
Costs Decision

Hearing Held on 29 November 2022

Site visit made on 30 November 2022

by Nick Davies BSc(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12th December 2022

Costs application in relation to Appeal Ref: APP/D0840/W/22/3295839 Bridge View Nurseries, Church Lane, Calstock PL18 9QJ

- 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 M Wight (Construction Partners) for a full award of costs against Cornwall Council.
 - The hearing was in connection with an appeal against the refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
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Decision

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

Reasons

2. The Planning Practice Guidance (the 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 application was made in writing, shortly before the Hearing opened. It alleges that the Council acted unreasonably, in refusing to entertain a proposal to vary the level of previously agreed affordable housing through the section 73 application, even though there were issues of viability, and knowing that a new section 106 agreement would be required to deliver the housing via this type of permission anyway. It is contended that this resulted in the Council basing its decision on the ability to deliver affordable housing, rather than the merits of the variation to the design of the proposal. Furthermore, it is claimed that the Council acted unreasonably in arguing that due to the Wheatcroft¹ principles, the evidence on viability, and the resultant implications for on-site affordable housing, should not be considered as part of the appeal.
4. It is not disputed that the application, as originally submitted to the Council, referred to a change to the affordable housing/open market percentage mix. However, there was nothing in the Planning Statement submitted at that time that identified any viability issues. Rather, the reduction in the level of affordable housing was premised on meeting minimum policy requirements.

¹ Bernard Wheatcroft Ltd v SSE [JPL 1982 P37]

The Council considered that the proposed reduction, from 45% affordable housing to 30%, was outside the scope of a section 73 application, because it conflicted with advice in the PPG that *"the local planning authority must only consider the disputed condition/s that are the subject of the application – it is not a complete re-consideration of the application"*². Whether the reduction in affordable housing amounted to a complete re-consideration was a matter of judgement, and the Council's conclusion was not manifestly unreasonable.

5. The Council's conclusion was not challenged at the time, and the application was resubmitted to the Council with no reference to a reduction in affordable housing. The Agent's covering e-mail said that the submission had been amended *"to remove any reference of changing the affordable housing percentage from that currently agreed under the S106 Agreement so this no longer forms part of this application"*. Accordingly, the Council publicised the application and considered it on that basis. Against this background, the Council's reason for refusal, regarding the impact of the design changes on the ability to deliver the previously approved affordable housing, was reasonable. I concluded in my decision that the concerns were well-founded.
6. The issue of viability was not raised until the applicant's agent's letter dated 16 November 2021, some 5 weeks after the application had been validated and publicised. The letter did not identify the extent of the viability issues, but indicated that a viability report would be submitted. It was, in effect, a request to amend the application that had been submitted. For reasons that are unclear, the letter was not answered. The evidence presented at the Hearing indicated that it was not published on the Council's website, although the appellant's final comments on this costs application, received after the Hearing closed, suggest that it was. In any event, there is no evidence that the matter was pressed by the applicant, and no viability evidence was submitted to the Council before the application was refused on 7 January 2022.
7. The PPG makes it clear that, although all parties are expected to behave reasonably throughout the planning process, costs can only be awarded in relation to unnecessary or wasted expense at the appeal. Consequently, the way that this letter was handled in the processing of the planning application has little bearing on the outcome of this application for costs.
8. What is clear, is that the application that was originally publicised made no reference to any alteration to the level of affordable housing that had been secured through the original planning permission. Whilst it is the case that delivery of the affordable housing, following approval of the section 73 application, would have required a new section 106 agreement, there was no reason for interested parties to assume that this would involve a wholesale reconsideration of the obligations. Indeed, in the context of a section 73 application, which is not supposed to be a complete reconsideration of the application, local residents and other interested parties could not be expected to envisage that the application for relatively minor physical changes to some of the dwellings could also entail the loss of all affordable housing on the site. Even if interested parties had somehow become aware of the letter dated 16 November 2021, there was no suggestion therein that there would be no affordable housing.

² Paragraph: 031 Reference ID: 21a-031-20180615

9. The introduction at the appeal stage of a proposal to remove all affordable housing from the scheme, supported by a viability appraisal that had not previously been seen by the Council, marked a fundamental change to the application that had been publicised, and determined by the Council. I concluded in my decision that, having regard to the Wheatcroft principles, my consideration of the amended proposal would deprive those who should have been consulted on the substantial changes to the development, the opportunity of such consultation. It therefore follows that I do not find the Council to have acted unreasonably in arguing that the evidence on viability, and the resultant implications for on-site affordable housing, should not be considered as part of the appeal.
10. I have been referred to another Costs Decision³ relating to proposals in Esher, in support of the application. However, there are significant differences between that case and the one before me. The Esher cases were section 78 planning applications, so there was no issue about what could properly be considered under section 73. Furthermore, whilst it appears that it was originally intended that the Esher applications would include the provision of affordable housing, at the time the Council made its decisions, there were no planning obligations to secure it. Consequently, the proposal for no affordable housing at the appeal stage was not contrary to the position at application stage. By contrast, in the case before me, there is a Section 106 agreement that secures 45% affordable housing, associated with the original planning permission that is the subject of the section 73 application. The application under section 73 did not explicitly propose any variation to this, so the position at appeal of 0% affordable housing was a fundamental change to the proposal.
11. In the Esher cases, the lack of affordable housing provision was a reason for refusal. The Inspector considered it reasonable that the appellants should have a right to make their case. Consequently, he concluded that the additional viability evidence did not amount to fresh and substantial evidence. In the case before me, however, the reason for refusal referred only to the impact of the physical changes on the deliverability of 4 of the affordable houses that had already been secured through the original permission. The introduction of viability evidence relating to the entire development, and a proposal to omit all of the on-site affordable housing, was new and significant evidence. Therefore, I do not find the Esher costs decision to be comparable.
12. For the reasons given above, I find that unreasonable behaviour, resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Nick Davies

INSPECTOR

³ Appeal Refs: APP/K3605/W/21/3275789, 3275803, 3275808 and 3275811