
Costs Decision

Site visit made on 7 November 2020

by Robin Buchanan BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 December 2022

**Costs application in relation to Appeal Ref: APP/C1435/W/22/3297976
Allsworthy, Hailsham Road, Stone Cross, Pevensey, East Sussex BN24 5AS**

- 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 Mr Simon Zender (Hubjub Ltd) for a full award of costs against Wealden District Council.
 - The appeal was against the refusal of planning permission for the erection of up to 22 no. dwellings (including affordable homes), together with access road and parking.
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Decision

1. The application for a full award of costs is refused. A partial award of costs is allowed in the terms set out below.

Reasons

2. 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.
3. The applicant alleges procedural and substantive failings. In essence, that the Council did not properly exercise its development management responsibilities, made vague, generalised or inaccurate assertions, did not determine the application in a consistent manner with other similar cases, including objections found acceptable in other appeals, failed to substantiate its reasons for refusal, introduced a new reason for refusal and new evidence at a late stage and prevented or delayed development that should clearly have been permitted. This led to the applicant incurring unnecessary costs in pursuing the matter through the appeal process.
4. The Council was given the opportunity to comment on the costs application. I have taken comments received into account in my decision.
5. I have been referred to other cost decisions against the Council¹. However, these include materially different circumstances to the present application for costs, so do not assist me.

Housing and location

6. The Member reason for refusal (RfR) clearly relies on the Wealden Local Plan 1998 (LP), not the 'development plan', as is otherwise suggested by the Council. The LP is part of the development plan, but the development plan must be taken as a whole. Wealden Core Strategy 2013 (CS) policies are listed

¹ APP/C1435/W/22/3296579 and APP/C1435/W/22/3297419

in the RfR. If Members had due regard to the CS policies this is not evident from the substantive wording of the RfR or the record of the planning committee decision against the Officer recommendation to grant outline planning permission subject to conditions.

7. The Officer report advised Members about the housing land supply position and that the CS acknowledged a need for a significant number of dwellings at Stone Cross, beyond development boundaries established by the LP. This flowed from CS Policy WCS4, but the reference in the report to 'in and around' Stone Cross comes from CS Policy SPO3 which was not mentioned. Nor did the report provide Members with any meaningful advice about outcomes of recent appeals or other Council decisions relevant to the principle of housing on the site or its location. The report relegates the CS to a subsidiary status to the LP and this rationale was carried over by Members into their RfR resulting in determinative weight given to the LP policies. This was unreasonable.
8. The Council introduced CS Policy WCS2 in its appeal statement but it was not part of the RfR. This policy was listed in the Officer report but its significance was not explained. While the substance of this policy is also reflected in CS Policy WCS4, which was referred to in the report, CS Policy WCS4 was not in the RfR. The reasons for these apparent inconsistencies or omissions are not clear but it was unreasonable to introduce this facet at appeal stage. The Council did not produce substantial evidence in this regard and it has not prolonged the appeal process. It nonetheless necessitated a detailed response from the appellant in its final comments.
9. Notwithstanding this unreasonable behaviour at application and appeal stages, given my findings on housing and location in my appeal Decision, these aspects of the applicant's appeal case did not incur wasted costs.

Character and appearance

10. I accept that the weight given by Members to the principle of the proposed development in terms of housing and location could have been different but this is not certain. Moreover, there is no credible evidence that it would have tipped the planning balance and Members would have granted permission.
11. Members were entitled to reject the Officer recommendation because of their objections on character and appearance. The Officer report before them was sufficient for them to do so. It was informed by a site visit, photographs, relevant views and existing physical features including recent housing development in the area, topography and vegetation. Officers also took into account the location of the site in the Low Weald landscape character area.
12. These considerations relate to matters of acknowledged planning interest and relevant local and national planning policies were referred to. The Council has sustained the character and appearance RfR in its appeal statement, including with relevant objective reports². There was no objective landscape or visual impact assessment from the applicant at application stage to counter Member objections in this respect or at appeal stage to counter this aspect of the RfR. Given the manner by which the Council made its decision, it is unsurprising, and certainly not unreasonable, that the Council's appeal statement contradicts certain aspects of the Officer report.

² Wealden Landscape and Settlement Character Assessment 2014: Landscape Setting of Stone Cross and East Sussex Landscape Character Area Assessment 2016: Pevensey Levels

13. I appreciate that significant harm to character and appearance of an area does not 'automatically trump the benefits'. However, I do not share the applicant's interpretation of other Council or Inspector appeal decisions as having established a de facto position that 'impact on the character of an undesignated area will not be sufficient grounds to refuse an application'.
14. The nature or degree of impact is a significant consideration and is informed by the particular circumstances of any case. That the density of proposed housing development was innately 'modest' and plot sizes adhered to relevant generic Council standards does not mean these aspects of the proposal were acceptable as of right on this particular site. The Council had not argued that visibility equated to harm, it was the extent of the proposal that resulted in visual intrusion. I do not, therefore, agree that Members 'misdirected' themselves in the weight they gave to these considerations.
15. The applicant's criticism of the Council on this issue is ultimately a difference of planning judgement. I have reconciled that difference in my appeal decision. It will be evident that I consider the Council did not prevent or delay development which should clearly have been permitted.

Noise and air pollution

16. The applicant submitted detailed, objective noise and air quality reports at application stage. These were prepared by suitably qualified professionals and were agreed by the Council's relevant technical pollution control Officers. Planning Officers agreed with the reports and with the technical advice from their own specialist Officers. Members were advised that subject to conditions the proposal would have no unacceptable noise or air quality effects on the living conditions of future occupiers of the dwellings.
17. It is not, therefore, clear to me on what rational basis Members rejected this advice. There is no evidence of significant objective information to the contrary relied on by Members and, with all due respect, comments made by interested parties in this regard were largely anecdotal or lacked sufficient technical justification. This part of the RfR was therefore unreasonable, albeit its omission would not have led to permission being granted given the Council's other objections.
18. Nonetheless, this led the applicant to consign a significant part of his appeal statement to maintaining his position on noise and air quality. While it appears that this evidence drew on the technical reports, which were not updated with this in mind or for this purpose (the noise report was updated to align it with the change made to the proposal by then refused by the Council for up to 22 dwellings, though not the air quality assessment which remained based on a scheme of up to 33 dwellings), I have no reason to doubt that there was also liaison with the authors of both reports at appeal stage.
19. However, after receipt of the appeal, including the appellant's statement of case, the Council did not substantiate this part of the RfR. Nor has it explained what new 'careful consideration' led it to withdraw this part of the RfR. Nothing of any substance had changed on these issues since Members had formulated this part of their RfR. This was unreasonable and consequently, wasted costs were incurred by the applicant; though I see no reason why this should have led the Council to withdraw entirely from the appeal given its other objections.

20. The Council's suggestion that withdrawing this RfR was 'timely' only has gravitas in the sense that unless or until the appeal was lodged, it was not in a position to withdraw any part of its RfR. It is not clear to me how or why the Council would otherwise have unilaterally 'withdrawn' this RfR before an appeal was lodged, as the applicant otherwise suggests. Fundamentally, withdrawing this RfR when it did, does not excuse or overcome the actions of Members in the first place. It is also a somewhat moot point that withdrawal of this RfR may have contributed to the appeal being 'downgraded' to Written Representations. The applicant had requested a Hearing and was evidently prepared to meet those costs in any event.

Conclusion

21. For the reasons given above, I find that unreasonable behaviour by the Council resulting in unnecessary expense in the appeal process, as described in the PPG, has been demonstrated. The unreasonable behaviour would not have resulted in planning permission being granted by the Council or therefore averted the appeal. PPG sets out that parties in planning appeals normally meet their own expenses. A full award of costs is not therefore justified, but a partial award of costs is.

Costs Order

22. 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 Wealden District Council shall pay to Mr Simon Zender (Hubjub Ltd), the costs of the appeal proceedings described in the heading of this decision but limited to those costs incurred in responding to the noise and air pollution RfR in the Council's decision notice only, as outlined above, including the expense of making the costs application in this respect.
23. The applicant is now invited to submit to the 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Robin Buchanan

INSPECTOR