
Costs Decision

Inquiry Held on 13-16 July 2021

Site visit made on 19 July 2021

by Harold Stephens BA MPhil Dip TP MRTPI FRSA

an Inspector appointed by the Secretary of State

Decision date: 12 August 2021

Costs application in relation to Appeal Ref: APP/T3725/W/21/3270663 Land south of Chesterton Gardens, Leamington Spa

- 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 A. C. Lloyd (Homes) Ltd for a full award of costs against Warwick District Council.
 - The inquiry was in connection with an appeal against the refusal of an application for planning permission. The development proposed is an outline planning application for a residential development of up to 200 dwellings with associated access, landscaping and public open space (all matters reserved apart from access).
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Decision

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

The submissions for A. C. Lloyd (Homes) Ltd

2. An application for a full award of costs is sought on a substantive basis that in refusing the appeal proposals, the Council has prevented or delayed development which should clearly be permitted having regard to the development plan, national policy, and other material considerations. The Council in withdrawing from the appeal has also failed to substantiate the reasons for refusal. Neither of the reasons for refusal withstand scrutiny. The Council no longer relies on them and agrees that permission should be granted.
3. The appeal site is part of a wider site allocated for residential development (Site H03) in the adopted WDLP 2017. The Council does not dispute that the proposals for up to 200 dwellings can be accommodated on the site and the proposals are in accordance with the development plan. Contrary to the Officer's advice, the Council refused the proposals for two reasons concerning highways and amenity objections on 12 February 2021.¹ There is no evidence to support the reasons for refusal. A second application was made for an identical proposal and the scheme was again recommended for approval to the Committee on 19 May 2021, but this was also refused on 28 May 2021.²
4. Following a 'review' of the case the Council withdrew from the appeal on 25 May 2021 and presented no evidence. Therefore, the Council has been unreasonable in refusing the proposals which it now accepts should be granted planning permission. The unreasonable behaviour has led the Appellant to incur unnecessary and wasted expense through: engaging professional consultants

¹ CD34

² CD86

and Counsel to prepare an appeal; drafting of evidence, supplementary evidence, and statements of common ground and preparing for and attending an Inquiry including fees associated with Counsel and expert witnesses.

5. In the alternative, and insofar as it is said that it was the submission of additional mitigation through the second application has led to the changed position and if that position were reasonable (which is not accepted) then the Appellant would seek a partial award of costs for all of those items listed at paragraph 4 except those costs incurred prior to the 19 May 2021 decision.

The response on behalf of Warwick District Council

6. The Council's position is that there should be no award of costs because the Council did not behave unreasonably. Alternatively, even if the Council did behave unreasonably, these costs should be limited to those incurred up until 25 May 2021 when the Council withdrew its objection from the appeal, and for any time that is spent at the Inquiry discussing the planning obligation and draft conditions. If planning permission is refused for the development, then no award of costs should be made as the Council did not act unreasonably. Moreover, even if planning permission is granted, the Council's democratically elected members are entitled to disagree with their officers on matters of planning merits. This includes matters such as traffic impacts and impacts on residential amenity and balancing such impacts against the benefits.
7. After the Council's refusal of the appeal scheme there was a material change in circumstances, in that the Appellant submitted additional mitigation measures via a traffic calming scheme and noise reduction measures for the occupiers of Brimstone End as part of the second application to help demonstrate that the concerns in the reasons for refusal would not materialise. Although the Council did refuse the appeal scheme on 19 May 2021, a prompt review of the case was made. The Council withdrew from the appeal via email dated 25 May 2021.
8. The Council rejects the Appellant's claim for a partial award of costs for all costs incurred from 19 May 2021. The Council's refusal of the appeal scheme, which did not contain the additional mitigation measures, was reasonable. The Council's behaviour did not then subsequently become unreasonable. Rather the Council promptly reviewed the case, including consideration of the material change of circumstances, and acted reasonably in withdrawing its objection to the appeal. It follows that the Council has not behaved unreasonably and should not be subject to any award of costs.
9. Alternatively, even if the Council did behave unreasonably in refusing to grant planning permission, this unreasonable behaviour only directly caused the Appellant to incur unnecessary or wasted expense to a limited and partial extent. The Council promptly reviewed its case and withdrew from the appeal on 25 May 2021. The Council has acted co-operatively throughout the appeal, in agreeing a Statement of Common Ground, conditions, and a s106 Agreement all in accordance with the Inquiry timetable. It has been the objection of the CPRE that has led to substantive proofs of evidence and rebuttal evidence being prepared by the Appellant. The costs directly caused by the Council should therefore be limited to those incurred up until 25 May 2021 when it was confirmed that it would no longer be objecting to the appeal scheme, and any time that is spent at the Inquiry discussing conditions and a s106 Agreement. The Council relies on the costs decision in Land North of Viaduct, Adjacent to Orchard Business Park Ledbury, to support its case.

Reasons

10. The *Planning Practice Guidance* 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.
11. In this case, the appeal site is allocated for housing development in the WDLP (2017). The appeal scheme has demonstrated that up to 200 dwellings can be comfortably accommodated and can be appropriately assimilated into the wider strategic allocation (Site HO3) for 500 dwellings in the WDLP. The appeal proposal is therefore in broad alignment with Policy H1 and DS11 of the WDLP. In my view, in a plan led system this is clear evidence that the appeal proposal is acceptable in principle and in accordance with the development plan.
12. Members would have been aware from the Council's Annual Monitoring Report 2019-2020 that the published 2020 trajectory figures include a contribution of 130 dwellings from the appeal site in the Five Year Housing Land Supply calculation, with 50 dwellings per year added thereafter until 2032. I consider that this provides further clear evidence of the acceptability of the principle of residential development on the appeal site.
13. Members had a comprehensive and professional Officer's report to consider at the Committee meeting in February 2021.³ The appeal proposal was recommended for approval by the Officer in the report to Committee. This report demonstrated that the scheme would result in a development of very high standards and was acceptable in visual amenity and character terms.⁴ In the Committee report there was a detailed analysis of the impact on residential amenity, both for existing and future residents. In respect of existing residents, it was accepted that there would be a noise impact on residents of Brimstone End but concluded that *"it would be viewed as disproportionate to object to a 200 dwellings local plan development based on the limited noise impacts that are predicted to occur."* The amenity of future residents was a matter that was regarded as capable of being dealt with by conditions. It is important to note that the proposals had been assessed by the Council's Environmental Health Officer (EHO) and there had been "significant engagement" on this matter.
14. With regard to highway issues the Officer notes that the Highway Authority has reviewed the work carried out in support of the scheme and raised no objections to it. The proposal was regarded as complying with policies TR1 and TR3 of the WDLP. In my view, the Officer's report provides additional cogent evidence of the acceptability of the appeal site for residential development subject to the imposition of conditions and the signing of a s106 Agreement.⁵
15. Contrary to the Officer's recommendation, the Committee refused the application for two reasons concerning highways and amenity objections.⁶ It is correct that the Council's Planning Committee as decision-takers have the discretion not to accept the professional recommendations of its Officers, but they must have a reasonable basis for doing so. In this case there was none.
16. Following encouragement by Officers, a second application was made for an identical proposal, and the scheme was again recommended for approval to the

³ CD31

⁴ CD31 Pages 11-13

⁵ CD31 Pages 16-19

⁶ CD34

Committee on 19 May 2021.⁷ Again, Members chose to depart from the careful and detailed analysis of Officers and refused the proposals for two reasons concerning the same two matters in a decision notice dated 28 May 2021.⁸ That is despite there being no objection from the Highway Authority or the EHO, or any technical or expert evidence to dispute the Appellant's case and the Officer's analysis. I accept that some minor additional mitigation was offered via a s106 Agreement and planning condition but in my view that mitigation did not change the nature of the proposals and did not lead to a change in the Officer's recommendation between the two applications.

17. Despite that, on 25 May 2021, between the date of the Committee and the Decision Notice, the Council wrote to the Inspectorate⁹ explaining that:

"Following a review of the case, the Council has taken the decision not to object to the appeal and will not be presenting any evidence against the proposal. ..."

Nothing at all had changed between the Committee's determination and the Council's withdrawal from the appeal. It is difficult to comprehend how a "review" so soon after the Committee's decision, and with no new or additional information to consider could have led to a different decision if the Council's refusal had been reasonable in the first place.

18. Crucially, two days later the Leader of the Council was clear in his statement that the Council had chosen not to defend the appeal in respect of the first application acknowledging that it did not offer the same mitigation as the second application.¹⁰ Had permission been granted by the Committee in respect of the second application, there would have been no need for the Inquiry to go ahead at all. In failing to defend the appeal, the Council has accepted that its position in refusing the proposals is unreasonable. The only conclusion is that the Council too considers that planning permission should be granted, and that it has acted unreasonably in refusing consent. Importantly, the SoCG records that there are no matters in dispute between the Appellant and the Council.
19. Furthermore, the Leader of the Council confirmed in his statement¹¹ that the appeal would not be resisted because the Council accepted the advice that *"the Planning Committee's decision to refuse this application was not supported by sound technical or planning reasons, is contrary to the expert evidence considered at the meeting and therefore may be irrational or unlawful."* The Council cannot argue on the one hand that the Members were acting reasonably and then accept that it cannot rationally defend the appeal on the other.
20. Moreover, if it was reasonable for Members to reject the proposals on the basis of noise impacts in February 2021, it would still be reasonable now. The impacts have not changed, and nor fundamentally has the mitigation that is offered. Officers were of the view that a traffic calming scheme, and measures for the occupiers of Brimstone End would be appropriate mitigation. The principle of the mitigation was established at that time and has not changed. The proposed mitigation was before the Council at the time the appeal proposal

⁷ CD83

⁸ CD86

⁹ CD103 Email dated 25 May 2021 from Caroline Gutteridge

¹⁰ CD104

¹¹ CD104

was considered. The difference is that there is simply more detail provided now. The Council could have negotiated with the Appellant on traffic calming measures and noise mitigation and the detail could have been secured by condition and/or s106 Agreement which would have followed the grant of planning permission. The Council chose not to do so.¹²

21. Although the Council claims a prompt review of the case was made, the review did not come soon enough. It was only made after the second application failed, which in itself is a surprising turn of events. In any event, and notwithstanding the Council's "review" of its case (prompt or otherwise), the Appellant had exhausted its free go, and was left without a permission. It had no choice but to continue with the appeal in order to try and secure a consent.
22. In the alternative submission, the Council highlights the guidance contained within the PPG that a costs award will only be made for unreasonable behaviour that has directly caused another party to incur unnecessary or wasted expense and essentially lays the blame at the door of CPRE for the costs of the Inquiry itself. The Council relies on the costs decision in Land North of Viaduct, Adjacent to Orchard Business Park, Ledbury to support its case.
23. However, I note that the Council refused two applications in respect of the appeal site. Had it permitted either one of them, which it now accepts it should, then the Inquiry could have been avoided. The Council's conduct has indisputably led to the need for the Inquiry; it is the single causative factor. In leaving the Appellant with no choice but to pursue an appeal the Council is plainly responsible for all that follows. CPRE did not cause the Inquiry, but they are entitled to participate in it as they have done, as are members of the public who wish to make representations.
24. The fact that the Council has cooperated in respect of conditions and a s106 Agreement is no more or less than could reasonably be expected of a public authority discharging its duties in respect of the planning process. It does not absolve the Council of its obviously unreasonable behaviour in refusing permission for proposals which it now accepts consent should have been given.
25. The Council relies on the Ledbury case to suggest that it should not foot the whole bill because it withdrew its reasons for refusal. However, the Appellant was bound to pursue the appeal because it was the only way a consent could be achieved. On the Council's approach, all an unreasonable Local Planning Authority has to do is "review" its case and decide not to defend an appeal in order to escape further liability for all the costs that an Appellant still has to incur thereafter. That cannot be right as a matter of principle nor does it encourage Local Planning Authorities to properly exercise development management functions in a proper way.
26. It is difficult to understand the full facts in the Ledbury case and it is not known whether there was some particular circumstance which led to the Council's changed position following the receipt of the appeal. That was certainly not the case here for all the reasons set out above. The Town Council took part in the Inquiry in that case and a part of its objection was found to be unreasonable albeit not all of it. The Inspector also considered that the Appellant had unnecessarily lengthened the Inquiry by calling witnesses on affordable housing

¹² See CD31 final two paragraphs on page 15

and housing land supply, which were not particularly contentious. The same criticism could not be levelled here.

27. I conclude that the Council's actions prevented or delayed development which should clearly be permitted and accorded with the development plan and national policy. There can be little doubt that had the Council not refused planning permission contrary to the recommendation of its professional officers, that an appeal would not have been necessary. Although the Council did review its case this did not come soon enough and was only done after the second application failed. The Appellant had exhausted its free go and was left without a permission. It had no choice but to continue with the appeal in order to try and secure a consent. Taking into account all of the points raised I consider that there is compelling evidence of unreasonable behaviour by the Council in this case.

Conclusions

28. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the *Planning Practice Guidance*, has been demonstrated and that a full award of costs is justified.

Costs Order

29. 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 Warwick District Council shall pay to A. C. Lloyd (Homes) 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.
30. The applicant is now invited to submit to Warwick District 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.

Harold Stephens

INSPECTOR