



Costs Decision

Site visit made on 11 May 2021

by Rachael Pipkin BA (Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 August 2021

Costs application in relation to Appeal Ref: APP/H1705/W/21/3268065 42-46 New Road, Tadley RG26 3AL

- 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 S Paull of McCarthy and Stone Retirement Lifestyles Ltd for a full award of costs against Basingstoke & Deane Borough Council.
 - The appeal was against the refusal of planning permission for erection of 42 retirement living apartments (Category II Type) with communal facilities, landscaping and car parking. Erection of a Class A1 retail store with 5 flats at first floor level, car parking and service layby.
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Decision

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

Procedural Matter

2. The application for an award of costs was submitted within the deadline for making an application for costs. Notwithstanding this, the consideration of the costs application has post-dated the appeal decision which was dated 25 June 2021. The Council has had an opportunity to respond to the costs application.

Reasons

3. 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.
4. The applicant has applied for costs on substantive grounds on the basis that the Council has prevented or delayed development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failed to produce evidence to substantiate each reason for refusal on appeal; and made vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis.
5. As part of the appeal proposal, the applicant set out four options to secure the delivery of affordable housing, secured through a Unilateral Undertaking (UU) under Section 106 of the Town and Country Planning Act 1990 (as amended). These were based on a 'cascade' approach whereby option 1 would provide five intermediate units. If option 1 were unachievable, then option 2 would provide five discounted market units (DMUs) plus a commuted sum of £100,000. Only

- if neither options 1 or 2 were achievable, then option 3 would enable the DMUs to be offered to the market alongside a commuted sum of £100,000. A fourth option, proposed a commuted sum of £202,326 in lieu of on site provision. This fourth option did not form part of the considerations at the time the Council made its decision. However, it had formed part of an original recommendation to the Council's planning committee and previously been rejected.
6. The Council's Officers recommended approval but the Council Members did not accept the recommendation. Members took the view that the scheme did not make adequate provision for affordable housing. The decision is one which is a matter of judgement. While the Members are not duty bound to follow the advice of their professional officers, if a different decision is reached the Council has to clearly demonstrate on planning grounds why a proposal is unacceptable and provide clear evidence to substantiate that reasoning.
 7. The reason for refusal set out in the Council's decision notice is brief but nevertheless specific and relevant to the application. The decision notice also clearly cites the relevant development plan policies against which the scheme was found to be in conflict. The Council expanded on this within its statement of case from which it is evident that the Council found the first options acceptable but not options 3 or 4.
 8. The Council considered that option 3 would result in a loss of affordable housing provision in the future. It also considered that the off-site contributions under option 4 would be difficult to spend in the Tadley area due to restrictions on development associated with its location within the Detailed Emergency Planning Zone (DEPZ).
 9. At the time of its decision, option 3 did not secure the affordable housing provision in perpetuity. As set out in the draft UU, it did however secure a financial contribution to affordable housing of £40,465.20, a fifth of the total commuted sum, for each affordable dwelling that became an open market unit. The final UU, upon which my decision was based, altered this to secure future sales as DMUs thereby retaining the units as affordable housing.
 10. The Council has a preference for on-site affordable housing. The scheme offered this. However, as an alternative, it also made provision in the form of open market housing with a commuted sum or a full commuted sum but only in the event that a suitable registered provider or qualifying purchaser could not be secured. This, in exhausting the preferred options first, to my mind, is both a practical and reasonable approach.
 11. The Council has accepted a commuted sum under option 2. However, it does not accept a full commuted sum and no provision of units as proposed under option 4. I agree that there is a difference between these options. Nevertheless, it seems to me that there is inconsistency in the Council's approach as it has argued a full commuted sum could not be easily spent but has not made the same arguments in respect of a reduced sum.
 12. The Council submitted an appeal decision as evidence of the effect of the DEPZ in restricting development. However, as I set out in my decision this did not provide conclusive evidence that a scheme delivering affordable housing would not be permitted. In this regard, I found the Council's position to be vague and unsubstantiated.

13. The Council indicated that in the event that either options 1 or 2 could not be secured, then it would be open to the applicant to apply for a variation to the legal agreement. However, this would be at a point when the scheme would be built out but only 75 per cent would be permitted to be occupied. The safeguards are in place to only permit options 3 and 4 after the preferred options have been found to be unsuccessful. In these circumstances, it seems to me unreasonable to delay a consideration of alternative options to a later stage, when the scheme is built out but cannot be fully occupied, when such matters are before the Council at this stage.
14. It will be seen from my decision that I have found the cascade approach would be appropriate to ensure that the proposal makes adequate provision for affordable housing. The Council, in rejecting this approach, despite the safeguards in place to secure the preferred option, has in my view behaved unreasonably.
15. I have no reason to doubt that the Council has worked with the applicant during the course of the planning application. This is demonstrated by the number of times the scheme with alternative scenarios for the provision of affordable housing was presented to the Development Control Committee. In this regard, I do not find the Council has behaved unreasonably.
16. Notwithstanding this, I find that the Council's decision is based on vague and generalised assertions about the proposal's impact which are unsupported by objective analysis. It has failed to produce evidence to substantiate its reasons for refusal. I have allowed the appeal. In the light of the Council's decision and evidence submitted in respect of the appeal, the Council has prevented and delayed development which should clearly be permitted, having regard to the development plan, national policy and other material considerations.
17. In these circumstances, the refusal of planning permission constitutes unreasonable behaviour contrary to the basic guidance in the National Planning Policy Framework and the PPG and the applicant has been faced with the unnecessary expense of lodging the appeal. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a full award of costs is justified.

Costs Order

18. 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 Basingstoke and Deane Borough Council shall pay to McCarthy and Stone Retirement Lifestyles Ltd, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
19. The applicant is now invited to submit to Basingstoke and Deane Borough 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.

Rachael Pipkin

INSPECTOR