



Costs Decisions

Inquiry opened on 30 March 2021

Unaccompanied site visit made on 29 March 2021

by Philip Major BA(Hons) DipTP MRTPI

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

Decision date: 13 April 2021

Costs applications in relation to Appeal Ref: APP/W3005/W/18/3204132 Land off Mansfield Road/Eastfield Side, Sutton in Ashfield NG17 4HH – Appeal 1

- The applications are 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 applications are made by Ashfield District Council and Asda Stores Ltd for a full award of costs against Lidl UK GmbH.
 - The inquiry was in connection with an appeal against the refusal of the Council to grant planning permission for the erection of a retail store with car parking and landscaping.
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Costs applications in relation to Appeal Ref: APP/W3005/W/18/3265806 Land off Mansfield Road/Eastfield Side, Sutton in Ashfield NG17 4HH – Appeal 2

- The applications are 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 applications are made by Ashfield District Council and Asda Stores Ltd for a full award of costs against Lidl UK GmbH.
 - The inquiry 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 the erection of a retail store with car parking and landscaping.
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Decisions

1. The applications for awards of costs is refused in all cases.

The submissions for Ashfield District Council

The gist of the applications is:

2. The first appeal was progressed despite the Council's attempts to negotiate a better scheme. The subsequent planning application (now Appeal 2) showed that an alternative proposal was possible. It was unreasonable of the Appellant to continue to promote the first scheme and the reasons for refusing it could have been reduced, thus eliminating one ground of appeal.
3. The Appellant has maintained a position that the new store would not be a replacement for that existing. However, the Lidl website indicates that in 2017 the company is intending to relocate its existing store. There is a failure to disclose full evidence, which was unhelpful and misleading. Notwithstanding the undertaking to retain the existing store for at least 5 years the Council has doubts about the enforceability of such an undertaking.

4. The Appellant introduced evidence at the inquiry relating to the availability of the Northern Bridge Road (NBR) site that was obtained at its behest. This was a disingenuous enquiry made by a party with no interest in acquiring or discussing the site. It was confirmed at the inquiry that the Appellant has no intention of making a genuine offer for the NBR site. The Appellant was seeking to demonstrate that the NBR site was not available despite evidence to the contrary, and continued to maintain that the sequential test was passed. This is unreasonable behaviour.
5. The failure of the Appellant to make an offer for the NBR site means that it has failed to fully explore the availability of a sequentially preferable site. It cannot be concluded that the site is unavailable and it is unreasonable to pursue the appeal in such circumstances as it had no reasonable chance of success.
6. The Appellant's assertion that the proposal (if developed on the NBR site) would be in conflict with the Town Centre Masterplan was not credible evidence. There is nothing in the Masterplan which would preclude the development and to continue to take that position is unreasonable.
7. The Appellant has submitted no specific analysis of the likely impact of the proposals on Outram Street local centre. This is a central concern of the Council and it was unreasonable of the Appellant not to provide substantive evidence to support its position.

The submissions for Asda Stores Ltd

The gist of the applications is:

8. The basis of the applications for costs is that the Appellant has acted unreasonably in making and continuing with the appeals when the evidence is clear that the sequential test cannot be passed. It should have been clear that there would be no reasonable prospect of the appeals succeeding.
9. The Appellant's case acknowledges that the appeals site is out of centre and in the least sequentially preferable location in national retail policy terms. The NBR site is agreed to be within Sutton town centre, is allocated for retail use and is a sequentially preferable location. The Appellant acknowledges that it is suitable operationally to accommodate the proposal.
10. It is clear that the Appellant's case was first being put on the basis that Lidl would be the developer and would progress a 2 store strategy for Sutton in Ashfield but would not wish to detract from the catchment of its existing store. But the identity of the operator is not a relevant consideration. The case now put, that the unsuitability of the NBR site is based on the prejudicial impact on the aspirations expressed in the Masterplan, is unsupported by the evidence. There is no conflict with the Masterplan.
11. There is no evidence to support the Appellant's position that the NBR site is not available. The Appellant has made no offer for the NBR site although invited to do so. Asda has made it clear that the site is available should a credible commercial offer be received.
12. The fact that the proposals fail the sequential test in relation to both the suitability and availability of the NBR site means that the appeals had no real prospect of success given that they were contrary to national policy. The

appeals were and remain unreasonable, and Asda has incurred costs in engaging with the appeals as an interested party.

The response by Lidl UK GmbH

13. The central premise of the costs applications by the Council and Asda is that the appeals had no reasonable prospect of success. However, this ignores the fact that the main issues to be determined in the appeals centre of the exercise of planning judgement.
14. There are judgements to be made in respect of the suitability and availability of NBR site, in relation to retail impact, and in relation to the planning balance.
15. The Appellant has taken a reasonable position in respect of the evidence put forward to inform planning judgements. The interpretation of the town centre Masterplan is a legitimate area of debate, and the *Aldergate*¹ judgement indicates that there are circumstances where the identity of an appellant may be relevant. It is legitimate to argue this point in these appeals.
16. It is also relevant for the Appellant to argue in relation to matters of consistency in decision making given the position of the permitted Aldi store approved under the same policy regime and with the same issues at hand. It was reasonable to expect these proposals to be considered on the same basis. That has not been the case and has necessitated the appeals.
17. The Appellant has submitted wholly reasonable grounds of appeal. There has been no unreasonable behaviour and as such there are no grounds for any costs award.

Reasons

18. Planning Practice Guidance 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.
19. As will be abundantly clear from my appeal decisions I have found that the Appellant has not made out its case that the appeal proposals have satisfied the sequential test. The fact that I disagree with the Appellant on the matter of the suitability of the alternative Northern Bridge Road site is largely a matter of planning judgement. That stems from an assessment of the current planning situation of the site. It is both an allocated site in the development plan (SH2Sa) and part of a key site in the later Sutton Town Centre Masterplan. Realistically it is clear that neither of these planning designations is prescriptive, and it is possible to interpret the later Masterplan in a variety of ways. Perhaps unsurprisingly the Appellant has interpreted that document in a manner which supports its case.
20. The planning judgement made by the Appellant in relation to the Masterplan I find to be flawed, but that is not to say that it is a judgement which is wholly devoid of merit. There is a grain of logic within it, but insufficient to justify the position of the NBR site being unsuitable. The judgement is perhaps clouded by the fact that it is clear that the Appellant would actually have no interest in acquiring the NBR site. However, on balance, I am satisfied that the position

¹ See main decision for citation

taken by the Appellant in relation to the suitability of the site does not reach the position of unreasonableness.

21. Turning to the matter of availability this ought to be clear cut. The site is either available or not. At the inquiry the Appellant repeatedly argued that there are questions in relation to availability and questioned whether the contents of the letter from FHP Property Consultants have been shown to be inaccurate. But the balance of the evidence submitted suggests otherwise. The fact that Asda has maintained its position that the NBR site is available and invited offers on more than one occasion is significant. An offer would not, of course, necessarily result in a successful sale. It is also the case that there is no compelling evidence that the land is being actively marketed. As I indicate in my appeal decisions this seems to be a case where the site is likely to be available, but with no hurry for disposal on the part of Asda. The Appellant took a view that the site is not genuinely available, but its case would have been strengthened if a reasonable offer for the site had been made and rebuffed. I also bear in mind that the Appellant has indicated that it would have no interest in buying the land in any event because of its store strategy for the town. On balance I find that the repeated questioning of whether the site is genuinely available has not shown that it is unavailable, but I accept that the Appellant was entitled to reach a judgement on that matter.
22. The fact that the site fails the sequential test on the evidence does not mean that the applications must be refused, as explained in my decisions. But it does mean that the Appellant has a high bar to jump to justify a grant of planning permission. In seeking to do so a number of benefits of the proposal were advanced. I acknowledge those benefits, but these are significantly and demonstrably outweighed by the adverse impact resulting from failure to meet the sequential test, and other harm in Appeal 1. But the balance is a matter of judgement and does not lead me to conclude that the Appellant has acted unreasonably in seeking to advance the benefits as matters which should reasonably lead to a grant of planning permission.
23. On the matter relating to the impact on Outram Street it seems to me that the Appellant submitted information which enabled a judgement to be made whether or not an impact test was needed in any event. Having received the evidence I was bound to consider it. The judgement of the Appellant is one with which I disagree in part. Nonetheless this does not amount to unreasonableness on behalf of the Appellant. The evidence submitted on behalf of the Council was more persuasive in relation to parts of the likely impact on Outram Street, but I accept that the Appellant's position was, in the round, a reasonable one.
24. To sum up, I do not find that the Appellant acted unreasonably in putting forward a case that the NBR site is unsuitable for the proposed developments. Despite a paucity of evidence that the site is unavailable it was open to the Appellant to run a case that even when the sequential test has been failed it is not unreasonable to seek a grant of planning permission where the benefits are judged to be of sufficient weight to override policy conflict. This is a finely balanced case. That the Appellant reached a different judgement on where the planning balance lies is not unreasonable in itself, and in this case I accept that there is sufficient in its case, just, to stay on the side of reasonableness. Hence the cases had to be tested at appeal and there is no wasted expense.

For these reasons I do not find that in these cases costs awards should be made.

25. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Philip Major

INSPECTOR