



Costs Decision

Site visit made on 12 April 2022

by E Symmons BSc (Hons) MSc MArborA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25th November 2022

Costs application in relation to Appeal Ref: APP/N4720/W/21/3289510 Land at Wharfeside, Boston Spa

- 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 Leeds City Council for a full award of costs against Wharfeside Boston Spa LLP.
 - The appeal was against the refusal of the Council to grant planning permission for demolition of existing buildings and the construction of new garage with ancillary accommodation above as part of enlarged residential plot for 301 High Street; erection of 5 new dwellings along with associated works; alterations to Wharfeside including the demolition and realignment of boundary walls facing High Street and Wharfeside and the alterations of existing residential plots.
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Decision

1. The application for costs is allowed in part.

Reasons

2. Irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved unreasonably in either a procedural or substantive way, and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
3. Awards against an appellant may be either procedural regarding behaviour in relation to completing the appeal process or substantive relating to the planning merits of the appeal. The Council is applying for costs on both grounds and has set these out under three headings.

Ground 1

4. This is based upon Paragraph 52 of the Planning Guidance on Appeals (2014) (the Guidance) which gives examples of unreasonable behaviour which may result in an award of costs. These are:
 - only supplying relevant information at appeal when it was requested, but not provided, at application stage; and
 - introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.
5. The Council cite three instances in support of this. These are, the lack of surveys for bats and Great Crested Newt (GCN), updated arboricultural and landscape information and submission of additional plans at the appeal stage.

Ecological surveys

6. Consultee comments from the Nature Team sent on 3 September 2019 (during the application stage and prior to the appeal) stated that surveys for GCN and bats would be “*required prior to determination [of the application] to confirm presence/absence of these species and the potential impacts upon them*”.
7. In an e-mail dated 20 July 2020, the Council set out its expected reasons for refusal relating to Green Belt, trees and highways. This did not mention surveys for protected species despite post-dating the Nature Team’s comments. Following negotiations on highway matters, the Council indicated, on 5 May 2021, that the proposed reasons for refusal now related to Green Belt and trees. Ecology was again not explicitly mentioned. There is no substantive evidence to suggest that the appellant, at this time, was aware that a lack of ecological surveys would lead to a recommendation for refusal.
8. Within the Council officer report and e-mail to the appellant dated 25 June 2021, the day the decision to refuse the application was taken, the Nature Teams comments were referred to. The appellant was therefore aware of this issue prior to the appeal being lodged and whilst preparing for the appeal, sought professional advice regarding the ecological issues. They therefore, submitted an Ecological Mitigation Strategy to answer these reasons for refusal. This advice also suggested that a condition would be possible to resolve these issues.
9. Within its statement of case, the Council further substantiated its view that surveys could not be left as the subject of a condition quoting Circular 06/2005. Furthermore, my decision concludes that a planning condition would not be acceptable. However, the appellant has deduced evidence in support of their contention in relation to this point. Therefore, the actions of the appellant has not been unreasonable based upon the professional advice they received.

Trees and landscape

10. Initial arboricultural reports were provided to support the planning application. During its determination the Council cited concerns regarding loss of trees and the extent of replacement planting.
11. The Council’s Landscape Team stated that the survey information was inadequate, but these comments did not elaborate upon this or recommend submission of additional technical arboricultural reports. Undated comments from the Landscape Team also referred to the proximity of RPAs to construction and questioning levels of replacement planting. Concerns relating to trees were indicated in the Council’s e-mails of 20 July 2020 and 5 May 2021. This latter e-mail only refers to loss of one tree at the High Street junction.
12. The appellant’s interpretation of this issue was that the arboricultural information submitted during the application, with layout amendments completed with advice from their arboriculturist, still applied to the amended proposals. Furthermore, they deduced that the tree issues raised by the Council related to disagreement of the construction impacts, lack of clarity regarding specific trees for removal and levels of replacement planting, rather than a lack of information. No further arboricultural submissions were made by the appellant and the issue was left to the discretion of the Inspector.

13. My appeal decision finds that the arboricultural information was inadequate. However, notwithstanding this, and that the appellant was aware of the tree and landscape concerns prior to the appeal, an Inspector may apply a different planning balance within their determination of an appeal, and this may differ from that of the Council. It was not therefore unreasonable for an appellant to proceed to appeal in this case.

Submission of additional plans

14. Various plans and professional statements and reports accompanied the appeal. The Council refer to the Procedural Guide: Planning Appeals – England (2022) paragraphs 1.2.1 and M.2.1. These advise that: an appeal should not be used as a bargaining tactic but as the last resort; the appeal process should not be used to evolve a scheme and what is considered by the Inspector is essentially what was considered by the local planning authority, and on which interested people's views were sought, and that appellants should be confident at the time they make their appeal that they are able to make their full case.
15. During determination of the planning application and prior to the e-mail of 25 June 2021, Council correspondence had raised refusal reasons relating to highway and tree issues. However, although the Council states there were other reasons for refusal, these were not explicitly set out in the e-mails and the appellant concluded that all other matters had been resolved. It was not until the e-mail of 25 June 2021 that it became clear this was not the case.
16. Although within this latest e-mail the Council stated that an appeal would be premature and offered to discuss revised proposals within the pre-application service, the appellant followed an alternative approach by way of an appeal.
17. The appeal was initially to be determined by way of a hearing and the appellant's evidence to support their case, including additional plans and reports, was submitted. The highway plan had been seen by the Highway Officer and a solution advanced. The other plans and reports sought to address reasons for refusal and all had been available for interested parties to comment upon with many individuals taking the opportunity to do so.
18. It was not unreasonable to consider that matters raised within the reasons for refusal related to application of policy, planning judgement and the consequent planning balance. Furthermore, given the explicit information available to the appellant, it was not unreasonable to support their case by way of submission of supporting professional reports.

Ground 2

19. The Council considers that the appellant's failure to agree a planning obligation was unreasonable. It contends that on 28 April 2021 the appellant was aware of the need for a planning obligation to resolve highway concerns. Moreover, although the decision to refuse the application was dated 25 June 2021, a draft unilateral undertaking (UU) was only sent to the Council and the Planning Inspectorate on 2 February 2022.
20. The appellant knew and accepted that a planning obligation would be required to overcome highway issues. However, having decided to lodge an appeal, the appellant would not have been in a position to submit such an agreement until the appeal started which was on 13 January 2022. Furthermore, due to the proposed hearings procedure, guidance within Annex N of the Procedural

Guide: Planning appeals – England applied. This states that a final draft of a planning obligation agreed by all parties to it should be received no later than 10 working days before the hearing opens. The appellant's timing of their submissions was therefore not unreasonable.

21. Regarding Biodiversity Net Gain (BNG), the Council contend that prior to the appeal being made the appellant was aware it considered a planning obligation an unsatisfactory way to deal with this. However, I have no evidence that the Council raised the issue of BNG and the lack of a mechanism to deliver this during determination of the application, other than within the Council's e-mail of 25 June 2021 and subsequent decision notice and officer report.
22. Following submission of the appeal, and when the UU was submitted, it not only included sums relating to highway improvements and maintenance, but also a contribution for delivery of BNG. This was to address part of the reason for refusal. The appellant, believing that a contribution could resolve this reason for refusal, and that the Council had used this approach before, included this within the UU. This was a reasonable conclusion to reach.
23. The Council advised the appellant that guidance contained within 'Achieving net gain for biodiversity – guidance for developers' states that if Option 2 (the Council's delivery of a project) is to be followed, prior confirmation it is feasible should be sought. Although this could have been agreed during ongoing discussions between the parties, particularly since at this stage the appeal was proceeding by way of a hearing, no resolution was reached.
24. Notwithstanding that the appellant's initial submission of a UU relating to BNG was reasonable, this approach was pursued, even after the Council further clarified its position in an e-mail dated 9 February 2022. This e-mail responded to and rebutted the appellant's suggestion that the Council had previously used the same approach elsewhere.
25. However, after the Council's e-mail dated 9 February 2022, the appellant continued to suggest this approach was feasible. The reasons why this was done have not been addressed within the appellant's 'Costs Rebuttal' and no substantive response to the issue of BNG and the Council's view that no delivery mechanism exists has been advanced.
26. Consequently, the appellant's pursuit of a UU with respect to BNG after the 9 February 2022 was unreasonable. The Council have subsequently incurred expense dealing with the UU with respect to the issue of BNG.
27. The right of appeal should be exercised in a reasonable manner. An appellant is at risk of an award of costs being made against them if the ground of appeal had no reasonable prospect of succeeding. Given the Council's position on this matter, it was unreasonable for the appellant to proceed with this part of the UU when this element could have been excluded after 9 February 2022.
28. The Council contend that the appeal should have been withdrawn at this point due to the conflict with policy. I will return to this point within Ground 3.

Ground 3

29. Paragraph 053 (Reference ID: 16-053-20140306) of the Guidance explains that the right of appeal should be exercised in a reasonable manner and that an appellant is at risk of an award of costs on substantive grounds if an appeal has

no reasonable prospect of succeeding. This may occur where either the development is clearly not in accordance with the development plan, and no other material considerations such as National policy are advanced that indicate the decision should have been made otherwise. This forms the basis of the Council's third ground.

30. Other than highway and biodiversity matters, reasons for refusal relating to Green Belt; housing mix; housing density and tree loss, were matters of application of policy, the situation on the ground and planning judgement. It is therefore not unreasonable to present a differing view from that of the Council at appeal. The appellant has presented a case with respect to each of these issues and as demonstrated by my decision, I have reached a view on each based upon the evidence before me.
31. The matter of highway works was being actively discussed with the Council and it was not unreasonable to pursue this through a planning obligation. As I have discussed earlier, a UU was submitted.
32. With regard to biodiversity, although I have found within my decision that surveys for protected species cannot be conditioned, the appellant was given professional advice to the contrary and although perhaps ill-advised, it was not unreasonable to pursue this through the appeal process.
33. For BNG, within their final comments the appellant provided evidence regarding the methodology employed in calculation of the sums detailed within the UU. An example of a development where BNG was addressed through financial payment for off-site works via a UU was also provided. I have already found within my conclusions on Ground 2 that pursuit of this following the Council's e-mail of 9 February 2022 was unreasonable.
34. However, it does not follow that the whole appeal had no chance of succeeding. Although the issue of BNG and associated conflict with policy could not be resolved, it is not inherently unreasonable to proceed with an appeal with unresolved reasons for refusal and potential conflict with policy. An Inspector may in their application of policy, planning judgement and planning balance, allow such an appeal despite this conflict. Therefore, with respect to Ground 3, I find that the appellant has not been unreasonable in considering that the appeal may still succeed.

Conclusion

35. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.
36. Having been refused planning permission the appellant could have sought pre-application advice, submitted an amended application, or, as they chose to do, appeal. It was not unreasonable to exercise this option and deal with matters of refusal within this context.
37. The appellant's appeal submissions are not without merit and when taken in their totality, presented an alternative view on the various policy conflicts identified. These were matters of judgement and application of policy. While I have dismissed the appeal, the appellant provided adequate supporting evidence in the statement of case and final comments regarding all but the issue of BNG.

38. However, I have found that the appellant was unreasonable in continuing to pursue resolution of the BNG issue within the submitted UU. This has resulted in additional expense by the Council with respect to its appeal submissions on this issue alone and following its e-mail dated 9 February 2022.
39. With respect to whether this should lead to a full award of costs, I note that paragraph 041 (Reference ID: 16-041-20140306) of the Guidance states that a partial award of costs may be limited to a part of the appeal process. I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has only been demonstrated with respect to the Council's expenses responding to submissions relating to the BNG aspects of the submitted UU. A partial award of costs is therefore justified only with respect to these matters subsequent to 9 February 2022.

Costs Order

40. 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 Wharfeside Boston Spa LLP shall pay to Leeds City Council, the costs of the appeal proceedings limited to those costs incurred responding to submissions relating to Biodiversity Net Gain aspects of the submitted Unilateral Undertaking; such costs to be assessed in the Senior Courts Costs Office if not agreed.
41. The applicant is now invited to submit to Wharfeside Boston Spa LLP, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

E Symmons

INSPECTOR