
Costs Decision

Hearing Held on 18 May 2021

Site visits made on 4 May and 5 July 2021

by Philip Major BA(Hons) DipTP MRTPI

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

Decision date: 14 July 2021

Costs application in relation to Appeal Ref: APP/W1850/W/20/3244253 Wolf Business Park, Ross-on-Wye HR9 5NB

- 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 Herefordshire Council for a full award of costs against Lidl UK GmbH.
 - The hearing was in connection with an appeal against the refusal of planning permission for the demolition of the existing Wolf Business Park buildings and the erection of a new Lidl foodstore, with associated car park and landscaping, and a new access to the retained and new employment land with associated works (full application). The erection of new employment premises on the retained employment land and associated works (outline application).
-

Preliminary Matters

1. Although the substantive case on this proposed development was considered at a hearing, the costs application, and its response, was agreed to be determined following an exchange of written submissions.

Decision

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

The submissions for Herefordshire Council

The gist of the application, procedural and substantive, is summarised below:

3. The Council has been dealing with Lidl and its agents since the first half of 2018, including 2 pre-application enquires. The Appellant was not encouraged to submit an application but did so nonetheless, later withdrawing it. A second application was made, which resulted in a refusal of planning permission for 7 reasons despite the endeavours of the Council to limit these.
4. Over the course of the applications the Appellant has behaved unreasonably in a number of ways. These include complaints about the Officer dealing with the application, the use of a confrontational and adversarial strategy with no meaningful commitment to working with the Council, and seeking to bypass the Case Officer by directly contacting Council Members and senior management.
5. The Council made it clear that there were insurmountable problems in relation to reasons for refusal 1 and 2, but nevertheless tried to engage with the Appellant in order to address reasons for refusal 3 to 7, thereby reducing the time and costs of any appeal. The Appellants did not engage and have failed to address technical and policy issues. The landowner's agent also expressed concerns.

6. The Appellant has failed to address heritage concerns with any objective or quantifiable evidence. This is unreasonable. Similarly, arboricultural matters failed to be addressed prior to determination of the application when there was no good reason to resist the Council's position. This demonstrates the Appellant's inflexibility. In relation to design the proposed building has failed to consider the local context, instead using an 'off the peg' approach. There has been no flexibility in this regard, or on the layout of the site. In addition the Appellant has not proposed any legal mechanism by which the new employment floorspace can be delivered in advance of the proposed store first coming into use despite this being a known requirement.
7. There has also been a lack of response to emails sent by the Council to the Appellant which has led to the Council having to carry out extra work at short notice

The response by Lidl UK GmbH

The gist of the response is as follows:

8. It is denied that the Appellant has acted unreasonably either procedurally or in substance. The Appellant has a statutory right to make planning applications and appeals against refusals.
9. The Appellant made proper and reasonable enquiries of the Council pre-application. There is nothing to prevent an application being submitted even if the advice does not encourage it. The first application was withdrawn for sound reasons and it was reasonable to do so. Much of the Council's complaint on procedure relates to the withdrawn application and is outwith the subject of this appeal.
10. The Appellant has not pursued a confrontational strategy but has acted professionally at all times. There is nothing unreasonable or inappropriate in making representations to senior Members or Officers of the Council, nor in providing independent legal advice. The delegated Officer's report was not provided prior to determination of the application so that any concerns expressed were unable to be addressed.
11. The Appellant relies on the statement of case and submissions at the hearing in relation to heritage matters, maintaining that the reason for refusal in relation to heritage is not sound. It has been addressed in a reasonable and proportionate manner. The reason for refusal relating to trees has now been withdrawn and the Council was not put to additional cost in that respect.
12. The design of the proposed store is not 'off the peg' but responds to local context as explained in writing and orally. There is a difference of view on aesthetic matters but that does not indicate unreasonable behaviour.
13. The major change to the planning system introduced by the introduction of Use Class E came after the appeal was made. This required consideration of the implications of the change, and the position of the Appellant, that a legal obligation is now unnecessary because of the opportunity to change from business to retail use without planning permission, justifies the stance taken.
14. Correspondence included within the Council's application relating to the withdrawn application is not relevant. Neither is the correspondence from Bourne Valley Associates as it was not connected with Lidl and the Council was made aware that Rapleys were to sole agents acting for Lidl.

Reasons

15. 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.
16. This case has had a long and relatively complicated gestation. I acknowledge that the Council has been consistent in advising the Appellant that it would not favour an application on the terms discussed in pre-application enquires. But that does not mean that it is unreasonable for an application to be submitted in accordance with the statutory right to do so. Manifestly it is not. The Appellant took that decision in the light of advice given in the knowledge that Officers of the Council would not support it. It was also not unreasonable, in light of that knowledge, to contact other members of the Council to seek to promote the benefits of the proposal. In my experience that is neither unusual nor inappropriate. I can of course make no comment on the tone of discussions which took place between the Council and the Appellant, but a degree of forthrightness can not be described as unreasonable. The planning system can be adversarial and that inevitably includes the exchange of differing views, sometimes strongly held. It is not unreasonable to make those views known.
17. The Appellant has sought to address the concerns of the Council and has produced evidence on the sequential test and town centre impact. It did not do so in an unreasonable manner since there was clearly a judgement to be made and the Appellant produced a respectable case in these regards.
18. The heritage matter was unusual and the Council's case did not explain any specific threat. The Appellant addressed this point and it was discussed at the hearing. In my judgement the Appellant has presented a sound basis for its stance and no unreasonable behaviour has been demonstrated.
19. Other reasons for refusal have been considered by the Appellant in their written and oral appeal submissions. In short, albeit that there remain differences between the Appellant and the Council I am satisfied that the Appellant has presented evidence to support its case. Whilst I have found against the Appellant in some respects I do not consider that there has been unreasonable behaviour in the manner in which it has approached the case.
20. I acknowledge that there was a great deal of correspondence between the Council and the Appellant. Some delays at times are not surprising. However there is nothing in the matters brought to my attention which suggests that the Appellant has wilfully delayed matters or otherwise acted unreasonably.
21. 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