by the applicant along with questioning the loss of trees and the effect upon heritage assets.
18. The effect of a proposal upon trees is a matter generally encompassed within character and appearance; and I accept that an LPA is expected to expand upon its RfR in a statement, along with responding to the applicant's statement. However, the introduction of this issue at the appeal stage did introduce fresh evidence that the applicant would have been unaware of prior to the LPA's statement being issued. Indeed the Committee Report sets out that *"officers are satisfied the construction of the access road would not have a significantly detrimental impact on the trees"*. Although reasoned points were made by the LPA during the Hearing about the construction of the access and potential loss of more trees which I have agreed with; the introduction of this matter was unreasonable behaviour following the RFR.
19. Heritage was raised within the LPA's statement, asserting the impact to be greater than initially anticipated and requiring myself to take account of this. It was also considered in the Committee Report, finding less than substantial harm.
20. Following my questions on the effect of the proposal on heritage assets, the Conservation Officer did appear to be veering towards a greater degree of harm than originally asserted. However, the conclusion from the Conservation Officer was that the harm was less than substantial, but on the upper end of this range. This did not change the LPA's written evidence, where it is detailed in the Committee Report that the *"Council's Conservation Officer has expressed concern in relation to the proposal and its impact on the Christ Church Conservation Area and setting of the Listed Building (Oakhill Mansion) opposite. The Conservation Officer considers that overall the harm to the Conservation Area and the setting of the listed building can be considered as 'less than substantial' as such in accordance with paragraph 196 of the NPPF the harm arising from the development needs to be weighed against the public benefits of the proposal, including where possible securing its optimum viable use."*
21. I have a statutory duty² to examine those effects. Furthermore, the extent of public benefits to be weighed in the balance is a matter of judgement for the decision maker. However, as noted in the Appeal Decision, the LPA's conclusion on this matter in the Committee Report appears contradictory to the requirements of the Framework.
22. Nevertheless, owing to the statutory duty, and the finding of less than substantial harm, it would have been necessary to examine this issue orally at the Hearing. Although noting the oral evidence from the Council, the behaviour overall from the LPA was not unreasonable.
23. The argument from the applicant that the LPA only referred to "countryside" in the RfR is fairly inconsequential when considering the effect of the scheme on the character and appearance of the area. The effect would include the whole

² Under the Planning (Listed Buildings and Conservation Areas) Act 1990.

site, which covers both countryside and undeveloped woodland within the urban boundary. Whilst strictly located in the urban boundary of the development plan, the woodland comprises part of the countryside per se owing to its undeveloped nature and clear linkages with the rest of the site. It would fall to consider the effect of the whole proposal on the character and appearance of the area not just the part allocated as 'countryside'. Thus, the RfR was not imprecise or misleading in this regard.

24. A Hearing gives both parties the opportunity to provide oral evidence and the inquisitorial burden is upon myself to examine the evidence, in order to be satisfied that all the points needed to make a properly informed decision have been adequately tested. This is what I did at the Hearing, examining evidence on the whole appeal, not just the matters raised in the RfR.
25. Whilst I have found the LPA's behaviour not unreasonable on most matters raised, regarding trees, the behaviour of the LPA was unreasonable. However, for costs to be awarded, the unreasonable behaviour must also have directly caused another party to incur unnecessary or wasted expense in the appeal process.
26. The Hearing concluded in 2 days as programmed. The applicant called no extra witnesses on trees. Furthermore, although the applicant would have been required to prepare for the event, any additional time spent preparing for this matter would not have been unnecessary or wasted.
27. Therefore, the unreasonable behaviour did not cause the applicant to incur unnecessary or wasted expense in the appeal process. Consequently, both tests of the costs' regime are not met, and an award of costs is refused.

Katie McDonald

INSPECTOR