



Costs Decisions

Hearing Held on 22 and 23 June 2021

Site visit made on 25 June 2021

by Zoe Raygen Dip URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 July 2021

Costs application in relation to Appeal Ref: APP/P3040/W/20/3251801 Costock Road, East Leake LE12 6HY

- 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 Rushcliffe Borough Council for a partial award of costs against Mr Martin Valentine (Positive Homes Ltd).
 - The hearing 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 22 residential units and a 3.5m high ball strike net to the eastern site boundary.
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Decision

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

The submissions for Rushcliffe Borough Council

2. The Council's claim for a partial award of costs relates to the late submission of viability evidence by the respondent after the Council had determined the planning application. If the evidence had been submitted at the time of the planning application then the Council's Commuted Sum Guidance 2016 document makes provision for an open book approach to viability with the independent viability assessment paid for by the applicant and the Council offering three quotes from independent valuers. In this instance due to the lateness of the evidence the Council had to pay for its own viability assessment. In addition, the appellant's viability evidence did not align with the schemes final dwelling mix and late evidence was submitted immediately prior to and during the Hearing.

The response by Mr Martin Valentine (Positive Homes Ltd)

3. The respondent contacted the Council twice in June 2020 regarding viability. The viability evidence was submitted in response to the changes in the very altered global context since the application was due to be determined by on 20 December 2019. The submitted viability evidence was prepared by Jones Long Laselle (JLL). Unfortunately, their office closed, and the evidence was reviewed by Mr Hilton of HEB Property Consulting who attended the hearing and presented evidence and response to the Council's statement on viability which was not seen until 21 June.

Reasons

4. The Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
5. The planning application the subject of the appeal was dated 30 July 2019 and was validated on 20 September 2019. After a number of agreed extensions of time for the Council to make a determination, the appeal against non-determination was submitted on 1 May 2020. At that time no viability evidence was included.
6. The applicant submitted a revised statement of case on 4 February 2021 which proposed amendments to the design of the houses, the housing mix and contained a statement regarding viability indicating that it was no longer considered viable to provide affordable housing on the appeal site and make the requested contributions towards education and health facilities.
7. While the applicant states contact was made with the Council in June 2020 to discuss viability there is no substantive evidence before me regarding this approach. The applicant's reason for submission of the evidence is the global pandemic and the consequent impact on the housing market. By May 2020, when the appeal was submitted, there may have been only limited indication of any impacts after only 2 months of lockdown. However, there is no meaningful explanation for the subsequent delay in submission from June 2020, when the applicant says he contacted the Council regarding viability, until February 2021, some nine months later.
8. It would have been helpful for the Council to have had the information during the application stage in accordance with its Commuted Sum Guidance 2016. However, any impact of the pandemic would not have been fully appreciated at that stage. Furthermore, Policy 8 of the Core Strategy allows for the consideration of the ability to deliver affordable housing alongside other requirements, taking into account broad assessments of viability. Moreover, given the timing of the submission of the new evidence and the arranged Hearing date, the Council had the opportunity both to undertake further consultation on the amended proposals and to respond to the viability evidence prior to the hearing, albeit at its own expense.
9. The Council considers that this part of the appeal was unnecessary as the applicant's own evidence suggests values and costs have risen during the pandemic and assumptions made in the evidence were unreasonable. However, the applicant clearly believes there is a viability case, and this is supported by appropriately qualified and competent experts. Equally there is nothing before me to question the credentials of the Council's witness in this regard. Therefore, even though I have not been persuaded by the applicant's viability evidence, I do not consider that he has behaved unreasonably in this regard.
10. The Council's statement regarding viability was received within the required timescales. Unfortunately, it was not forwarded to the applicant at that time. As a result, the applicant states that he did not have sight of the evidence until 21 June with the Hearing due to open on 22 June. As well, the office of JLL was closed and a different witness appointed to represent the applicant on viability matters at the Hearing. That witness submitted updated evidence with

respect to build costs, Gross Development Value and an explanation of external work costs on 17 June – all matters raised by the Council in its statement, together with an updated viability appraisal. In my view, this still gave the Council sufficient time to address the matters raised prior to the Hearing. Although not helpful it is not unusual for evidence to be raised at such a stage in the proceedings and given the requirement to consider the most up to date evidence and the late receipt of the Council's viability evidence by the applicant, it is not unreasonable.

11. However, when discussion commenced on viability at the Hearing it became evident that, even though he relied on the same Benchmark Land Value figure as JLL, the applicant's new witness had approached its calculation in a different way to JLL. Furthermore, new information by way of explanation was given by the applicants on a number of matters including the profit assumption and assumed acquisition fees. The introduction of this fresh information so late in the proceedings, when the applicant would have reasonably known that information prior to the Hearing, is unreasonable behaviour.
12. However, that information was not substantial, and the Council did not require the offered additional time via an adjournment to deal with the points put forward by the appellant. As the viability witness was already at the Hearing on behalf of the Council then I am not persuaded that any unnecessary or wasted expense was incurred by the Council due to this unreasonable behaviour.
13. That the viability evidence did not align with the schemes final dwelling mix is a matter for the decision maker in determining what weight to give it and does not form unreasonable behaviour.
14. I therefore 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.

Zoe Raygen

INSPECTOR