
Costs Decisions

Inquiry Held on 23-27 November 2020 and 30 November 2020

Site visit made on 19 November 2020

by Stephen Normington BSc DipTP MRICS MRTPI FIQ FIHE

an Inspector appointed by the Secretary of State

Decision date: 7th January 2021

Costs application in relation to Appeal A: APP/U2235/W/20/3254134 & Appeal B: APP/U2235/W/20/3256952

Land West of Church Road, Otham, Kent ME15 8SB

- 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 Bellway Homes Limited for a full award of costs against Maidstone Borough Council.
 - The inquiry was in connection with two appeals. The first is against the failure of the Council to issue a notice of their decision within the prescribed period on an outline application for up to 440 residential dwellings, with associated access, infrastructure, drainage, landscaping and open space. Access to be considered in detail and all other matters reserved for future consideration. The second was in connection with an appeal against the refusal of planning permission for residential development for 421 dwellings with associated access, infrastructure, drainage, open space and landscaping. The award of costs is pursued in respect of both appeals.
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Decision

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

Procedural matters

2. The appeals to which these costs applications relate are in respect of two planning applications on the same site with the same means of access. For ease of reference I have referred to the two cases as Appeals A and B in this costs decision as set out in the header. The award of costs is pursued in respect of both appeals and I use singular terms such as 'appellant' and 'appeal site' for ease of reference.
3. Appeal A was submitted in respect of the non-determination of the outline planning application. The Council refused planning permission for the application relating to Appeal B and resolved that it was minded to refuse planning permission for Appeal A had it been in a position to determine the relevant planning application. The same two reasons for the refusal of planning permission were applicable to both applications and related to the impacts of the developments on traffic congestion on Willington Street and would worsen highway safety issues on Church Road.
4. The Planning Practice Guidance (PPG) advises that all parties are expected to behave reasonably to support an efficient and timely process. Where a party has behaved unreasonably and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to

an award of costs irrespective of the outcome of the appeal. Further, local planning authorities are at risk of an award of costs if they behave unreasonably with relation to:

- preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations;
- making vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis;
- refusing planning permission on a planning ground capable of being dealt with by conditions, where it is concluded that suitable conditions would enable that proposed development to go ahead; and
- not determining similar cases in a consistent manner.

The submissions for Bellway Homes Limited

5. The appellant has identified three substantive grounds to support an application for a full award of costs. Firstly, that the Council failed to adequately acknowledge that the appeal site was allocated for development in the Maidstone Borough Local Plan adopted in October 2017 (the Local Plan) and Members of the Council failed to heed the advice of their planning officer that planning permission should be granted in respect of both applications. Furthermore, Members also failed to consider legal advice in respect of the prospect of an award of costs in relation to pursuing the reason for the refusal of planning permission through the appeal process.
6. Secondly, that there was insufficient evidence to support the two reasons for refusal both at the time the applications were considered by Members and at the Inquiry. Finally, the Council failed to take a consistent approach in decision making in comparison to the other sites allocated in the South East Maidstone Strategic Development Location (SEMSDL) in Policy H1 of the Local Plan in that all but the appeal site allocated in Policy H1(8) have been approved.
7. The appellant contends that the Council acted unreasonably by following the advice of Kent County Council (KCC) in its capacity of highway authority who have always maintained opposition to all of the sites allocated in the SEMSDL despite the fact that the Inspector in the Examination of the Local Plan found these sites, including the appeal site, to be sound following the consideration of the impact on the local highway network.
8. In addition, the Council had been inconsistent in its decision making by ignoring the advice of KCC in respect of the consideration of the planning applications relating to five other allocated sites in the SEMSDL but did not do so in respect of the planning applications relating to the similarly allocated appeal site. With regard to the reasons for refusal of planning permission, the Council failed to produce any substantive evidence to support its position. In particular, the Council offered no understanding of the interpretation of "severe" in the context of paragraph 109 of the National Planning Policy Framework (NPPF). Furthermore, the Council did not provide any modelling/data or other objective evidence and unreasonably sought to rely on the provisions of the Kent Design Guide, which is not adopted and largely applies to new roads. It also failed to take into account other material considerations.

The response by Maidstone Borough Council

9. The Council considers that the appeal schemes have been amended to provide additional highway safety mitigation and new modelling evidence that was not before the Council at the time that the decisions was made in respect of Appeal B, and the view that it would have been minded to refuse the development proposed in Appeal A had it been in a position to do so. In addition, the Council contends that the highway witness on behalf of KCC provided a detailed proof and oral evidence to demonstrate that the mitigation measures would not be sufficient and why the outputs from the modelling would lead to network conditions that would be cumulatively severe.
10. The Council considers that the highway issues associated with the appeal site are largely discrete from, and can be distinguished from, the objections made by KCC at the Local Plan stage. In particular, the appeal site is modelled to displace a significant amount of traffic onto Deringwood Drive, unlike the other sites referred to in the SEMSDL by the appellant.
11. The signalling solution proposed to mitigate queuing on Deringwood Drive at peak hours would cause alternative problematic effects on Willington Street which has a more important function on the local highway network hierarchy. The proposals are also forecast to create an unacceptable highway safety impact on Church Road due to the current narrow nature of the highway which, in parts, is insufficient to enable two vehicles to pass each other, in particular Heavy Goods Vehicles (HGVs).
12. The Council contends that the allocation of the site in the Local Plan was not ignored and that Members were provided with the clear views of the Planning Officer that were different from those of KCC. Furthermore, it is not for the highway authority to provide a solution to unacceptable congestion arising from the development proposals. At the time the decisions were made on the applications, Members were aware that no widening on Church Road south of The Rectory was being offered.
13. KCC evidence provided a thorough objective analysis of the highway harm and a currently good safety record of Church Road does not mean that this will continue to be the case when it has to cater for the traffic arising from up to 440 dwellings. Furthermore, none of the other allocated sites in the SEMSDL that were granted planning permission required the signalisation of the Deringwood Drive/Willington Street junction. The fact that Council Members gave reasons for refusal based on a statutory consultee's advice is neither surprising nor unreasonable.

Reasons

14. The development proposed in these appeals is of a location and scale that is entirely consistent with the allocation in the Local Plan. The examination process which led to the adoption of the Local Plan involved the provision and consideration of evidence, including the Council's own commissioned modelling, relating to the highways impacts and mitigation required to support the allocation of the SEMSDL sites.
15. The Inspectors Report on the Examination of the Local Plan¹, dated 27 July 2017, states, "*In conclusion the Policy SP3 South East Maidstone Strategic*

¹ CPRE: Proof of Evidence – Otham Parish Council – Appendix 5

Development Location will generate additional traffic and could contribute to an increase in congestion, particularly at peak hours, even after mitigation in the form of road improvements and other measures to make sustainable travel more attractive and effective”.

16. In adopting the Plan that provided for the allocation of the appeal site, the Council were aware of the impact of development on the local highway network. No substantive evidence was provided in the Inquiry to identify what is different in terms of envisaged traffic flows in 2020 from when the Council decided that the site was suitable for up to 440 dwellings in 2017.
17. The submitted Transport Assessments included traffic surveys and assessments of local junctions, including that at Deringwood Drive with Willington Street. For the wider/strategic junctions, the appellant's evidence provides the likely additional impact of the development but relies upon the cumulative assessments of transport impacts carried out to support the planning applications for the development on allocated sites H1(7) and H1(10) and included the likely traffic arising from the appeal site. These assessments concluded that the cumulative traffic impact upon the local network (including the appeal site) would not be severe subject to the improvements outlined in the relevant policies to junctions and public transport. In respect of the planning applications relevant to the H1(7) and H1(10) sites the Council had accepted the conclusion that there would not be a severe cumulative effect on the local network as a consequence of developing these SEMSDL sites, including the appeal site.²
18. Therefore, I consider that the Council were fully aware of the likely effect of the traffic to be generated from all of the SEMSDL sites, including the appeal site, both during their acceptance of the allocation in the adoption of the Local Plan and in the consideration of planning applications for the H1(7) and H1(10) sites. The Local Plan Inspector correctly pointed out that there would be an increase in congestion as a consequence of the development of the SEMSDL sites. However, up to the consideration of the appeal schemes the technical evidence that was accepted by the Council did not define the cumulative impact on the local highway network as being severe.
19. The appeal schemes do not propose anything different to the form of development as prescribed by the requirements of Policy H1(8) of the Local Plan in respect of the location, quantum or access position. Other than the effect on traffic flows that was predicted to occur as a consequence of the development of the SEMSDL sites, no evidence was presented by the Council to suggest that there has been a fundamental change in the traffic data or highway conditions in the Borough since the Local Plan was adopted only three years ago when the traffic implications of the SEMSDL for the plan period to 2031 were comprehensively assessed.
20. Irrespective of whether the appeal schemes are allowed, the submitted Transport Assessment suggests that the Willington Street/Deringwood Drive junction cannot remain to operate within its existing arrangement over the next few years with the various committed development schemes currently completed or under construction in south-east Maidstone. In considering the additional traffic arising from the appeal schemes, the appellant has understandably sought to address this matter to provide a mechanism to

² CD168 & 169 Planning Committee Report - 28 May 2020

access Willington Street from Deringwood Drive. Equally understandable is that in doing so there would be some impact on Mean Maximum Queues (MMQ) on Willington Street as a consequence of signals introducing a break and delay in traffic flows along Willington Street. In my view, this is an entirely understandable consequence of developing the allocated site in accordance with the requirements of Policy H1(8).

21. I note the Council's view that Members did not have the opportunity to consider the recent modelling data. The Council's reply to the costs submission indicates that Members placed significant reliance on the views of KCC as the statutory consultee. Before the Inquiry opened the revised modelling data was available to the KCC highway witness, being the same officer who had advised the Council on behalf of the highway authority, in response to the consultations on the planning applications.
22. Despite this revised data being available, there was no suggestion whatsoever in the Inquiry itself that this would influence or change the views of the highway authority. The highway witness remained resolute throughout the Inquiry that the proposed improvements to the Deringwood Drive and Willington Street junction will result in severe traffic congestion on Willington Street. Therefore, even if the Members of the Council had been able to consider the revised modelling I am not persuaded that the views of KCC would have been any different to those expressed in the Inquiry.
23. There was no suggestion in the Inquiry by the Council's highway witness that the proposed signalisation of the junction would cause any highway safety issues. Furthermore, no quantification was provided by the Council to establish the threshold at which the extent of congestion, which was foreseen to some extent in the evidence before the Local Plan Inspector, could be interpreted to cause severe residual cumulative impacts in the context of paragraph 109 of the NPPF. Moreover, there was no indication of what degree of traffic impact on Willington Drive would be found acceptable to the Council despite acknowledgment that a significant number of vehicles would need to use the junction of Deringwood Drive with Willington Street to gain access to the wider network as envisaged in the allocation of the site.
24. Overall, with regard to the first reason for the refusal of planning permission, I find that the Council did not adequately take into account the allocation of the site in the Local Plan in terms of its acknowledged impact on traffic congestion. The Council also failed to provide any quantification to justify why the consequential impact of addressing the MMQs on Deringwood Drive would cause such 'severe' cumulative residual impacts on Willington Street to the extent that planning permission should be refused in the context of paragraph 109 of the NPPF.
25. The Council's first reason for the refusal of planning permission failed to conclusively substantiate any conflict with Policy DM21 of the Local Plan and paragraphs 108 and 109 of the NPPF. It was not substantiated by technical evidence or objective analysis, particularly as the site was allocated for the quantum of development proposed, utilising access to Church Road as identified in Policy H1(8) of the Local Plan. Furthermore, its impact had been considered in previous transport assessments accepted by the Council.
26. In the planning judgement, it appears to me that having regard to the provisions of the development plan, national planning policy and other material

considerations, the proposal should have reasonably been permitted with regard to the first reason for refusal. The refusal of planning permission based on the Council's first reason for refusal therefore constitutes unreasonable behaviour contrary to the guidance in the NPPF and the PPG. The appellant has been faced with the unnecessary expense of lodging the appeal in this regard. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that an award of costs is justified in respect of the first reason for refusal.

27. In my view, the consideration of the effect that the proposed developments may have on highway safety on Church Road is, to some extent, more of a subjective judgement. The Council's wording in the second reason for refusal unfortunately refers to the worsening of safety issues on Church Road. I accept that this road has a good safety record. Nonetheless, I also accept the Council's view that a current good safety record does not mean that the road will continue to have a good safety record when it has to cater for the traffic generated by up to 440 dwellings.
28. Whilst Policy H1(8) specifies that access to the site needs to be taken off Church Road it does not specify what works would be necessary to ensure that suitable and safe use of the road can be made to enable access and egress into and out of the site. Policy DM1 of the Local Plan requires that vehicular movement arising from a development can be safely accommodated on the local highway network. The Council therefore correctly considered the effect of the development on Church Road in the context of Policy DM1.
29. The applications considered by the Planning Committee provided for the widening of Church Road to the south of the site to a continuous carriageway width of 5.5m but only as far as 'The Rectory'. The carriageway width thereafter would remain predominantly as existing, on average between 4.25m and 4.49m with the narrowest section at 3.9m³. Manual for Streets⁴ shows that a carriageway width of 4.1m is only wide enough to accommodate two passing cars, a width of 4.8m enables a HGV to pass a car and a width of 5.5m enables two opposing HGVs to pass.
30. Unlike the issues of traffic flows, junction capacity and MMQs which can, to a large extent, be modelled and predicted with some degree of accuracy, traffic safety is more of a subjective consideration. To some extent, amongst other things, it is reliant on driver behaviour, road alignment and width and the frequency to which vehicular conflict would occur. These factors provide a basis to consider whether safety may be compromised but the degree to which this may be the case cannot be predicted with any degree of accuracy.
31. The proposed development would undoubtedly increase the frequency of opposing traffic movements on the narrower parts of Church Road, including an increase in HGV movements that would occur in servicing a development of up to 440 dwellings. Taking into account the extent of road widening proposed at the time, the increase in traffic movements on Church Road and the views of KCC, I do not find that the Council's concerns, as identified in the second reason for the refusal of planning permission, constitutes a vague, generalised or inaccurate assertion about the proposals' impact. Members of the Council's relevant decision making body were quite entitled to come to a subjective

³ Paragraphs 4.42 and 4.44 – Mr Wright Proof of Evidence

⁴ CD178

judgement on the effect of the development on the safety of Church Road, taking into account the factors that I have outlined above and in particular the road width.

32. I find that the second reason for the refusal of the planning application was specific, relevant to the applications and relevant to the development plan. I have found that the Council had reasonable concerns about the impact of the proposed developments on the safety of users of Church Road to justify its decision. Just because I have found differently from the Council on this matter this does not mean to say that the Council's concerns had no basis. Accordingly, with regard to the Council's second reason for refusal, I do not find that the Council failed to properly consider the merits of the scheme and therefore the appeal could not have been avoided.
33. The further widening of Church Road proposed in the Inquiry that provides a carriageway width of 4.8m for the majority of the length of Church Road up to the junction with White Horse Lane was not before, or considered by, Members of the Planning Committee. The second reason for the refusal of planning permission took into account the mitigation proposed at the time and specifically identified that "... *the mitigation proposed is not sufficient to overcome the safety concerns.*"
34. Whether or not the Council would have had a different view had the additional widening been proposed at the time the applications were considered is a matter of speculation. In addition, and notwithstanding the views of KCC, I do not consider that the wording of the second reason for refusal implies that a carriageway width of 5.5m, as desired by KCC, was necessary to be achieved throughout the whole length of Church Road.

Conclusion

35. The Council's reason for refusing planning permission, as set out in its Decision Notice in respect of Appeal B, and the same reasons in respect of Appeal A, had it been in a position to determine the relevant planning application, consists of two distinct elements. These relate to the impacts of the developments on traffic congestion on Willington Street and would worsen highway safety issues on Church Road.
36. I have found that the Council behaved unreasonably in reaching its decision on the first reason for the refusal of planning permission, but not the second. I therefore conclude that a partial award of costs, to cover the expense incurred by the appellant in contesting the first of the Council's reasons for refusal in respect of both Appeal A and Appeal B is justified.

Costs Order

37. 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 Maidstone Borough Council shall pay Bellway Homes Limited the costs of the appeal proceedings relating to both appeals described in the heading of this decision. In respect of Appeal A this is limited to those costs incurred in contesting the first of the Council's indicative reasons for refusal had it been in a position to determine the relevant outline planning application. Similarly, in respect of Appeal B this is limited also to those costs incurred in contesting the

first of the Council's reasons for refusal. This relates to the perceived resultant severe traffic congestion on Willington Street as a consequence of the proposed development.

38. The applicant is now invited to submit to the 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. In the event that parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Stephen Normington

INSPECTOR