The Planning Inspectorate

Costs Decision

Hearing held on 21 & 22 June 2022

Site visit made on 26 July 2022

by Matthew Nunn BA BPl LLB LLM BCL MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd November 2022

Costs application in relation to Appeal Ref: APP/Y3940/W/22/3290305 Land to the north of Whychurch Farm and to the south of Filands, Malmesbury

- 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 Gleeson Strategic Land Ltd for a full award of costs against Wiltshire Council.
- The appeal sought permission for 'outline planning application (all matters reserved except means of access) for residential development, including the construction of dwellings, the creation of a new vehicular access with footways and cycle ways and ancillary road infrastructure, public open space, children's play area, allotments, landscape planting, surface water attenuation and associated infrastructure'.

Decision

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

Reasons

Appellant's case

2. In summary, the appellant's costs claim, made in writing[1], is that the Council's behaviour in defending the appeal was unreasonable, and this has resulted in unnecessary costs. In essence, the appellant argues, in relation to the first putative refusal ground, that the principle of development outside settlement boundaries, not just in Malmesbury, but elsewhere in Wiltshire has not been seen as a bar to planning permission. Core Strategy policies have previously been held to be out-of-date given the absence of a five-year supply of housing, and therefore accorded diminished weight. Consequently, the first putative reason for refusal was not justified.

3. In relation to the second putative ground, relating to character and appearance, it is alleged the Council has made vague and generalised assertions about the proposal's impact on the locality which are unsupported by any objective analysis. Given that the other putative reasons for refusal could be dealt with by conditions and a planning obligation, the Council has been unable to demonstrate that the only harm it relies on (namely in relation to the principle of development and the limited impact on character and appearance) significantly outweighs the benefits, applying the so called 'tilted

[1] Dated 20 June 2022; A further reply to Council's costs response is dated 30 July 2022

balance'[2] of the National Planning Policy Framework ('the Framework'). The Council's stance in resisting the appeal simply cannot be supported, and amounts to unreasonable behaviour resulting in wasted expense.

Council's response

4. The Council's written response[3] in summary is that it has not behaved unreasonably. It produced clear and detailed putative grounds for refusal some of which later fell away (including in respect of archaeology and matters covered by the planning obligation). It is common ground that the scheme conflicts with various Core Strategy policies, but other allowed appeals outside the settlement boundaries were based on the specific circumstances of those cases. The appellant is mistaken in believing permission should have been granted 'as a matter of right'. The appellant's scheme is an 'affront to the plan led system' and its urbanising effect is clearly explained in the Council's statement of case. Whether permission should be granted is a matter of judgement.

5. Furthermore, the Council highlights the appellant's 'volte face' regarding a public art contribution, which was made without warning at around 4.40pm on the first day of the Hearing, even though this matter (including CIL[4] compliance) was previously agreed as part of the Heads of Terms for the obligation and recorded in the Statement of Common Ground. Although the Council does not seek to pursue its own costs application, it argues such behaviour is unreasonable and should inform the Inspector's deliberations. Overall, the Council has not acted unreasonably and the costs application is therefore misconceived.

Reasons

6. The Planning Practice Guidance (PPG) states that parties in appeals normally meet their own expenses. The PPG also 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 or wasted expense in the appeal process. For an application for costs to succeed, an applicant will need to demonstrate clearly how any alleged unreasonable behaviour has also resulted in unnecessary or wasted expense.

7. It is the case that development plan policies, especially relating to schemes outside settlement boundaries, have previously been found to be out-of-date in Wiltshire, and that this has resulted in housing proposals being granted permission outside the settlement boundary, both by the Council and at appeal. Also, in this instance the Council openly acknowledges that any harm to character and appearance would be limited and localised, particularly given the recently approved and completed developments adjacent to the appeal site. In my judgement, it must have been clear to the Council that it faced an uphill struggle in succeeding in this appeal. Its case was not strong, especially as the absence of a five-year supply of housing would mean the 'tilted balance' of the Framework would apply.

8. On the other hand, I acknowledge the Council's point that the scheme was contrary to the development plan, and the meaning and interpretation of

[2] Paragraph 11(d)(ii) of the Framework
[3] Dated 25 June 2022
[4] Community Infrastructure Levy

development plan policies, including any weight to be given to their conflict, is a proper matter of debate about which reasonable people may disagree. Similarly, assessing harm in respect of character and appearance is a matter of judgement. That people disagree about all these matters was evidenced by the appearance of Malmesbury Town Council members at the Hearing who objected to the scheme. I consider that the Council's case was set out clearly and comprehensively enough in its Statement of Case. Having regard to the above, and on a fine balance, I do not consider that the Council's behaviour was unreasonable, and it follows that costs should not be awarded. As is evident from my decision, I found the appellant's case on the main issues more convincing.

9. However, I must also mention the appellant's own behaviour at the Hearing. Within the Statement of Common Ground, it was expressly recorded that all the planning obligation heads of terms had been agreed, including relating to the provision of public art[5]. According to the Council, although the appellant had previously queried some elements of the requested contributions as part of agreeing the Heads of Terms, it had not given any indication that public art would be raised as an issue of contention. Surprisingly and regrettably, the appellant resiled from that position at the end of the first day of the Hearing. This was on the basis of an appeal decision where a public art contribution was found not to be compliant with the CIL Regulations.

10. The appellant's approach at the Hearing, departing from the previously agreed Statement of Common Ground, was unheralded and without notice. As a result, the Council had no warning it would need to produce new evidence to justify its position. I see no good reason for the appellant's approach, given that the appeal decision in question had been published long before the Hearing took place[6]. In my view, this clearly amounts to unreasonable behaviour. Although the appellant says that this matter is irrelevant and intended to divert attention away from the key issues, time was undoubtedly wasted discussing this matter at the Hearing, including the Council defending its position, which could and should have been avoided. On the other hand, the Hearing did not overrun its overall allocated time, and whilst I do have power to award costs, I have decided not to do so in this instance.

11. To sum up, the Council's case was not strong, but on the other hand, the appeal scheme was clearly contrary to the development plan, and proper application of the 'tilted balance' does require a judgement as to whether the alleged harms significantly outweigh the benefits. On a fine balance, I do not consider the Council has behaved unreasonably, and therefore costs should not be awarded.

Matthew Nunn

INSPECTOR

[5] Paragraph 5.19
[6] APP/Y3940/W/21/3275352 published 8 February 2022.