
Costs Decision

Hearing Held on 19 October 2022

Site visit made on 19 October 2022

by Helen O'Connor LLB MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 November 2022

Costs application in relation to Appeal Ref: APP/C1435/W/22/3292552 Mill House Farm, Maresfield, Uckfield, East Sussex TN22 2ED

- 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 Messrs SJ, NM, PA and RP Flittner for a full award of costs against Wealden District Council.
 - The hearing was in connection with an appeal against the refusal of outline planning permission for 'Phased development of up to 49 houses. All matters reserved apart from the access, which will use the existing approved access and existing internal road'.
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Decision

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

Preliminary Matters

2. The applicants' main application for costs was submitted in writing in advance of the hearing, as was the Council's response. These are already a matter of record and there is no further need to repeat them before setting out the reasoning. As such the following two sections refer only to additional oral submissions made during the hearing, to ensure that there is a record of them.

The submissions for Messrs SJ, NM, PA and RP Flittner

3. At the hearing the applicants confirmed that the application was for a full award of costs. Specific reference was made to their attempts to agree a final version of a bilateral section 106 planning agreement (draft s106) in the run up to the hearing opening. They contend that the Council failed to engage with them on this within a reasonable timeframe which necessitated the submission of a Unilateral Undertaking to meet the procedural deadline. Furthermore, they consider that the Council acted unreasonably in responding to the draft s106 two days before the hearing opened.

The response by Wealden District Council

4. The Council confirmed that their written response outlined their case. The timing of their response to the draft s106 was primarily due to other workload pressures.

Reasons

5. 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. Although behaviour and actions at the time of the planning application can be taken into account, costs can only be awarded in relation to unnecessary or wasted expense at the appeal.
6. The applicants consider that the Council has behaved unreasonably prior to, during and following their decision on the outline planning application and a description of events from their perspective is set out in the written submission. Effectively, the principal point made is that the Council refused the proposal at the 13 week target date without warning. They contend that had they allowed more time by agreement for negotiation, acceptance of potential revisions to the proposal, the submission of further information on technical matters and a completed planning agreement, then the appeal could have been avoided altogether, or at least have contained fewer substantive refusal reasons. In particular, they contend that the formal decision ought not to have been taken in the absence of a written consultation response from the Highway Authority.
7. The applicants further consider that the Council takes a more engaged and flexible approach in relation to other applications for major residential development and so has been unfair in their behaviour towards them. In addition, the applicants suggest that the Council have acted secretly in their communications with the Highway Authority and in relation to a new policy in dealing with applications.
8. The PPG gives examples of unreasonable behaviour where local planning authorities are at risk of an award of costs. This includes the following:
 - Lack of co-operation with the other party or parties
 - Delay in providing information or other failure to adhere to deadlines
 - Deliberately concealing relevant evidence at planning application stage or at subsequent appeal
 - Refusing to enter into pre-application discussions, or to provide reasonably requested information, when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed, thus reducing the expense associated with the appeal.
9. The National Planning Policy Framework (the Framework) encourages early engagement signalling that it has significant potential to improve the efficiency and effectiveness of the planning application system for all parties¹. In this case pre-application advice was given in relation to a proposal for 20-80 dwellings at the site. The applicants opted for written advice only, which did not include meetings with Council Officers. The higher level of service was available to the applicants subject to an additional fee.

¹ Paragraph 39

10. The letter sets out relevant development plan policies and gives a broad discussion of the likely main issues. It ultimately clearly recommended against the submission of an application for residential development. Even so, some indication of the likely information that would be required to support an application was given and in particular, it was recommended that the access arrangements should be discussed with the Highway Authority. The evidence does not indicate that the applicant sought any further pre-application advice via the routes normally provided by the Council nor with the Highway Authority prior to submitting the application.
11. My attention has been drawn to paragraph 38 of the Framework which states that local planning authorities should approach decisions on proposed development in a positive and creative way. However, this must be balanced with paragraph 47 of the Framework which stipulates that decisions on applications should be made as quickly as possible, and within statutory timescales unless a longer period is agreed in writing with the applicant.
12. The Council had discretion whether to seek the agreement of the applicants to extend the time period in order to prolong exploratory negotiations and accept further additional material following the submission of the planning application. I do not consider that the content of paragraph 38 amounts to an obligation for them to do so.
13. Even had they chosen to do so, there is little evidence that the substantive concerns raised by the Council in relation to the impact arising from the scale of development for up to 49 dwellings would have been satisfactorily addressed, which is reinforced by my findings. The approach taken by the Council was broadly consistent with the pre-application advice given and, on this basis, ought not to have come as a complete surprise to the applicants.
14. It may or may not be the case that the Council's concerns could have been addressed by different smaller scale proposals, or by including additional land that was not within the appeal site. However, that was not the scheme proposed. The Council were required to consider the principle of the full extent of development proposed, albeit that this could leave the possibility of building fewer dwellings under any consent granted. A significant reduction in the maximum number of dwellings and or changes to the red line of the appeal site would not have been minor adjustments, rather they would have been fundamental changes probably necessitating further consultation.
15. I accept that it was unhelpful to all parties that the Highway Authority failed to provide a timely written consultation response and that some of the applicants' criticism is justified in this respect. Nevertheless, evidence has been provided within the necessary appeal deadlines to substantiate the relevant reasons for refusal. Hence, it is not clearly shown that prolonging the period for determination beyond the statutory 13 weeks would have obviated the objections of the Highway Authority.
16. Accordingly, I cannot agree that had the Council acted otherwise, it would certainly have affected the ultimate outcome. I acknowledge that it is probable that the scope of objections may have been reduced, for example the updated Flood Risk Assessment provided at the appeal did address the concerns raised in relation to the version originally presented at the application stage. It was also probable that suitable planning obligations might have been secured to address some of the Council's refusal reasons.

17. Nevertheless, putting the applicants to the added expense of updating technical submissions and providing a section 106 agreement when other substantive concerns remained could equally have been open to criticism. In these circumstances, it was not unreasonable for the Council to proceed to make the decision within the statutory period as they are expected to do.
18. The evidence further shows that some subsequent dialogue has taken place between the applicants and officers of both the Council and Highway Authority. Overall, it is not shown that there has been a failure to engage, although I accept the messages may be unpalatable to the applicants.
19. The applicants have chosen to make an appeal, rather than, or in addition to pursuing a subsequent revised planning application. The Procedural Guide: Planning Appeals (England), updated in April 2022 (PG) advises that if an applicant thinks that amending their application proposals will overcome the local planning authority's reasons for refusal, they should normally make a fresh planning application. I am aware that the applicants have expressed dissatisfaction with the pre-application advice and service given by the Council. It is not for me to review that service, but it does indicate that the local planning authority are open to, and provides a route for, continuing discussions on whether an amended scheme would be viewed favourably.
20. It is clear from the extensive planning history that the applicants have some considerable experience of making planning applications at or close to Mill House Farm, and generally keep abreast of major residential developments in the district. Some of the background information provided outlined the frustrations and complexities the applicants have had and continue to experience in delivering other development proposals. Even so, it has not been shown that the Council has been secretive or deliberately uncooperative in relation to this appeal within the meaning of the PPG.
21. Reference is made to the Council's approach being different to that displayed in relation to a contemporaneous application for 39 houses, reference 21/1419. It is asserted that further time was allowed in that case to the applicants to address the concerns of the Highway Authority. Whilst there may be some similarities, it is not shown that the example cited was fully comparable with the appeal scheme in terms of the nature of the proposal. Given the unique nature of land, there will be physical differences between the two schemes that distinguish them and may explain the approach of the Council. Of itself, if there are differences between the merits of respective proposals, I do not consider that it would be unreasonable in principle for the Council to respond differently to them.
22. I am satisfied that the Council have subsequently provided evidence to substantiate their concerns regarding the development, which, as will be seen from my decision, I found to be justified. PPG confirms that where local planning authorities have exercised their duty to determine planning applications in a reasonable manner, they should not be liable for an award of costs.
23. That said, there is one area highlighted at the hearing by the applicants where I consider the Council did display unreasonable procedural behaviour, and that is in relation to their delay in responding to, or engaging with, the applicants on their draft section 106 agreement submitted to the Council in August 2022. The pre-hearing note drew the attention of both main parties to the requirements

and deadlines for planning obligations in the PG well in advance of the hearing opening. It was manifestly unreasonable of the Council to produce detailed annotations on the draft s106 agreement two days before the hearing opened. Moreover, this was after a completed Unilateral Undertaking (UU) had been submitted by the applicants as part of their appeal submission.

24. However, given that the UU had already been prepared and was under discussion at the hearing, it meant that the production of annotated comments on a previous draft s106 had been superseded by other events. At the hearing the applicants were unable to point to any unnecessary or wasted expense that resulted directly as a consequence of this unreasonable behaviour.

Conclusion

25. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Helen O'Connor

Inspector