



Costs Decisions

Hearing Held on 3 November 2021

Site visit made on 2 and 3 November 2021

by Rachael Pipkin BA (Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21/01/2022

Costs application in relation to Appeal Ref: APP/Y1110/W/20/3265253 Land at Pennsylvania Road, Exeter EX4 5BL

- 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 Exeter City Council for a partial award of costs against Land Allocation Ltd.
 - The hearing was in connection with an appeal against the refusal of planning permission for an outline application including access, with all other matters reserved, for up to 26 (maximum) residential dwellings.
-

Decision

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

Procedural Matter

2. An application for costs was also made by Land Allocation Ltd against Exeter City Council. This application is the subject of a separate Decision.

The submissions for Exeter City Council

3. The submission was made in writing. In summary, the Council has applied for a partial award of costs on substantive grounds on the basis that the appellant has been unreasonable due to its lack of co-operation on the planning obligation in association with the appeal. The manner in which the planning obligation was submitted and its contents has amounted to unreasonable behaviour by the appellant.
4. There was no dialogue with the Council's legal department and a signed planning obligation was submitted to the Planning Inspectorate in April 2021. This finalised planning obligation sought different contributions from those requested by the Council, notably in respect of affordable housing contributions and contributions to primary healthcare. A deed of variation has been required to make the planning obligation acceptable. This has caused the Council extra and unnecessary work, the costs for which are sought by the Council.

The response by Land Allocation Ltd

5. The appellant set out in the draft Statement of Common Ground (SoCG) on 11 January 2021 that they intended to secure the planning obligations by way of a Unilateral Undertaking (UU) under Section 106 of the Town and Country

Planning Act 1990 (as amended) which would be in accordance with the consultation responses received for the planning application¹.

6. The appellant sought the agreement of the Council to the SoCG including the planning obligations detailed within it. The Council did not respond until October 2021 when they apologised for not commenting or agreeing the SoCG. The Council's statement of case, dated April 2021, did not refer to the draft SoCG or planning obligations. The Council only responded in respect of the UU as part of its response to the Inspector's pre-hearing note. The appellant refutes the claim made that there was no dialogue with the Council before the UU was submitted.
7. The Council could have raised its concerns that it did not consider the affordable housing contributions being provided were policy compliant. This could have been done when it had the completed UU before it on 21 April 2021 rather than waiting until weeks before the Hearing. It is not clear what 'unnecessary expense' the Council has incurred as a consequence of this.
8. The NHS contributions included within the UU were in response to consultation responses. It is subject to a blue pencil clause which would enable it to be excluded should the Inspector consider this necessary. It is therefore irrelevant.
9. The appellant revised the UU in good faith in accordance with the information it had but the Council did not respond on this for several months.

Reasons

10. 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.
11. Paragraph 53 of the PPG² sets out the type of behaviour that may give rise to a substantive award of costs against an appellant. This may occur through a lack of co-operation on any planning obligation.
12. The Council has confirmed that it was never provided with a draft planning obligation. The only planning obligation provided to it was the finalised UU, signed and dated 21 April 2021. This made provision for contributions to affordable housing and healthcare amongst other things. On 21 May 2021 there was email correspondence between the Council and the appellant advising that the Council would review the document if the appellant could provide the relevant ownership details and confirmation that the Council's legal fees would be paid. The appellant requested a quote for the fees, which the Council provided.
13. There is nothing before me to show that the required details of ownership had been provided and confirmation that the Council's legal fees would be paid by the appellant. There is nothing to suggest that beyond this date there was any further dialogue between the parties. However, I concur with the Council that the 'ball' was at this stage in the appellant's court. I note that the Council followed this matter up on 26 August 2021 when it sought clarification from the

¹ Council Ref 20/0596/OUT

² Paragraph: 053 Reference ID: 16-053-20140306

- appellant as to how they wished to proceed. I have not been made aware of a response to that request.
14. I appreciate that the Council only provided detailed comments in relation to the acceptability of the legal agreement in response to the pre-hearing note on 22 October 2021. However, the appellant did not advise of its position following the Council's email of 21 May 2021. This was unreasonable of the appellant.
 15. Annexe N of the Procedural Guide: Planning appeals – England provides good practice advice to appellants in preparing planning obligations in relation to an appeal. It sets out at paragraph N.2.3 that there should be a continuous dialogue between the parties in the run up to the hearing about the state of the draft section 106 to ensure that the final draft is as good as it can be. At paragraph N.2.5, it goes on to explain that a final draft rather than an executed planning obligation be provided, to allow for the possibility that it may be changed during the hearing process.
 16. The appellant, in submitting an executed planning obligation by 21 April 2021, did not follow the procedural guidance. I appreciate that the Council did not provide comments on the required contributions within its Statement of Case, which pre-dated the executed planning obligation. I also acknowledge that the appellant had to chase the Council for a response on the SoCG which, had it responded earlier, may have clarified the Council's position in respect of the planning obligation earlier on in the appeal process.
 17. The affordable housing contribution in respect of social rented housing was a point of dispute between the parties. The Council considered that the contributions as set out in the executed UU were not policy compliant. These matters could be and were resolved. Had the appellant been informed of the Council's concerns earlier on, they may have been resolved sooner during the appeal proceedings. However, this would not have altered the fact that the UU had been executed, it was wrong and required a deed of variation.
 18. The contribution to the healthcare was included by the appellant as a result of the consultation response and request for this by the NHS. However, I note that the planning officer's report refers to this contribution not being justified by policy at this time. It is not therefore clear why this point was not clarified by the appellant before its inclusion within the finalised UU. I do however accept that Clause 13 of the executed UU includes a 'blue pencil' clause such that that the obligation is conditional on my finding that it complies with CIL regulations.
 19. Nevertheless, the planning obligation sought the wrong contributions and had been executed. No reason has been put to me as to why this was executed in advance of the Hearing and not in accordance with the procedural guidance. A deed of variation was therefore required to make the planning obligation acceptable. I therefore find that the appellant did not co-operate with the Council in regards to this matter and this amounts to unreasonable behaviour by the appellant.
 20. This behaviour has resulted in extra work and additional expense for the Council in resolving this matter, set out by the Council as entering into additional documentation in the form of deeds of release to correct. An award in respect of this extra work is appropriate.

Conclusion

21. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

22. 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 Land Allocation Ltd shall pay to Exeter City Council, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in resolving matters in relation to the planning obligation.

23. The applicant is now invited to submit to Land Allocation Ltd, 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