
Costs Decision

Site visit made on 5 February 2020

by John Felgate BA(Hons) MA MRTPI

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

Decision date: 18th February 2020

**Costs application in relation to Appeal Ref: APP/P4605/W/19/3235238
Land adjacent to Western Business Park, Great Western Close,
Birmingham B18 4QF**

- 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 Rochda Limited for a full award of costs against Birmingham City Council.
 - The appeal was against the refusal of planning permission for: *"Redevelopment of the existing vacant site for residential accommodation consisting of a wide range of high quality apartments with onsite car and cycle parking located below ground"*.
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Decision

1. The costs application succeeds in part, and a partial award is made in the terms set out below.

Reasons

2. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused another to incur unnecessary or wasted expense in the appeal process. Examples are given in the PPG of some of the types of unreasonable behaviour which are likely to lead to an award of costs.
3. In the present case, the appellants' main complaints against the Council relate to an alleged lack of co-operation and engagement, lack of feedback, inconsistency, unwillingness to hold meetings, and a failure to devote sufficient resources to considering the application and other submitted information. Although these accusations are refuted by the Council, it is evident from the varying accounts of both parties, that the process of dealing with the application did not go smoothly.
4. This does not necessarily mean that the faults were all on one side. The appellants do not dispute that their pre-application discussions were held on an informal basis, rather than through the Council's fee-paid service. It seems likely that it was at least partly because of this that some of the differences that emerged later between the parties were not fully explored in advance. But nevertheless, having regard to the matters identified in the costs application, together with the conclusions that I have already arrived at in my decision on the appeal itself, there are a number of instances where I consider that the Council's handling of the application amounted to unreasonable behaviour, adding to the costs incurred by the appellants in the appeal process.

Refusal Reason (RR) 1: loss of existing open space

5. As set out in the appeal decision, it seems to me that Policy TP9 is clear in allowing for partial development of existing open space, where the loss is outweighed by improvements to the remainder. It should have been obvious to the Council that the appeal proposal represented such an opportunity.
6. I appreciate that RR1 was based on a desire for more written justification, rather than any actual allegation of harm. But the balance to be struck between the losses and the improvements was simply a matter of planning judgement. In my view, the Council was in a position to make that judgement, or if it wished to, to seek to negotiate a different balance, without needing any further information. Indeed the Council has not clarified the nature of the further information it would have wanted, or how that would have helped.
7. Refusing permission on the grounds of RR1 left the appellants with no clarity as to whether the Council was willing to accept even the principle of development. The Council's decision with regard to RR1 was therefore unreasonable.

RR4: ecology

8. At some point during their consideration of the application, the Council asked the appellants to prepare further information on ecology, including a BIA and related material. This was a substantial exercise. The appellants eventually submitted that information, shortly before the Planning Committee meeting at which the application was to be heard. The Council did not then have time to consider the BIA, but carried on nonetheless, and made its decision without taking the BIA or the other accompanying material into account. In so doing, the Council included RR4, alleging a lack of relevant ecological information. Subsequently, after the appeal process had been set in motion, the Council accepted that, with the benefit of the BIA, their ecology concerns could be overcome by condition.
9. Having specifically requested the BIA, the Council should have waited for it, and given it proper consideration, before proceeding with their decision. I accept that the appellants took some time to carry out the BIA, but given the intervening Christmas period, the length of time taken was not excessive. And in any event, the Council could have avoided that situation by making their request earlier.
10. I appreciate that by the time of the Committee meeting, officers had concluded that the application should be refused for other reasons anyway. But that did not justify failing to even consider the new information that they themselves had asked for. The inclusion of RR4 in the Council's decision means that the possible ecological impact was still seen by them as a reason for refusal in its own right. Although later the Council effectively withdrew RR4, by accepting that ecology could be dealt with by condition, that was late in the day, and left the appellants in the dark as to how to address the issue in their appeal submission.
11. The Council therefore acted unreasonably in failing to take account of the BIA and related ecological information, in refusing permission on the grounds of RR4.

RR6: housing mix

12. Although RR6 is founded in the BDP's policy aim for balanced communities, that aim goes hand-in-hand with meeting local housing needs. It follows that an alleged conflict cannot properly be substantiated without clear and up-to-date evidence regarding those needs. As set out in the appeal decision, the evidence relied on by the Council in this case is of some considerable age. As such, the available evidence does not justify a refusal reason based on this ground. The Council's decision to refuse permission based on RR6 was therefore unreasonable.

RR7: contributions

13. In so far as it relates to the possible need for a financial contribution towards off-site public open space, I agree that RR7 is justified, for the reasons set out in the appeal decision.
14. However, in so far as it also seeks a contribution to affordable housing, RR7 is supported in the Council's statement only by a few generalised assertions. The Council has made no attempt to respond to the evidence provided in the appellants' financial viability assessment, and has therefore failed to substantiate its refusal reason relating to affordable housing. The decision to refuse permission on the grounds of this part of RR7 was therefore unreasonable.

RR9: gym and nursery

15. Although a gymnasium or nursery as stand-alone uses would conflict with relevant policies, in the context of the appeal scheme these were secondary uses, small in scale, and offering potential benefits. In this type of situation, the Council should have recognised that Policy TP21 was not necessarily a determining factor, and that a conflict with strict terms of that policy could potentially be outweighed by other considerations specific to the gym and nursery. However, the Council failed to give weight to either the benefits of the facilities in question, or their likely low level of impact on the policy's objectives.
16. The Council also failed to recognise that a nursery is not a main town centre use, and as such, in policy terms its location is a matter of preference rather than presumption.
17. The decision to refuse permission on the grounds of RR9 was therefore unreasonable.

RR8 and RR10: sustainable construction, energy and drainage

18. The NPPF and PPG both make it clear that authorities should always consider whether their objections to a proposed development could be overcome by imposing suitable conditions. In the case of RR8 and RR10, the matters raised were ones which are commonly dealt with in this way. The Council has expressed a preference to have these details at the outline stage, but gives no compelling reasons as to why that approach is necessary. In the absence of any such evidence, RR8 and RR10 are unsubstantiated, and therefore unreasonable.

The other main issues

19. With regard to RRs 2, 3 and 5, relating to new public open space, design and layout, and trees, I have found the Council's refusal of permission to be justified, based on the evidence and arguments before me. Therefore, irrespective of the Council's handling of the application, these issues would have had to be contested at appeal in any event. It follows that no award is made in respect of these issues.

Conclusions

20. For the above reasons, I conclude that in respect of RRs 1, 4 and 6, and RR7 (in relation to affordable housing only), and RRs 8-10, the Council behaved unreasonably, causing the appellants to incur unnecessary costs in the course of their subsequent appeal. A partial award of costs in favour of the appellants, limited to these specific issues, is therefore justified.
21. For the avoidance of doubt, the award is intended to cover only those costs necessarily incurred in contesting the appeal. Any costs relating to the preparation of the amended plans, post-dating the Council's decision, are not covered by the award, because they did not form part of the scheme that was before the Council.

Costs Order

22. 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 Birmingham City Council shall pay to Rochda Limited, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in connection with Refusal Reasons Nos 1, 4, 6, 7 (affordable housing only), 8, 9 and 10, such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to Birmingham City 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.

J Felgate

INSPECTOR