
Costs Decision

Inquiry held between 2 and 11 August 2022

Site visits made on 1 and 8 August 2022

by Mark Dakeyne BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23rd September 2022

Costs application in relation to Appeal Ref: APP/V1505/W/21/3285386 Eastgate Shopping Centre, 85 Southernhay, Basildon SS14 1EB

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by InfraRed UK Lion Nominee 1 and InfraRed UK Lion Nominee 2 for a full award of costs against Basildon District Council.
 - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for outline planning permission for the part-demolition and redevelopment of the Eastgate Centre and neighbouring land to provide a mix of town centre uses, including the provision of up to 2800 residential units (Class C3) (including built to rent, open market sale, student accommodation, later living and co-living (Class C3, C2 and sui generis uses)); consolidation and reconfiguration of existing retail and commercial floorspace (Class A1, A2, A3, A4, A5, D1, D2, sui generis and/or B1 uses); introduction of new retail and commercial floorspace (flexible within Class A1, A2, A3, A4, A5, D1, D2, sui generis and/or B1 uses); reconfiguration of car parking; new public realm, footpaths and walkways, landscaping, open spaces and other associated physical works.
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Decision

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

The submissions for InfraRed UK Lion Nominee 1 and InfraRed UK Lion Nominee 2

2. The costs application was submitted in writing at the inquiry. The appellants sought a full award of costs

The response by Basildon District Council

3. With my agreement the Council's response was made in writing after the close of the inquiry.

Reasons

4. The Planning Practice Guidance (PPG) 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.
5. The Council changed in position between April 2021, when it resolved to grant planning permission, and December 2021 and June 2022, when it twice resolved to refuse planning permission. The latter two resolutions followed the appellants' appeal against non-determination in October 2021. Due to the

- appeal it was necessary for the Council to review its position so that it could determine the stance that it would take at the inquiry, particularly as there had been a change in the constitution of the Council. In the above context, it is necessary to ask whether the Council substantiated its putative reasons for refusal through its evidence in advance of and during the inquiry.
6. As referred to in my appeal decision, the first three reasons for refusal relate to effects on character and appearance and design. The fourth was resolved by the end of the inquiry with final agreement on the terms of the obligations under Section 106 of the Planning Act, a not unusual or unreasonable position.
 7. Looking at matters in the round, the Council substantiated its concerns about the height, scale, and massing of the development by reference to the effects on the townscape in general and the wider setting of Brooke House in particular. As a significant development, it was a matter of planning judgement as to whether the scheme would be transformative in a positive way or would lead to an unacceptable change in the townscape.
 8. The Council provided evidence in support of its misgivings about the layout based on the parameter plans, Design and Access Statement (DAS) and Design Code. In particular, issues about the relationship between residential units and service yards and face to face distances were suitably put.
 9. The Council was entitled to refer to the design process and the failings of the DAS and Design Code. In particular it was reasonable to explain, in the Council's opinion, that these documents did not fully articulate the design approach in the context of the New Town form, architecture, and layout of Basildon Town Centre. Moreover, it was reasonable to point out that the Design Code was ambiguous in relation to matters such as space standards, amenity space, balconies, and a lower carbon future. In some respects I agreed with this analysis¹, whilst coming to the conclusion that the development would be well-designed overall.
 10. The changed circumstances between April 2021 and June 2022 were reviewed by the Council. Notwithstanding the officers' advice, the Council was entitled to resist the appeal. The developments subject to the appeal decisions at Market Square and Town Square were of a smaller scale and different character. Therefore, whilst changing the baseline, they did not constitute similar cases which meant that the appeal scheme had to be determined in a consistent manner. The withdrawal of the emerging Basildon Borough Local Plan (eBBLP) and the worsening housing supply position were factors which made the case for granting planning permission stronger, but it did not lead to a situation where the appeal should clearly be permitted.
 11. It was also relevant for the Council to take into account the new version of the National Planning Policy Framework (the Framework) and the National Model Design Code, both published in July 2021. The former increased the emphasis on good design, the latter set out parameters to help local planning authorities decide what good quality design looks like in their area. It is also of note that the Council decided not to proceed with the Town Centre Regeneration Strategy which included the 2020 Masterplan in the period between April 2021 and June 2022. These documents, which reflected a move towards much greater concentrations of taller buildings in the town centre and were still

¹ See in particular paragraphs 26, 48-50 and 52 of appeal decision

relevant as part of the evidence base for the eBBLP, had less weight as a result of the Council's withdrawal of the emerging local plan.

12. The Council was entitled to conclude that the development was not well designed² and should be refused and as a result that it would conflict with the most important policies for determining the application³ and the policies of the Framework. In turn it was reasonable to come to the view that the adverse impacts of granting planning permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.
13. Ultimately I have not sided with the Council, but its position was substantiated by producing evidence and having regard to the development plan, national policy, and other material considerations. The fact that the first reason for refusal does not refer to development plan policy does not make it unreasonable as it relies on the very important material consideration of the Framework. Moreover, the first three reasons for refusal need to be read together.
14. Conditions could potentially have resolved some of the detailed matters referred to in evidence, but would not have been capable of overcoming the Council's concerns about the height, scale, massing, and layout of the development. Whilst the Inspector in the Town Square appeal imposed a condition requiring the submission of a design code, she was faced with the lack of a code, not whether a submitted code was adequate. As indicated above, the Council was entitled to consider the adequacy of what had been submitted in support of the design approach, whether or not all the documentation was required by legislation or policy.
15. The circumstances in the Stansted Airport costs application referred to by the appellants are different. Uttlesford District Council's evidence at the inquiry was ultimately that the substantive issues could be overcome by conditions or obligations, that the proposal would accord with the development plan, and that the planning balance was favourable. Basildon District Council took a different position on all three counts.
16. I therefore find, for the above reasons, that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Mark Dakeyne

INSPECTOR

² Paragraph 134 of the Framework

³ Policies BAS TC1 and BAS BE12 of the Basildon District Local Plan