
Costs Decision

Site visit made on 14 May 2020

by S Hunt BA (Hons) MA MRTPI

Inspector appointed by the Secretary of State

Decision date: 17th June 2020

Costs application in relation to Appeal Ref: APP/R4408/W/19/3242646 Land to the South of Lee Lane, Royston, Barnsley

- 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 Bellway Homes Ltd (Yorkshire Division) for a full award of costs against Barnsley Metropolitan Borough Council.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for residential development of 250 dwellings with associated access, parking, engineering, landscaping and ancillary works.
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) on appeals advises at paragraph 30 that 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. Unreasonable behaviour may be either procedural or substantive.
3. It was established at the pre-inquiry case conference on 4 February 2020 that the main issues in dispute were unclear in the Council's statement of case. Shortly afterwards the Council put forward six reasons why it would have refused planning permission, and this was followed by two statements of common ground. In accordance with paragraph 48 of the PPG the Council explained their reasons for not reaching a decision within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period (putative reasons for refusal 'PRFR').
4. The six PRFR essentially distilled into the issues identified in the appeal decision. The applicant submits that the Council's decision to defend all of these PRFR was unreasonable and that the Council's behaviour is both procedural and substantive.
5. Taking each of the PRFR in turn:
PRFR 1:
6. The appeal is not the forum for determining the future content of the future Masterplan Framework (MPF) for the MU5 allocation, therefore the matters

raised regarding the link road are not directly relevant to consideration of this costs application.

7. The applicant's offer of improvements to off-site junctions in lieu of the additional costs of construction of the primary school has not been fully addressed by the Council in their evidence. This is because they have a range of outstanding technical concerns relating to those junctions. My decision has found that safety of the proposed works to the junctions has not adequately been demonstrated and would not outweigh the need for additional contributions towards a new school. The provision of a primary school is a specific requirement of Policy MU5. Whilst there was initially some delay on the part of the Council, they provided costings for the school in the relevant proof of evidence. The applicant's education witness easily rebutted the information.
8. The viability issue was at times confused, nevertheless the Council's viability evidence was not put forward because of a dispute that the site was unviable for the relevant policy and SPD contributions. Rather, it was to demonstrate that additional contributions over and above these standard requirements could be met by the applicant. A short rebuttal was provided by the applicant's planning witness which simply clarified matters and I am content that this did not result in unnecessary or wasted expense.

PRFR 2:

9. This reason relates to use, design and layout. Whilst I have agreed with the applicant that such matters would not result in any significant adverse effects and are not determinative to the appeal, the Council is entitled to form their own view on whether such matters would meet the relevant policies. They have not acted unreasonably in doing so.
10. Evidence from the Council on education matters was necessary to provide information relating to costs of a new primary school. There is a lack of evidence relating to the applicant's suggested location for the school, but this is not part of the proposals before me and would be a matter for a MPF.

PRFR 3:

11. Early discussions between the main parties on the submitted transport assessment appear to be focused on the wider issues of capacity and off-site junction improvements rather than the site access and internal layout. The detailed comments from the Council's highway officer on access and layout were not set out until January 2020, following submission of the appeal. This was a lengthy response setting out a wide range of concerns which led to the submission of an amended site layout plan just prior to the case conference.
12. The introduction of these matters required a detailed response by the applicant's highway consultant. Such matters could have reasonably been raised earlier in the planning application process and avoided the need for the late submission of an amended layout plan. However, this is an appeal against non-determination where all matters in dispute are initially not as clear cut as an appeal against refusal of planning permission. The matters were raised at an appropriate point in the appeal process, some weeks before the case management conference.
13. Matters of inconsistency in application of highway guidance would not constitute unreasonable behaviour in this case, as the range of guidance can be

applied to each site on a case by case basis and the full details of other similar cases are not before me. The evidence is largely technical and does not assert particular harm, nonetheless I have come to the decision that the access and layout are acceptable.

14. Notification of a Traffic Regulation Order (TRO) to reduce the speed limit of Lee Lane was not provided until a late stage of the appeal. Notwithstanding this, the applicant was aware that an order to reduce speed limits was highly likely. It was more a matter of timescales, and by how much the limit was proposed to be reduced. Notwithstanding the eventual outcome of the TRO, I concluded that the access is acceptable. The applicant would not have come to any unnecessary or wasted expense in respect of the speed limits.
15. In relation to the off-site junctions, the evidence demonstrates that the Council set out their concerns at a reasonable stage in the application process, considering that instruction of transport consultants was necessary.
16. The Council initially stated that it would not provide rebuttals, and this was because I had discouraged such additional information at the case management conference. At the time that rebuttals could have been submitted the appeal was still scheduled as an inquiry. The Council would have been able to supplement their evidence orally at the event. When the appeal procedure was changed to written representations, I gave the Council the opportunity to respond in writing in order to assist the decision making process. The submission of late highways evidence does not therefore constitute unreasonable behaviour.

PRFR 4:

17. Density was not previously raised as a matter of concern in the Council's correspondence prior to the submission of the appeal. The Council provided adequate evidence relating to harm and policy conflict. Consistency with other planning applications carries limited weight in my decision. The late introduction of this matter has resulted in the need for the applicant's urban design witness to produce evidence. However the Council's firm stance on the 40dph requirement of the Policy is clear and unambiguous. The applicant's evidence on this point is not unnecessary or wasted expense.

PRFR 5:

18. As with the density point above, concern regarding room sizes, relationship to the play area and on site open space were not raised by the Council during their consideration of the planning application. Their statement of case mentions amenity of future occupiers as an objection, but this was not substantiated until the PRFRs were submitted. This is another matter where the nature of the appeal against non-determination meant that the main issues were not clear at first. However the PRFRs are clear in respect of these matters and could be dealt with in time for the submission of proofs of evidence therefore unreasonable behaviour has not been demonstrated.
19. Notwithstanding this, the amount of green space was not specified in the PRFR and was not introduced until the exchange of evidence. The failure to raise this matter at an earlier stage amounts to procedural unreasonableness. However this is a matter that the applicant has dealt with rapidly and concisely without the need for costly or time consuming additional evidence.

PRFR 6:

20. The need for a Great Crested Newt (GCN) survey was not specifically raised by the Council when the preliminary ecological appraisal (December 2018) was received as part of the planning application. This appraisal noted that it was unlikely that GCN would be present on site and were therefore not considered further. It was highlighted that no such survey had been requested for the nearby BDWH development site. The Council could have asked for a survey during the first half of 2019 if they had considered there was a reasonable prospect of this protected species being present. However a full response by the Council's Biodiversity Officer was not forthcoming and this seems to be because of wider concerns about lack of a MPF for the allocation¹.
21. Following submission of the appeal and receipt of an additional ecological assessment dated November 2019, the Council's Biodiversity Officer then raised several concerns². Many of them were subsequently withdrawn, particularly in relation to bats and biodiversity net gain. In the response it was recommended that pond surveys for amphibians should be carried out in the spring. Later the Officer quoted that it is on balance 'unlikely' for GCN to be present in any of the ponds within 500m of the site, but not 'highly unlikely' therefore maintaining that surveys would be required³. The condition of the ponds and the presence of Lee Lane as a barrier were not enough to convince the Council.
22. The applicant's ecology evidence including an eDNA survey carried out in April 2020 provided me with the evidence I needed to confirm that GCN are highly unlikely to be present and establish that no further action is required. Without the survey the element of doubt regarding the likelihood of protected species being affected by the development would remain. Such a survey could have been carried out in spring 2019 if previously raised by the Council, and the lateness of the matter being raised constitutes unreasonable behaviour. The applicant has encountered further expense in order to carry out the eDNA survey in April 2020, but in view of the above it is not unnecessary or wasted.

Conclusions

23. There were substantive reasons to justify the delay in determining the application. It is apparent that if certain outstanding technical matters (relating to highways in particular) had ultimately got resolved, the Council would still have refused the application without the benefit of an approved MPF in place.
24. It will be seen from my decision that I did not agree with all of the Council's concerns, nevertheless I have dismissed the appeal for the reasons given. It follows that I find the Council had sufficient justification to take the view it did. The Council did not act unreasonably in giving weight to a plan-led decision making approach.
25. Overall I have identified some instances of procedural unreasonable behaviour relating to the six PRFR. The Council's response to the applicant's notification of appeal in October 2019 was comprehensive but it did not cover all the matters subsequently raised in their statement of case. Moreover, the statement of

¹ CD 2.2a Trevor Mayne, 29 March 2019

² CD 2.2b Trevor Mayne 6 January 2020

³ CD 6.3.1 Trevor Mayne email 12 February 2020

case then had to be supplemented after the case management conference as the putative reasons for refusal and main issues were not clear.

26. Whilst the PRFR were numerous and broadly worded, there was a legitimate policy basis for them. There was no failure on the part of the Council to produce evidence to substantiate the various aspects of the PRFR. Some matters were raised late, notably an objection on amounts of greenspace, but the Appellant easily rebutted the Council's position without an unnecessary waste of expenditure. Consequently, no award of costs is made.

S Hunt

Inspector