



Costs Decision

Site visit made on 1 June 2021

by **Sarah Manchester BSc MSc PhD MIEnvSc**

an Inspector appointed by the Secretary of State

Decision date: 9th December 2021

Costs application in relation to Appeal Ref: APP/M0933/W/21/3269341 Land south of Hags Lane, Hags Lane, Cartmel, Cumbria LA11 6PH

- 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 Ms Rachel Bagshaw of Holbeck Homes (Cartmel) Ltd for a full award of costs against South Lakeland District Council.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for residential development.
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Decision

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

Reasons

2. The Planning Practice Guidance (the PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and that behaviour has directly caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. Applications for costs should clearly demonstrate how alleged unreasonable behaviour has resulted in unnecessary or wasted expense.
3. The appeal was made against the Council's failure to determine the planning application within the prescribed time period. The applicant Holbeck Homes (Cartmel) Ltd (HHC) is seeking to recover the full costs of the appeal on grounds that the Council behaved unreasonably in the processing of the application. The alleged unreasonable behaviour is that the Council's failed to grant planning permission for development that should clearly have been permitted in accordance with the development plan, national planning policy and material considerations; that it did not negotiate the planning obligation in a prompt manner; that it did not approach the decision positively, creatively and proactively; and it did not hold constructive discussions to avoid the need for the appeal. HHC considers that it incurred unnecessary and wasted expense because the appeal could have been avoided.
4. The parties have provided detailed chronological commentary in relation to the processing of the planning application, which was made in August 2017. On 30 November 2017, the Council's planning committee resolved to grant permission subject to the resolution of a number of matters, including a drainage scheme and a completed section 106 obligation (the s106) for the provision of 14 units of affordable housing (AH) in accordance with the development plan. The

- surface water drainage scheme was agreed with the Lead Local Flood Authority and the statutory undertaker in July 2019.
5. No s106 pertaining to the original scheme with 14 AH units was agreed. Instead, during the course of 2018, HHC reviewed the abnormal development costs and revised its financial viability assessment (FVA), which concluded that the scheme would not be viable at any level of AH provision. HHC informed the Council of this in January 2019, providing the revised FVA in February 2019. The Council commissioned an independent review of costs and market values. This was issued in June 2019 and it concluded that the scheme would be viable with 10 AH units. Although this was rebutted by HHC, following a meeting in August 2019, it subsequently proposed 8 AH units.
 6. The Council agreed the reduced level of provision and the amended scheme was returned to the planning committee on 31 October 2019, at which time the Council again resolved to grant permission subject to completion of a s106. Subsequent to this, and in the interests of timeliness, the Council instructed an external solicitor to draft and negotiate the s106.
 7. On 19 February 2020, HHC proposed several s106 amendments including changes to the open market value, an adapted cascade structure and changes to the trigger for the completion and disposal of the AH units. Following detailed consideration, the Council reverted substantively on 07 April 2020. This does not appear to constitute an unreasonable delay, particularly given the nature of the proposed amendments and the disruption to working practices arising from the first national coronavirus pandemic lockdown.
 8. HHC subsequently sought legal advice, it advised the Council it would appeal against non-determination if its terms were not agreed, and it submitted a letter before claim for judicial review. This does not demonstrate that the Council's behaviour leading up to this point had been unreasonable, particularly given that, following the Council's response to the letter before claim, HHC agreed a further extension of time for determination of the application.
 9. HHC submitted further information on 24 July 2020 including updated viability information, varied triggers for AH delivery and revisions to the s106 to meet the requirements of Heylo Housing in the event that it was the Registered Provider. At the start of August 2020, the Council agreed the change of ownership provisions, the trigger points and a limited cascade clause for AH disposal. HHC considers it was unreasonable of the Council to later question why 2-stage delivery of AH was not possible and to then not accept the applicant's position. The Council states that agreeing the proposed single trigger point did not preclude it from asking for a second trigger.
 10. The applicant subsequently converted the draft s106 to a draft Unilateral Undertaking (the UU) and submitted it to the Council on 2 October 2020 with a request to issue planning permission within 7 working days. Permission was not granted. HHC revised the draft UU to include 2-stage AH delivery and this was submitted to the Council on 3 November 2020, again with a request that planning permission be issued within 7 days. On the basis that the AH could be delivered in 2 stages, it does not seem unreasonable that the Council had earlier questioned this point.
 11. The Council agreed the 2-stages and the trigger points on 11 November 2020. On 25 November 2020, the Council noted the UU required amendment to

- ensure consistency with the agreed 2-stage approach. It also raised a concern in relation to the absence of a moratorium period for attempted disposal of AH to another provider in the mortgagee in possession (MiP) clause. In respect of the latter, it stated it would be in a position to advise further on the Council's position following discussions later that week.
12. On 26 November 2020, a report setting out a proposed approach to the treatment of requests for MiP clauses during s106 negotiations was presented to and it was approved by the Council's planning committee. On 1 December 2020, the Council provided HHC with its draft proposed standard mortgagee exclusion clause and the associated committee report. It also requested justification for the MiP clause in the draft UU, in accordance with its adopted approach.
 13. HHC declined to justify the inclusion of the draft UU MiP clause or to revise it to include a moratorium period in line with the Council's draft standard clause. The parties agreed a further extension until 8 January 2021 to determine the application, but no further progress was made and the application was not determined.
 14. The s106 negotiations during 2020, which pertained to the amended scheme with 8 AH units, were protracted and the parties ultimately failed to agree the s106 or the UU. Nevertheless, the parties did engage with one another on a regular basis. There is little compelling evidence that the Council failed to work proactively with HHC to secure an acceptable development, as is required by the National Planning Policy Framework.
 15. The appeal, which was made in February 2021, was supported by a further revised draft UU. On the basis that the Council had not previously seen this version of the UU, it was not unreasonable of it to seek the views of its solicitor before providing its appeal statement of case. This resulted in the late submission of the Council's appeal statement but given the circumstances of the case this does not constitute unreasonable behaviour nor did it result in unnecessary or wasted expense in the appeal.
 16. Evidence with the appeal includes correspondence from an affordable housing and development consultancy¹. This appears to confirm that the Council's standard mortgagee exclusion clause is typical of most local planning authorities' requirements and is as close to 'standard' as exists. HHC is frustrated that the Council did not raise the concern about the MiP clause at an earlier stage. I agree that the Council could probably have alerted HHC sooner to the fact that it was likely to be adopting a standard approach to mortgagee exclusion clauses in s106 agreements. Nevertheless, it has not been demonstrated that the Council behaved unreasonably by proposing a nationally-accepted standard form of mortgagee exclusion clause or by requiring evidence that such a clause should be included in the s106 or UU, given its implications for the delivery of AH.
 17. HHC clearly wanted planning permission to be granted as quickly as possible so it could begin construction. The Council understandably wanted to be certain that the scheme would deliver an appropriate level of AH in perpetuity and in accordance with the development plan. The long delay in the processing of the application, and the fact that the Council would have refused to grant

¹ Pioneer Housing and Development Consultants, letter to Smith & Love, 3 February 2021

permission if it had determined it, will undoubtedly be frustrating and disappointing to HHC. In this regard, HHC considers it should not have taken over 3 years to fail to determine a proposal on an allocated site and which had been found acceptable subject to a s106 on 2 occasions. While this may be so, the evidence is clear that both parties share responsibility for the long duration of processing of the application.

18. The Council's appeal statement explained why it failed to determine the application in the prescribed time limits and it responded to the appellant's appeal statement. Where appeals relate to the non-determination of planning applications, the Council is expected to set out the reasons why it failed to determine the application in the prescribed time limits. Therefore, it was not unreasonable of the Council to provide evidence in relation to the processing of the application and in response to the appellants' appeal statement.
19. Clearly, if the parties had agreed the terms of the s106 or the UU during the processing of the application, then permission would have been granted and the appeal would have been avoided. However, the draft UU that was ultimately before the Council did not robustly secure the AH in perpetuity in accordance with the development plan. Consequently, and irrespective of whether or not there were points during the processing of the application when the Council behaved unreasonably, the appeal could not have been avoided.
20. As can be seen from my appeal decision, I accepted that, if there was a need for an MiP clause, then the Council's draft standard wording including the moratorium period would be appropriate. However, while this is included in the completed UU, there is little substantive evidence to demonstrate that finance would not be forthcoming in this case in the absence of the MiP clause. I also found that there was little compelling justification to allow for the disposal of all AH on the open market without alternative provision being made. On the basis that I was not satisfied that the completed UU would deliver AH in perpetuity, I dismissed the appeal.
21. It therefore follows that the Council's failure to grant planning permission did not prevent or delay development that should clearly have been permitted. HHC has incurred expense in the appeal process, but the parties are expected to meet their own costs in the appeal. The applicants exercised their right to appeal, but permission was not unjustifiably withheld.

Conclusion

22. For the reasons set out above, unreasonable behaviour on the part of the Council resulting in unnecessary or wasted expense in the appeal process has not been demonstrated. An award of costs is not therefore justified.

Sarah Manchester

INSPECTOR