Costs Decisions

Inquiry Held on 15 and 16 June 2021

Site visit made on 1 July 2021

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH

an Inspector appointed by the Secretary of State

Decision date: 13th August 2021

Costs applications in relation to Appeal Ref: APP/C3620/C/20/3260682 Land lying to the South East of Upper Fairfield Road, Leatherhead, Surrey KT22 7HJ (Formerly known as Fairfield Works)

- The applications are made under the Town and Country Planning Act 1990 (the Act), sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- Application A is made by 4MA Limited (the appellant) for a full award of costs against Mole Valley District Council (the Council).
- Application B is made by Mole Valley District Council (the Council) for a full award of costs against 4MA Limited (the appellant).
- The inquiry was in connection with an appeal against an enforcement notice alleging without planning permission, the unauthorised demolition of the former Fairfield Works building and the erection of a new building to provide 10 No. flats with associated parking and landscaping.

Decisions

1. Application A for an award of costs is refused.

2. Application B for an award of costs is allowed in the terms set out below.

Reasons

3. 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.

4. The enforcement notice subject to the appeal was issued on 9 September 2020. Some time prior to that a Temporary Stop Notice (TSN) had been issued on 4 February 2019 (expiring after 28 days) and there was a refusal on 9 March 2020 of planning application MO/2019/0263 principally due to the appellant's failure to agree affordable housing provision for that scheme (drainage was also a reason for refusal).

5. Amongst the appellant's arguments for costs are that the Council acted manifestly unreasonably in relation to the issue of the TSN and in response to attempts to negotiate with the Council in connection with the issue of affordable housing and viability in the submission of the above application. The appellant also notes that an enforcement notice had been issued on 13 August 2020 which was flawed because it did not have a compliance date. However, these arguments are misplaced as costs can only be awarded in relation to the appeal made against the 9 September 2020 notice.

6. In any respect, on the issue of affordable housing an email sent to the appellant by the Council's Affordable Housing Officer on 22 January 2020 said:

   "*DSP* [the Council's consultants] *have given their advice based on all the information already provided. They have advised us that when applying the guidance, the site appears to be viable at the date of appraisal as there is no building to value. I have spoken with DSP this afternoon,* ***if you have additional information to provide then we can discuss a further review***" (my emphasis)

7. The appellant has not provided any evidence that it responded to this invitation by providing further viability information to enable an alternative view to be taken by the Council on the assessment. Further, no viability analysis was provided during the appeal – despite a ground (a) appeal having been made – for the purposes of my determination of the deemed planning application (DPA). I therefore do not accept that the Council failed to engage with the appellant on this issue. The appellant has declined to agree affordable housing as required by the development plan, without providing viability evidence during the appeal to justify departure, and it is not unreasonable for the Council to seek to apply the policies of its development plan.

8. The appellant says that enforcement action has only been taken by the Council to 'extract' an affordable housing contribution, as it had not been able to do so at the time of granting earlier permission MO/2017/0394. However, it appears to be common ground that the circumstances at the time of that approval meant the Council was not able to apply its policy due to a Written Ministerial Statement[1] but subsequently it could do so due to changes in national planning policy. This is not unreasonable behaviour and, as I have found that the appeal development does not benefit from permission under MO/2017/0394, I agree with the Council that an application necessary to make it lawful should be determined in accordance with the development plan as whole (including the policy requiring affordable housing provision unless unviable, which I consider to be fundamental) unless material considerations indicate otherwise.

9. At the inquiry, the appellant's sole witness giving evidence (Mr Alsop, expert planning witness and planning agent) conceded in cross-examination that every ground of appeal should fail. He had also provided plans that showed that the development 'as built' did not comply with the approved plans for MO/2017/0394 and which in my view showed widespread material differences (ground (c)). No substantive evidence was provided to support the appellant's apparent position in the ground (a) appeal that the scheme could not viably provide affordable housing, and Mr Alsop conceded that (even when applying the 'tilted balance') permission should be refused where the decision-maker did not have an up-to-date viability analysis justifying departure from the policy. In the ground (f) appeal the appellant did not put forward any alternative steps which might achieve the purpose of the notice.

10. In these circumstances, it is extremely tenuous for the appellant to argue that the Council behaved unreasonably in issuing the notice or in defending the appeal which its own expert planning witness gave evidence should not succeed. Accordingly, the appellant's costs claim does not succeed in that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

[1] 28 November 2014

Further, it is of no account that Council officers took enforcement decisions under delegated authority as that is the purpose of a delegated authority scheme.

11. For the same reasons, the Council's costs application does succeed as Planning Practice Guidance says:

"The right of appeal should be exercised in a reasonable manner. An appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding."

12. This was an appeal with no reasonable prospect of succeeding, as the comprehensive concessions by the appellant's expert planning witness at the inquiry plainly demonstrated. The Council has incurred appeal costs that it should not have borne. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated.

Costs Order

13. 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 4MA Limited shall pay to Mole Valley District Council, 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.

14. Mole Valley District Council is now invited to submit to 4MA Limited, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Andrew Walker

INSPECTOR