
Costs Decision

Hearing Held on 29 September 2020

Site visit made on 10 September 2020

by D M Young JP BSc (Hons) MA MRTPI MIHE

an Inspector appointed by the Secretary of State

Decision date: 26 October 2020

Costs application in relation to Appeal Ref: APP/M1005/W/20/3248700 Land to the south of B600 Lower Somercotes, Somercotes, Alfreton, Derbyshire

- 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 Paul Newman New Homes for a full award of costs against Amber Valley Borough Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for a residential development of 99 dwellings with associated landscaping and recreational open space.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

Background

2. The "*Planning Practice Guidance*" (the PPG) advises that costs may be awarded against a party who has behaved unreasonably and where this behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. The general principle embodied within the PPG is that the parties involved should normally meet their own expenses. Examples of unreasonable behaviour by planning authorities include:
 - A failure to produce evidence to substantiate a reason for refusal on appeal;
 - The use of vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis;
 - Not determining similar cases in a consistent manner, and
 - Refusing planning permission on a planning ground capable of being dealt with by conditions.
3. Although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviour and actions at the time of the planning application can be taken into account in the Inspector's consideration of whether or not costs should be awarded.

The Case for Paul Newman New Homes

4. The Applicant's claim is based on the following arguments:
 - (a) The Council's decision to refuse planning permission was made against Officer recommendation;

- (b) The decision was based on a single incoherent reason for refusal;
 - (c) The decision was inconsistent with the Council's earlier Nether Farm decision;
 - (d) The Council consistently failed to substantiate its reason for refusal or to furnish the Applicant with further information despite written requests, and
 - (e) The Council refused the re-submission on different grounds and despite a second positive officer recommendation.
5. It is argued that the above left the Applicant with no alternative but to pursue its appeal and to incur the unnecessary expense in relation to that.

The Case for Amber Valley Borough Council

6. The Council has defended its handling of the application arguing that whilst the reason for refusal may have been vague and/or incoherent, the Planning Board's main concern was one of public safety which relates directly to land contamination. Members of the Board were entitled to exercise their own judgement in a rational way taking into account the information contained in the Officer's Report. The Council also points out that the supplementary land contamination report was not before the Planning Board when the decision was made.
7. Following the decision to refuse the application, further consideration by the legal team resulted in the Council's decision not to defend the matter due to the Nether Farm Judgement. The Council communicated that decision to the Appellant in June 2020 so that unnecessary costs relating to the appeal could be avoided. The timing of the Council's decision was such that it should have been possible to deal with the appeal by written representations rather than a Hearing. This would have avoided the expense associated with the calling of witnesses.
8. Based on the foregoing, the Council resists a full award of costs. Should an award be made, it should be commensurately reduced to reflect the Council's decision not to defend the appeal.

Reasons

9. The Council's decision to refuse planning permission was taken contrary to a very clear and well-reasoned recommendation contained in the Planning Board Report. Whilst it is a fundamental principle of local decision making that a planning committee is not bound to follow the advice of its officers, there is a legitimate expectation that where this occurs it should show reasonable planning grounds for taking a contrary decision and produce sound, substantive and defensible evidence on appeal to support the decision in all respects. That clearly did not happen in this instance.
10. The reason for refusal, which simply listed several local plan policies, was completely indefensible on the Council's part. It failed to inform the Applicant, nor anyone else who happened to read the Decision Notice, why the application had been refused. That failing was compounded by the Council's failure to produce substantive minutes from the Board meeting. Those that were submitted with the Appeal Questionnaire were limited to a short summary of Cllr McCabe's and the Planning Agent's oral comments. There were no

substantive minutes from the debate itself and therefore I have no way of knowing how Members came to reject the advice of its Officers and to arrive at such a vague reason for refusal.

11. Anecdotal evidence from those in attendance, suggests there was very little by way of a proper and reasoned debate at the meeting. Moreover, there appears to have been no detailed consideration given to the Applicant's contaminated land report and as confirmed by Cllr McCabe, no discussion about how Member's concerns, even if they were valid, could have been addressed by conditions (as was the approach taken at Nether Farm). There is no evidence that Member's undertook any kind of balancing exercise by weighing their concerns about public safety with the benefits of the scheme which were comprehensively set out in the Officer's Report. On any assessment, these failings clearly cross the unreasonable behaviour threshold.
12. The Council argue that the Board's decision was 'rational'. However, that argument has very little going for it. From the available evidence, it appears that the Planning Board's decision was based almost exclusively on Cllr McCabe's 'local knowledge' and was completely bereft of supporting evidence. It was evident from my own questions at the Hearing, that Cllr McCabe was not familiar with the technical reports submitted with the application. Given that these reports are compiled by competent experts in their field and at significant cost to the Applicant, there is a reasonable expectation that all those engaged in the decision-making process are familiar with them. That is particularly so in cases where a Planning Board wishes to depart from the recommendations of a particular report, the conclusions of which have been endorsed by the Council's professional officers.
13. The lack of any detailed and specific evidence means that the Council was not able to substantiate its 'public safety' concerns. In short, the decision was irrational and relied on no more than vague and generalised assertions unsupported by appropriate analysis and evidence. To its credit, the Council accepted that its opposition to the scheme was untenable and withdrew its opposition accordingly. In recognition of that, I have gone on to look very carefully at the chronology of events following the Planning Board's decision in order to determine whether a full or partial award of costs should be made.
14. The Board meeting was held on 9 September 2019 with the decision notice being issued on 17 September 2019. Following the decision, the Council were contacted by the Applicant on three separate occasions between 19 February and 10 March 2020, seeking clarification as to the Council's reason for refusal in order to narrow the scope of disagreement. That approach is entirely in line with that advocated in the PPG.
15. The final letter put the Council on notice of the Applicant's intention to lodge an appeal and to seek a full award of costs if the requested clarification (and suitable supporting evidence) was not forthcoming. Whilst it appears the Council did respond to the Applicant's final letter, that response failed to provide any clarification as to the reason for refusal.
16. The Appeal was subsequently lodged on 10 March 2020 and the parties were informed of the Applicant's choice of procedure. It was originally decided that the appeal was to be heard by way of a Public Inquiry lasting for three days. The Council's response dated 13 March, confirmed its agreement to the Inquiry procedure albeit that a one-day Inquiry was considered sufficient. Around this

- time, the Nether Farm Judgement was published, prompting a further exchange of correspondence between the main parties.
17. The result of those exchanges was that the Applicant offered to resubmit the application to give Members of the Planning Board the opportunity to reconsider their objection in light of the Nether Farm Judgement. Pragmatically, the Applicant offered to withdraw the appeal (and cost application) if the second application was approved in a timely manner.
 18. By this time the Council accepted through its letter dated 19 March 2020 that its objection related solely to contaminated land. Moreover, in response to a request for information from the Inspectorate's Case Officer, the Council confirmed that *"the only evidence with be that of the Chairman of the Planning Board who will provide an explanation of how the board arrived at the decision to refuse based upon the above policies. The Council is therefore not intending to adduce any further evidence which will require testing or the Appellant to counter."*
 19. The second application was submitted to the Council in late April 2020 and was accompanied by a supplementary contaminated land report. At the beginning of May the Council began to question the need for a Planning Inquiry on the basis it was not intending to call any witnesses. On 3 June the Council submitted its Statement of Case. Despite its 19 March letter, the Council's Statement sought to widen its concerns to include matters pertaining to development in the countryside as well as heritage and carbon reduction concerns¹.
 20. Having reviewed all the available evidence up to that date and in light of the fact that the Council had resolved not to defend the appeal, I took the procedural decision to downgrade the appeal to a Hearing on 19 June. Given that one local resident (representing a local action group), had requested Rule 6 status² and another was intending to call a specialist witness, it was felt that written representations would have been inappropriate.
 21. In summary, the appeal was submitted on 10 March. The Applicant and Council both initially agreed an Inquiry would be the appropriate procedure. However, it was not until sometime later on 15 June that the Council withdrew its opposition to the scheme and after it had submitted its Statement of Case. That extended period of time afforded the opportunity for interested parties to become involved and to lodge their own detailed objections, something which was fuelled by the uncertainty of the reason for refusal which effectively left all matters on the table.
 22. Given the timeline set out above, particularly the time taken to respond to the Applicant's letters and the Nether Farm Judgement, I find that the Council did not act swiftly enough to avoid the need for a Hearing. Had the Council withdrawn its opposition in the immediate aftermath of the Nether Farm Judgement, then I would be more sympathetic to the position it now finds itself in. Instead, it dithered for approximately three months by which time the need for a Hearing was unavoidable.

¹ Paragraphs 9-16 of the Council's Statement of Case

² Troy Smith

Conclusion

23. The Council's decision to refuse planning permission patently failed to stand up to scrutiny on appeal and this means that the Council's decision was injudicious.
24. The Council's failure to adduce a satisfactory explanation as to why its position in relation to this case was so contrasted with the approach taken in relation to the Nether Farm application means it has not determined similar cases in a consistent manner. The Council is guilty of much the same offence in relation to the second application which was refused on different grounds to the appeal scheme.
25. The contaminated land concerns were clearly capable of being dealt with by planning conditions and this too amounts to unreasonable behaviour.
26. Whilst I can appreciate that correspondence in a busy planning department can at times fail, the Council's repeated failure to engage with the Applicant in the aftermath of the Planning Board's decision was also unreasonable and left the applicant with no real alternative but to proceed with the appeal and to seek costs.
27. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG has been demonstrated on several fronts and that a full award of costs is justified.

Costs Order

28. In the 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 Amber Valley Borough Council shall pay Paul Newman New Homes, the costs of the appeal proceedings described in the heading of this decision.
29. The Applicant is now invited to submit to Amber Valley 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.

D. M. Young

Inspector