
Costs Decision

Hearing held on 17 May 2022

Site visit made on 17 May 2022

by Andrew McGlone BSc MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 June 2022

Costs application in relation to Appeal Ref: APP/U2370/W/21/3278191 Land south of Blackpool Road, Poulton Le Fylde, 333704, 439607

- 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 Blackpool Council for a full award of costs against Wyre Borough Council.
 - The appeal is against the refusal of planning permission for the erection of up to 330 dwellings and associated infrastructure.
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Decision

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

The submissions for the applicant and response by the Council

2. The application made in writing by the applicant is for a full award of costs as it is alleged that the Council failed to allow development that should clearly be permitted and/or failed to produce substantive evidence to justify the refusal. The application, if I determine that a full award of costs is not warranted also seeks a partial award in relation to unnecessary and wasted costs incurred due to needing to address the late service of VISSIM modelling by the Council and their highway consultant.
3. The Council submitted its written response ahead of the Hearing. The applicant responded to this in writing. I have had regard to both in reaching my decision.
4. At the Hearing, oral submissions were made by the Council. These are: in relation to the partial award, that is based on an alleged unreasonableness of serving evidence without the necessary supporting data. It is said that this has caused additional and unnecessary work, in the form of preparation of rebuttal evidence and conference with counsel. Very helpfully dates of the appellant's conferences with Counsel have been provided. These were on 7 April and 29 April. Sir, in a nutshell it shows that there was no wasted or additional expense because it wasn't available until shortly before evidence was submitted and wouldn't have mattered in any event when it was provided as you can see the applicant's first conference was shortly after the Council's highway statement was submitted two days earlier. They decided to submit a rebuttal and have a further conference on 29 April. They already had a conference or needed to have a conference to review it. I don't think it has been put that the use of VISSIM is inherently unreasonable.
5. In response, the applicant made oral submissions at the Hearing. These were as follows: we had a conference scheduled for 7 April after the Council's

evidence, but because it contained so much material not seen and VISSIM, Mr Tiley said it is going to take some time to get his head around it and provide more information. Criticism was so far wide ranging, we needed to address it in writing. We expected to be able to schedule a conference a few days after the Council's submissions to get through the material, but there was too much to go through that had not been seen before.

Reasons

6. The Planning Practice Guidance (the 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. For an application to be successful, it needs to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. Parties in the appeal process are normally expected to meet their own expenses.
7. The planning application subject of the Appeal was refused by the Council against its Officer's recommendation and following extensive dialogue between the applicant, the Council and consultees. Of relevance to the latter and the costs application is the input of the Highway Authority and National Highways, statutory consultees, to the modelling undertaken by the applicant in support of their proposal. LinSig was the agreed modelling which formed the basis on which both consultees raised no objection to the proposal subject to the imposition of planning conditions and a planning obligation to secure various highway related measures. The views of both consultees seem to have carried substantive weight in the Officer's recommendation to the Planning Committee to approve the application on three occasions.
8. The Planning Committee are not bound to accept the recommendation of their Officer or the reasons for it. Given the views of interested parties, an alternative take on the scheme was a potential outcome. To support that decision, the Council has subsequently produced evidence to substantiate the reason for refusal. This work has focussed on two concerns: an unacceptable impact on highway safety; and a resultant impact on queuing and traffic which would have an unacceptable and severe impact on highway safety and the local highway network. Both formed the basis of the Council's case on appeal and should not therefore have come as a surprise to the applicant especially as they are reflected in the Planning Committee Minutes of the meeting on 3 March 2021, and within the Council's decision notice. Moreover, the applicant's Appeal Statement – Highways picks both points up in paragraph 5.2.5.
9. In the year between refusing planning permission and submitting its statement as part of the appeal process, the Council instructed a body of work to be done to substantiate its case evidentially. The outcome of this work was the Council's reliance on a VISSIM model as an alternative to the applicant's modelling. During discussions in January, February and March 2022 between the respective highway consultants the Council explained to the applicant that it would seek to rely on a VISSIM model. It is fair to say that any matters relating to scoping, inputs, the need for validation of the base model could have been discussed and resolved during this time.
10. Nevertheless, a Highways Statement of Common Ground was submitted a day before the Council's statement was submitted as per the timetable outlined in the appeal start letter. By sometime in March at least, the Council would have

been fully aware of its case and the evidence underpinning it, including the results of the VISSIM model which was not complete in January and February when the highway consultants engaged. The Council were professionally represented by a highway witness. So, while the Council may not necessarily be required under procedure rules, it was unreasonable to not share or provide data that was subsequently requested by the applicant on 7 April 2022 either at the time when the Council's statement was submitted or ahead of this given that the two parties were engaged on highway matters. This is because the Council's evidence was new and technical.

11. Some of the requested data that was available or which could be produced at short notice was provided by the Council in accordance with the timeframe that I set out. This allowed the applicant to submit a rebuttal in a timely manner as per my instruction. However, the upshot of producing and submitting new technical evidence and without meaningful dialogue about the intentions behind that model or its conclusions, whilst in accordance with the timetable, has been that the applicant has incurred extra time and expense in responding to that evidence at a late stage. This involved an additional unexpected conference with Counsel, correspondence and the preparation of a rebuttal statement to go through, understand and respond to the new evidence. This could have either been avoided or the applicant could at least have been adequately forewarned. The evidence before indicates that neither occurred.
12. This is against a backdrop of the Council's new technical work not being discussed with the Highway Authority at any stage. The lack of input from the Highway Authority was a striking omission given their prior involvement in the scheme up until the Council refused planning permission.
13. A Local Model Validation Report (LMVR) was not produced by the Council for the VISSIM model. According to Design Manual for Roads and Bridges, Volume 12, Section 2, Part 1 – Traffic Appraisal in Urban Areas, a LMVR is only mandatory for trunk road schemes. As such, producing a LMVR for the appeal scheme would be best practice to demonstrate that it represents existing conditions prior to it being used to forecast the proposal's effect. Without a LMVR it does lessen the weight that can be attributed to the VISSIM results. Furthermore, LinSig is a well established and commonly used software to model networks. Its use in this case was supported by the Highway Authority and it was in fact used by the Council's highway consultancy in the Brindle Road case¹ which involved a priority junction and a nearby level crossing. So, it is somewhat surprising that LinSig is seen as underestimating/understating the impact, especially when the barriers are not routinely down three times in twelve minutes across the whole morning peak hour period.
14. In any event, both models showed that, even in the absence of a LMVR, the proposed development would result in additional traffic on the local highway network. Comparatively, the queue lengths in each model were not dissimilar. It was also clear from the evidence and on the ground that there are existing issues on the highway network in terms of safety and journey time. The effect of the proposal in terms of both was therefore a matter of judgement, when factoring in the package of highway measures.
15. In conclusion therefore, even though I have disagreed with the Council's judgement on the proposal's effect, this does mean that it did not substantiate

¹ Appeal Decision Ref: APP/F2360/W/18/3202604

its case on appeal. Furthermore, the outcome of the case was not so clear that I can agree with the applicant that the Council failed to allow development that should clearly be permitted. Consequently, the application for a full award of costs fails as the Council has not behaved unreasonably and caused the applicant to incur unnecessary or wasted expense in appealing that decision. However, the applicant has incurred unnecessary and wasted expense in the appeal process due to the Council's unreasonable behaviour in submitting new technical evidence at a late stage without meaningful dialogue about the model or its conclusions or the involvement of the Highway Authority.

Conclusion

16. I conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated. As a result, a partial award of costs is warranted in this case.

Costs Order

17. 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 the Wyre Borough Council shall pay to Blackpool Council, the partial costs of the appeal proceedings limited to those incurred after the submission of the Council's statement concerning the VISSIM model and the subsequent additional conference with Counsel, correspondence and preparation of the Rebuttal Statement – Highways; such costs to be assessed in the Senior Courts Costs Office if not agreed.
18. The applicant is now invited to submit to Wyre Borough 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.

Andrew McGlone

INSPECTOR