Costs Decisions

Hearing Held on 1 September 2021 and 28 September 2021

Site visit made on 1 October 2021

by C Dillon BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16/11/2021

Costs application in relation to Appeal Ref: APP/W4515/W/21/3268413 Land at Eccleston Close, Station Road, Backworth, Newcastle-upon-Tyne NE27 0RX

- 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 Keenans Ltd for an award of costs against North Tyneside Metropolitan Borough Council.
- The hearing was in connection with an appeal against the refusal of an application for planning permission for the construction of 67 residential dwellings (C3) and 14 No B1, B2 and B8 commercial units totalling 650 sqm, with associated road infrastructure, car parking spaces, open spaces, gardens and landscaping.

Decision

1. The application for an award of costs is granted in part in respect to the additional costs which were incurred by Keenans Ltd in making representation relating to the late evidence submitted by North Tyneside Metropolitan Borough Council only.

The submissions for Keenans Ltd

2. Keenans Ltd confirm that they are an interested party whose business is associated with reason for refusal No 3. They advise that they have made an application for costs in response to North Tyneside Metropolitan Borough Council's procedural conduct during the appeal and, specifically in relation to the submission of late evidence. In doing so, they acknowledge that parties involved in appeals normally meet their own expenses and also that costs applications made by interested parties are uncommon. They draw attention to the Planning Practice Guidance which states that examples of unreasonable behaviour which may result in an award of costs include lack of co-operation with the other parties or party or delay in providing information or other failure to adhere to deadlines.

3. Keenans Ltd states that the Council failed to keep them informed about the appeal, particularly in regard to their revised position on the reasons for refusal. They believe this represents a lack of co-operation. Furthermore, Keenans Ltd advance that the Council provided confirmation of their revised position and late evidence at very short notice, which was key to the Council's revised position which until that point, they had been unaware of, and is therefore extremely significant to the appeal.

4. They confirm that their participation at the hearing was confirmed in July 2021. They advise that was on the understanding that the Council would be defending their reasons for refusal and therefore they had only expected to contribute to the discussion regarding the business operation where useful. On that basis the requirement for no further technical representation was anticipated as was the ability to rely upon their previously submitted technical representations. Keenans Ltd argues that it was the technical content and lateness of that evidence which led them to request an adjournment. They firmly maintain that the responsibility for the adjournment rests with the Council.

5. Keenans Ltd states that the expenditure that they incurred in commissioning a review of the late evidence by their consultants was unnecessary given it concludes that the Council should not have revised its position on reason for refusal No 3 on the basis of that evidence. They also advance that in the absence of prior notification of the late evidence, the Council's revised position and the timescales involved to respond led to unreasonable pressure on their representative Mr Keenan and disenfranchised him as an interested party from making his case based on the Council's revised position.

The response by North Tyneside Metropolitan Borough Council

6. North Tyneside Metropolitan Borough Council states that they have not acted unreasonably and opposes the costs application. The Council firmly maintains that the documents in question were confidential, containing no substantive or new material technical evidence upon which its case relies. The Council advise that its revised position was communicated to the Planning Inspectorate and was clearly set out within its Statement of Case. The Council confirms that these documents were posted on the Council's website within the timescales set in the appeal programme.

7. The Council argues that it did not conceal the documents nor deny their existence and they were shared as soon as possible after the Planning Inspectorate's request, having first secured the necessary legal authority. They do not consider that those documents fall within the scope of those covered by paragraph 8 of the Inspector's pre-hearing note.

8. The Council disputes the argument that it was responsible for keeping interested parties informed of the Appeal process, describing how it sought to undertake its responsibilities. The Council states that at no point did the Planning Inspectorate advise the Council that Keenans Ltd was a statutory party to whom it must send its Statement of Case and Statement of Common Ground. The Council also states that it is unfortunate that timescales for the submission of documents by the Council and interested parties coincide. Furthermore, the Council states that it was aware that Keenan's Ltd was represented by a planning consultant and therefore did not consider it was reasonable for it to exceed its formal obligations and notify them of the revised position. As it considers that the revised position was clear within its submission, the Council does not consider that it should have been a surprise to anyone.

9. The Council argues that had Keenans Ltd wished to be represented at the hearing, but the date prohibited that then they could have requested an alternative date in advance of the opening of the hearing and they had not done this. The Council considers that it was Keenan's Ltd choice to seek the support of consultants and it states that the attendance of a noise specialist at

the resumed hearing would not cause additional unnecessary expense. The Council advances that both the appellant and Planning Inspectorate had anticipated that the hearing could be completed within 1 day. The Council draws attention to the fact that the Inspector explained the reasons why the documents had been shared the evening before the hearing rather than the morning it opened. The Council states that it is a reasonable expectation that Keenans Ltd or their consultant would have read the Council's evidence in advance of the hearing. The Council firmly maintains that the adjournment of the hearing was the result of Keenans Ltd representative not being properly prepared and not their own actions.

Reasons

10. Keenans Ltd exercised their right to register and attend the opening of the hearing as an unrepresented interested party, whose business interests are directly related to the Council's third reason for refusal. I have subsequently found that the appeal proposal could prejudice the future operation of Keenans Ltd and the appeal has failed on that basis.

11. The Council is familiar with the Appeals process and the timing of submissions. However, the Council's decision to revise its position is not common place and would not have been anticipated by an interested party whose experience of the Appeals process is likely to be limited at best. The Council's decision to notify Keenans Ltd, albeit just prior to the hearing undermines their argument that they had no obligation to do so. Contrary to the Council's view, the documents in question were significant to understanding and testing the basis of the Council's revised position and also the transparency of the appeal.

12. There is no firm indication that the Council deliberately concealed that evidence. However, it should have been made available earlier to substantiate the Council's revised position. The Council's continued reluctance and failure to recognise the significance of these documents to other parties led to the available narrow window of opportunity being missed for sharing those documents and seeking views on whether a postponement was appropriate.

13. There is nothing before me to indicate that it was unreasonable for Keenans Ltd to have arranged and planned their participation on the basis of the Council's original decision. The Council's response to the appeal significantly changed the dynamic of the proceedings for Keenan's Ltd. As an unrepresented party, they did not have sufficient opportunity to digest and understand the documents before the hearing opened. In the interests of fairness and having had regard to all participant's views, the hearing session relating to reason for refusal No 3 was adjourned to a later date to ensure that the ability of all to fully participate was not compromised. This arose as a direct consequence of the Council's failure to provide those documents at an earlier stage. This was unreasonable on the Council's part.

14. Had the Council's late evidence been communicated earlier in the programme to interested parties then it would have given Keenans Ltd reasonable opportunity to address it through their appeal submission or at the hearing. Given the Council's revised position and the technical nature of the matters in dispute, it is not unreasonable that Keenans Ltd sought further consultancy support and arranged for further submissions to be made that led to further costs. Further submissions would have been unnecessary had the Council acted in a timelier manner. In addition, Keenans Ltd secured consultancy support at

the resumed hearing in addition to further written submissions. Whilst this meant that they incurred further additional costs, that was by choice and not absolute necessity. Consequently, that part of the claim does not justify an award of costs.

Conclusion

15. For the reasons given above, I find that unreasonable behaviour from North Tyneside Metropolitan Borough Council on procedural and substantive grounds, as described in the Planning Practice Guidance, is evident in regard to their behaviour which led the adjournment of the hearing over matters relating to noise. This in turn caused Keenans Ltd to incur unnecessary expense in terms of securing additional consultancy support to respond to the late evidence between the 2 hearing dates insofar as it relates to reason for refusal No 3. As Keenans Ltd acknowledges, it is not common place for costs to be awarded to an interested party. However, a partial award of costs to Keenans Ltd is justified in this particular instance.

Costs Order

16. 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 North Tyneside Metropolitan Borough Council shall pay to Keenans Ltd the costs of the appeal proceedings described in the heading of this decision insofar as they relate to Keenans Ltd securing consultancy support to respond to the late evidence between the 2 hearing dates insofar as it relates to reason for refusal No 3.

17. Keenans Ltd is now invited to submit to North Tyneside Metropolitan 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. Such costs are to be assessed in the Senior Courts Costs Office if not agreed.

C Dillon

INSPECTOR