



Costs Report to the Secretary of State for Housing, Communities and Local Government

by Geoff Underwood BA(Hons) PGDip(Urb Cons) MRTPI IHBC

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

Date 12 September 2018

TOWN AND COUNTRY PLANNING ACT 1990
AMBER VALLEY BOROUGH COUNCIL
WHITEHOUSE FARM, 153 BELPER LANE, BELPER
APPEAL BY
WHEELDON BROTHERS LTD

Hearing Held on 3 July 2018, Site Visit Held 4 July 2018

Whitehouse Farm, 153 Belper Lane, Hilltop, Belper DE56 2UJ

File Ref: APP/M1005/W/18/3198996

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- The application is made under the Town and Country Planning Act 1990, sections 78 and 322, and the Local Government Act 1972, section 250(5).
- The application is made by Wheeldon Brothers Ltd for a full award of costs against Amber Valley Borough Council.
- The hearing was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for a residential development of 65 dwellings including sustainable drainage and infrastructure, demolition of 153 Belper Lane and outbuildings, enhancement of existing public open space including new recreational facilities, landscape and ecological enhancements.

Summary of Recommendation: That the application for a full award of costs be allowed.

Preliminary Matters

1. The appeal to which the claim for costs relates was recovered for a decision by the Secretary of State for Housing, Communities and Local Government by a direction dated 3 July 2018. The reason given for this direction is that “the appeals involve proposals which would have an adverse impact on the outstanding universal value, integrity, authenticity and significance of a World Heritage Site”.
2. The costs application and responses were made in writing with additional oral submissions made at the Hearing.
3. Since the application for costs was made the National Planning Policy Framework (the Framework) has been revised and the parties are aware of the revised Framework.

The Submission for Wheeldon Brothers Ltd

4. The Council prevented or delayed development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations. The officer's recommendation was to approve the application as the clear public benefit outweighed any perceived harm upon the World Heritage Site (WHS). The Council resolved to grant planning permission subject to the completion of a Planning Agreement. All parties subject to the Agreement had agreed its content and it has been signed by the landowner, the appellant and Derbyshire County Council. The Council did not sign the Agreement and did not issue the planning permission decision within the agreed time limits. The Council has offered no explanation, reasons or justification for withholding the permission. There are no substantive reasons to justify delaying the determination.
5. The Council has clearly delayed development which, the Council itself has concluded, should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

The Response by Amber Valley Borough Council

6. The development would have been a departure from the development plan and would not, therefore, be development that should have been clearly permitted

- having regard to its accordance with the development plan. The Council's starting point was refusal as it was not in accordance with the development plan but officers recommended approval and the Planning Board accepted this recommendation.
7. The Planning Agreement was at an advanced stage but not signed at its validity was dependent on the resolution of the December 2017 Planning Board. However a motion to a Full Council meeting to revoke planning permission was made by a Councillor who was not a member of the Planning Board, notwithstanding that no decision notice had been issued. The matter was reported to 19 February 2018 Planning Board which set out a series of issues as to why the decision would not be issued until legal advice had been obtained. A subsequent report in March advised that the application would be considered at the April Planning Board. The appellants were kept informed during this process as demonstrated by correspondence between the Council and the appellants' agents.
 8. The appellants advised they did not want the application to be considered by Planning Board during the pre-election period. The Council responded advising that it was perfectly appropriate to hold a meeting during the election period as the Council had to continue to discharge its functions, including holding Planning Board meetings. The appellants then made their appeal before the Board meeting.
 9. A letter from the appellant¹ demonstrates that they were fully aware of what had occurred and had been kept informed by the Council, contrary to the assertion in their costs application. The appellants had consented to all extensions of time up until that point.
 10. Whilst they are at liberty to appeal, the appellants delayed matters further given that the Hearing was on 3 July and, had the matter been heard at April Planning Board, there would have had a further resolution which could have been to grant permission. The Council have not acted unreasonably.

The Reply by Wheeldon Brothers Ltd

11. Following the resolution of the December Planning Board the appellant instructed solicitors to prepare the Planning Agreement. On 22 January 2018 the appellants were advised that the Secretary of State did not intend to 'call in' the application and the Council confirmed it would complete the legal agreement, asking for an extension of time until 23 February to do so and then issue its decision without delay. On 16 February the Council advised it would not be issuing a decision.
12. None of the issues reported to February Planning Board were material to the application itself and some related to the call-in of an unrelated planning application and one to a proposed motion to revoke the permission by a Ward Councillor. There were no changes to the planning balance or interpretation of planning policy. The Council failed to provide substantive reasons to justify delaying the decision and this amounts to unreasonable behaviour.

¹ Letter from Planning and Design Group to Principal Planner, Amber Valley Borough Council, 27 March 2018, provided as part of the Council's written costs reply.

13. Engrossed copies of the Planning Agreement were provided the day before the extension of time, with all terms agreed with the Council awaiting only the Council's signing. The appellants could only speculate on the nature of the legal opinion sought although the appellants attempted to ensure a measured degree of balance would be brought to any reconsideration of the application.
14. The appellants were concerned that the April Planning Board was less than three weeks before the local government elections, with two seats contested in Belper and the politicised nature of Planning Board voting on the application. The appellants had no choice but to appeal. The appeal was made on 3 April but when the agenda for the April Board meeting was published on 9 April it appeared that the application would not have been considered at the meeting in any event.
15. The Council's suggestion that if the matter had been heard in April and if it had been resolved to grant planning permission identifies such a degree of uncertainty that the appellant could not reasonably risk the process, when they did not even know what the issues or the recommendation would be. To suggest the appellant should just 'sit it out' and see what happens is not reasonable in a process that should be transparent and positive.
16. The Planning Practice Guidance (PPG) notes that in cases of non-determination, the local planning authority should give the applicant a proper explanation. In any appeal against non-determination, the local planning authority should explain 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.
17. In this case the Council had resolved to grant planning permission, the motion to revoke the planning permission was effectively a legal 'non-starter' as no decision had been issued. The Council's legal opinion was held to be privileged and the officers could not tell the appellant what their reconsidered recommendation would be. This evidently unreasonable behaviour on the part of the Council has directly resulted in the need for the associated appeal and the supporting advice and evidence produced to contest it, including at the Hearing itself. The Council put forward no case in respect of the appeal in writing or at the Hearing which was also unreasonable.
18. A full award of costs is the only reasonable outcome.

Inspector's Conclusions

19. The PPG advises 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. It notes that a local planning authority may be at risk of an award of costs if an appeal is allowed and if the "Secretary of State concludes that there were no substantive reasons to justify delaying the determination and better communication with the applicant would have enabled the appeal to be avoided altogether. Such a decision would take into account any unreasonable behaviour on the part of the appellant in causing or adding to the delay."
20. The PPG gives examples of the types of behaviour which may give rise to a substantive award of costs against a local planning authority and this includes not

- reviewing their case promptly following the lodging of an appeal against non-determination as part of sensible on-going case management.
21. The recommendation to the Secretary of State on the planning merits of the appeal in the Appeal Report which accompanies this Costs Report is that planning permission should be granted. The recommendation in the initial Board Report found that, in light of national policy and any other material considerations, the application should be approved. Nevertheless, the application was a departure from the adopted development plan and the Board Report sets out a balanced judgement before reaching its recommendation. These are circumstances that indicate that the development was not necessarily one which should so clearly be permitted, having regard to its accordance with the development plan.
 22. Based on the correspondence between the Council and the appellant, reasonable steps were taken by the Council to keep the appellant informed of what was happening procedurally and the timescale implications. However there was limited information and explanation as to the actual reasons for this or the implications for the appellants' planning application in light of the previous recommendation for approval.
 23. The appellants found themselves in a confusing situation where, at one point, they could reasonably expect planning permission to have been granted, waiting only for the Council to sign the Planning Agreement, the contents of which they had agreed to. Subsequently, and over three months after the Council's resolution to grant permission, the appellants were in an unwarranted ongoing period of considerable and increasing uncertainty where they remained uncertain what the recommendation to Planning Board would be and therefore whether planning permission would in fact be granted.
 24. It was the appellant who did not wish the application to be considered at the next Planning Board, not the Council, so the Council did not delay in that particular respect. It was the appellant's decision to consequently make an appeal and there is no evidence that the Council's decision to consider the application again during the pre-election period would necessarily have led to any prejudice or injustice. The subsequent delay in delay was in part due to the appellants' decision to make the appeal which meant that the Council was no longer in a position to determine the application. Nevertheless, although by appealing the appellants added to the delay, they did not act unreasonably in the circumstances, particularly given the delay outside their control which had already occurred.
 25. The Council did not act unreasonably if it felt that, in light of legal advice, it found itself in a position where it could not issue planning permission as it had previously resolved to do. Nor is it obliged to reveal that privileged legal advice. The Council's solicitor explained in some detail why he considered that a meeting of the Planning Board could take place during the pre-election period and the Council did not act unreasonably by proposing to consider the application at that time. However, the absence of a clear explanation of the Council's approach following such a clear one at the point of the resolution to granted permission was unreasonable.
 26. The Appeal Report notes that the Council advised that, since the appeal was made and the Council elections were held on 3 May 2018, there had been no Planning Board Meetings. On the basis of the information available it is not clear

- whether the Council would have had the opportunity to advise what their position on the appeal would have been before the Hearing.
27. Nevertheless, the situation is such that the Council did not review their case promptly following the lodging of an appeal against non-determination as part of sensible on-going case management. This amounts to unreasonable behaviour.
28. The Council's approach not to provide any indication of how they wished to consider the proposal beyond noting the steps which had led to the appeal was unreasonable. Despite direct questioning at the Hearing they could not advise what their position or view on the appeal was. This gave rise to considerable uncertainty as the appellant did not know whether the Council would be opposing the application or supporting it at appeal. The PPG advises that Councils should not only explain their reasons for not reaching a decision but also why permission would not have been granted had the application been determined within the relevant period.
29. By not having a position on the appeal the Council did not explain why permission would not have been granted, or indeed the opposite, and this amounts to unreasonable behaviour.
30. Had the Council not acted unreasonably the appellants would not have had to make the appeal and the associated unnecessary expense of doing so. By not having a clear position on an appeal against non-determination this caused wasted expense of attempting to fight an appeal where it was uncertain what the Council's position actually was.
31. The Council behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process as set out in the PPG.

Recommendation

32. It is recommended that the full award of costs is allowed.

Geoff Underwood

INSPECTOR