



Costs Decision

Inquiry Held on 20 to 23 October 2020

Site visit made on 16 October 2020

by Richard Aston BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21st December 2020

Costs application in relation to Appeal Ref: APP/D3640/W/20/3248476 Woodside Cottage, Chapel Lane, Bagshot GU19 5DE

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Julian; Charles and Julian-Ann and S. Korn; N.Hall and Kentish Barnes (c/o CALA Homes Thames Ltd) for a full award of costs against Surrey Heath Borough Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for development described as *'full planning application for the proposed erection of 44 dwellings with accesses from Chapel Lane, landscaping and associated works following the demolition of the existing dwelling'*.
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Decision

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

The submissions for Julian; Charles and Julian-Ann and S. Korn; N.Hall and Kentish Barnes (c/o CALA Homes Thames Ltd)

2. The appellant's application was originally refused, contrary to the case officer's advice, for 5 reasons albeit only 3 were controversial (reasons 1, 2 and 4 – the other being uncontroversial matters which in the appellant's opinion were always capable of being dealt with by s.106 contributions in the event that the Council was minded to grant permission. Reason for refusal 2 was withdrawn immediately before the first case management hearing on 25 June 2020. The appellant spoke with the Council on 2 September 2020, who confirmed that the appeal was to be defended, even though it had conceded it could not demonstrate a 5-year supply of housing land.
3. Reason for refusal 4 was withdrawn on 8 September 2020 after Surrey County Council and the Council finally accepted the appellant's case that the contribution, they had previously sought for the provision of a one-way system and/or 20mph speed limit on Chapel Lane was not necessary to make the development acceptable.
4. Just prior to the second case management conference on 14 September 2020 the Council confirmed it no longer wished to defend its decision to refuse planning permission. By this stage, the appellant had already incurred and committed itself to considerable costs in relation to the appeal. Proofs of evidence had already been largely written and leading counsel had been engaged for the Inquiry.

5. The Appellant contends that the Council's refusal of planning permission, and/or its maintenance of its opposition to the appeal until 14 September 2020, was "substantively unreasonable". It is no good to assert the non-opposition was only attributable to its revised 5 Year Housing Land Supply ('5YHLS') for the following reasons:
 - 1) The appellant's case had always been that the Council could not demonstrate a 5YHLS
 - 2) The Council maintained its opposition to the appeal following the publication of the housing land supply position statement.
 - 3) The drip-drip withdrawal of the Council's reasons for refusal – reason 2 on 25 June, reason 4 on 8 September and reason 1 on 12 September – properly interpreted this was the Council gradually appreciating that its refusal was not properly defensible. It is also indicative of the Council in not reviewing its case promptly.
 - 4) The application should clearly have been permitted irrespective of the 5YHLS position, bearing in mind in particular the case officer's recommendation for approval and the allocated status of the site in the adopted development plan, a position carried through in the emerging development plan
 - 5) The bottom line is that the Council has failed to produce any evidence at all to substantiate any of the reasons for refusal or to justify Members' decision to reject the case officer's recommendation to approve.
6. The Council's earlier unreasonable stance has caused the Appellant unnecessary expense of preparing for and attending the Inquiry. It would be unjust, and contrary to the PPG, not to compensate the Appellant for that.

The response by Surrey Heath Borough Council

7. The appellant's costs application should be dismissed because:
 - The Council has not acted unreasonably with respect to either the substance of the matter under appeal or in relation to the process;
 - Even if it has (which is denied) any unreasonable behaviour has not directly caused the appellant to incur unnecessary or wasted expense in the appeal process.
8. The Council's Reason for Refusal 4 was entirely reasonable, based as it was on advice from the Highways Authority. The appellant's explanation as to the reason for refusal 4 being withdrawn on 11 September is incorrect. It is not because the County Council and the Borough Council "finally accepted the appellant's case" that the contribution previously sought was not necessary. Negotiations simply led to an acceptable alternative scheme. No criticism can be made of the Council in respect of either its original reason for refusal nor the timing of the conditional withdrawal of this reason.
9. In terms of reason 1, it was entirely reasonable for the members of the Council's planning committee to form their own planning judgment notwithstanding that the site was allocated for residential development.

10. The only issue is whether the timing of the Council's withdrawal of this reason for refusal due to the change in the 5YLS was reasonable. It was for the following reasons:
- 1) on 23 January 2020 (and therefore very soon after the application was refused on 20 January 2020), an Inspector had confirmed that the Council was able to demonstrate a 5YLS (the Appellant has failed to mention this). The Council's previous 5YLS paper 2019 October Report also showed that the Council could demonstrate a 5YLS.
 - 2) the Appellant was well aware that the Council needed time to carry out its annual review of the 5YLS, and that this would be published in early September and not before. The Appellant agreed to that timeframe at the first CMC
 - 3) that review (as set out in the Council's 5YLS paper) was completed by the time indicated by the Council and sent immediately to the Appellant when it was published (on 1 September 2020)
 - 4) once that was published, the Council needed time to review its position based on advice received from its professional advisers. Having received that advice, and confirmed its instructions based on that, its position was communicated immediately to the appellant on the 14 September.
11. In the circumstances, that period of time does not constitute any sort of unreasonable delay. there was no positive evidence produced by the appellant in March in respect of 5YLS that the Council can be criticised for not considering. Rather, the 5YLS Housing Land Supply paper was the result of a review that the Council was required to undertake in any event pursuant to national policy and guidance that expects such reviews to be carried out annually.
12. Any delay by the Council in withdrawing has not caused the appellant any additional costs because:
- 1) The appellant expressly indicated in statement of case in March that it was awaiting the Council's evidence on 5YLS and that it would wish to interrogate that evidence in the course of the inquiry.
 - 2) The appeal is continuing due to the involvement of a Rule 6 party and therefore the need to prepare for the inquiry and produce proofs of evidence arises in any event. the costs and expense of preparing for the inquiry, and indeed the costs of preparation of proofs of evidence, all of which are the subject of the present application for a full award costs – would have had to have been incurred in any event.

The final response on behalf of the applicant

13. The Council's response to the appellant's costs application does not grapple with the fundamental point that the planning application which was the subject of this appeal was one which should manifestly have been granted. The Council has produced no evidence at all to defend its reasons for refusal let alone demonstrate why (in the face of the case officer's advice) they were reasonable. The Council's response does not provide any convincing answer to the submissions on the 5YHLS point made at para. 10 of the appellant's costs application.

14. If the Inspector agrees that it was unreasonable to refuse permission, then no appeal would have been necessary and there would therefore have been no Rule 6 Party involvement. Therefore, a full award of costs would be justified. If, on the contrary, the Inspector considers that the refusal was reasonable but the delay in withdrawing the reasons for refusal was not, then the appellant is content to accept that any award of costs should be partial and confined to the cost incurred or committed to as of the date on which the Council communicated that it would not defend the appeal 14 September 2010. For the avoidance of doubt, this is a considerable five-figure sum (which if not agreed would be subject to detailed assessment in the usual way).

Reasons

15. The Planning Practice Guidance ('PPG') advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.
16. The planning application was reported to the Council's Planning Committee with a recommendation to grant planning permission. The Planning Committee however is not obliged to accept the officer's recommendation, especially where an exercise of judgement is required, as is the case here, but in doing so it must be able to provide clear reasons for refusal.
17. In this instance the first reason for refusal states that the proposal would fail to respect and improve the character and quality of the area. Quantum and density are matters referred to along with an associated loss of trees and ultimately a failure to respect and improve the character and quality of the appeal site and area.
18. I do not have the benefit of being party to the meeting and the discussions that took place. However, notwithstanding the positive officer recommendation, the committee was not bound to accept the advice especially where an exercise of judgement is required, and they had clear concerns on specific matters that formed the focus of the Inquiry. The Council also clearly considered at the time of the decision that it could demonstrate a 5YHLS. This view was supported by the findings of an Inspector in a recent appeal decision and the October 2019 5YHLS Paper.
19. Whilst I appreciate that the applicant disagrees with the Council's consideration of the development, the reason for refusal is a matter of planning judgement that involves a degree of subjectivity. I have also found harm to the character and appearance of the area in the associated appeal decision. In my view, this is not a case where planning permission should clearly have been granted and an appeal was inevitable.
20. Following that decision, the second reason for refusal was withdrawn promptly prior to the first Case Management Conference ('the CMC') and therefore did not involve the appellant in unnecessary or wasted expense.
21. In terms of highways and the fourth reason for refusal, it appears to me that ongoing negotiations led to an acceptable alternative scheme and the reason was withdrawn on 8 September 2020. The Council confirmed this to PINS on 11 September 2020 indicating that, subject to a suitable condition securing the provision of this alternative scheme, it would withdraw its objections to the

- proposal set out in reason 4 of the decision notice. That was an entirely reasonable position to adopt following changes in circumstances. I do not take it as the Council finally accepting the appellant's case as suggested in the application.
22. The PPG encourages the parties to review their cases promptly as part of sensible on-going case management. The Council further reviewed their position on the appeal following publication of their latest 5-Year Housing Land Supply Statement, which they had informed me was due to be published in early September 2020 at the first CMC call in June 2020. The statement was duly submitted to PINS and the parties on 28 August 2020 as the Council indicated.
23. As a result of this material change the Council did not feel able to demonstrate that the adverse impacts would significantly and demonstrably outweigh the benefits. As a material consideration, the presumption in favour of sustainable development¹ contained within paragraph 11 d) ii of the National Planning Policy Framework indicated to them that a decision should be made other than in accordance with the development plan.
24. The applicant's agent appeared to contact the Council on 2 September 2020 and was told verbally that the appeal was still to be defended. I do not read too much into this because it was straight after a Bank Holiday weekend and no matter how keen the appellant was, it is not surprising that was the response given. The period of 10 working days which it took for the Council to formalise this is not unreasonable, especially during the ongoing COVID-19 Pandemic and the need for consideration and discussion to take place and a decision to be made by the appropriate officer, no doubt requiring consultation with members of the Council who had overturned the original recommendation.
25. The statement was a result of the normal review required by national policy and guidance. The appellant was clearly aware of it and was awaiting the review before confirming its position, offering no positive evidence of their own in the statement of case. This suggests the majority of the work in this respect would have taken place after this paper had been published and before proofs were due on 22 September 2020. The appellant has also not challenged the figure contained within.
26. If this was the basis that proofs were progressed that was ultimately the appellant's choice. Proofs of evidence were not due until 22 September 2020 (I also gave 1-2 days flexibility) which would be sufficient for evidence to have been produced and/or amended, if necessary.
27. The quotation from 4.8 of the Statement of Common Ground does not assist because that was not my understanding of the Council's position at the second CMC. Further at my request for clarification at the Inquiry, the Council also re-affirmed that position. This is clear in my decision on the associated planning appeal and that statement plainly does not accurately set out the Council's position.
28. The appellant had instructed Counsel by that stage, but the refusal was reasonable and Rule 6 Party status had been granted to Chapel Lane Action Group whose participation was on the basis of the first identified main issue of

¹ Because the Council cannot demonstrate a 5-year supply of housing land, in accordance with footnote 7 of paragraph 11 d).

effects on character and appearance. Third parties had also raised issues of highway safety which would need to be addressed. Costs associated with the appeal in terms of all of the evidence would therefore have been incurred in any event.

29. Overall, I do not consider that this is a scheme which should manifestly have been granted planning permission. Whilst changes to the Council's position may have come in varying 'drips' as the application puts it, I do not agree that the situation can properly be characterised by the Council gradually appreciating that its refusal of planning permission was not properly defensible. The Council was, in my view, responding reasonably and responsibly to changes in circumstances.
30. For these reasons, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. Therefore, for the reasons given above, I refuse the application for an award of costs.

Richard Aston

INSPECTOR