



Costs Decision

Site visit made on 9 January 2023

by B Plenty BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 January 2023

Costs application in relation to Appeal Ref: APP/W3005/W/22/3307025 32C Carsic Lane, Sutton-in-Ashfield, Nottinghamshire NG17 2AX

- 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 Ms Chantelle Dodsley for a partial award of costs against Ashfield District Council.
 - The appeal was against the refusal of planning permission for a single-storey side extension to be operated as a cold food takeaway, including a home-based cold food catering business.
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Decision

1. An application for a partial award of costs is refused.

Reasons

2. The Planning Practice Guidance (the Guidance) 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. A Council would be vulnerable to costs if it prevents or delays development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations or makes vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.
3. The substantive costs application is made for a partial award of costs in relation to the need to produce a response to the Council's Statement of Case. The claim asserts that, within its Statement of Case, the Council:
 - Misrepresented facts in relation to the dwelling being used for an unauthorised catering use and in producing hot food for sale,
 - introduced new and unsubstantiated concerns, that had not formed part of its reason for refusal, where it identified that the proposed use should be located in the town centre, which includes several suitable vacant units,
 - raised an unsubstantiated claim that "takeaways never just serve the immediate vicinity",
 - raised 'spurious claims' that hot food may be prepared on site in the future, and
 - raised unsubstantiated evidence that is at odds with the comments of its Environmental Health Officer.

4. The Appellant asserts that in introducing these new matters this required the appointment of a planning consultant resulting in unnecessary further expense to the Appellant.

Previous catering use

5. The Council stated that the dwelling was previously used for a catering business including the serving of hot and cold food. The Appellant declared that this activity was incidental to the use of the property as a dwelling and no breach in planning had ever occurred. I do not have sufficient evidence to come to a clear view as to whether a material change of use took place on site in the past. However, the Council stated that the catering use, incidental or otherwise, had ceased following enforcement investigation.
6. Furthermore, the proposed development related to a new use within an unbuilt extension. As such, any previous activities that took place within the existing dwelling would have been materially different to that which was proposed, having no bearing on my consideration of the merits of the proposal.
7. I therefore have not found any substantive evidence that the Council misrepresented the planning history of the site.

Preferred town centre location

8. In my main decision I concluded that the proposal would small scale and would provide convenience goods to a local community. I found that it would not have an adverse effect on the town centre, despite the town having some vacant units, due to its size and nature. The Council did not refuse the proposal on the basis that it was outside of a local centre.
9. Although the National Planning Policy Framework seeks development that would ensure the vitality of town centres, this must be balanced against small retail uses that would serve a local community. Furthermore, once introducing this issue, the Council then failed to substantiate its concerns with reference to policy, leaving doubt as to whether it objected to the scheme on this basis or not.
10. This therefore amounts to unreasonable behaviour by introducing a late and unsubstantiated objection to the proposal.

Raised an unsubstantiated claim

11. The Appellant asserts that the proposed use would serve only a local catchment area, and that this is proven by the local support received identifying a local demand. However, this is unconvincing proof that the business would only serve the local community. I have accepted elsewhere that the retail use would not be required to be located within the town due to its local community focus.
12. However, it would not be possible for the Appellant to guarantee local custom only and any condition that might attempt to curtail the customer base of the use would be unreasonable. As such, whilst I do not concur with the Council that a wide customer base would be inevitable, it is nevertheless correct to say that neither the Council nor the Appellant could reasonably control how far customers would choose to travel to access the takeaway.
13. I therefore do not concur with the Appellant that this comment is spurious or represents unreasonable behaviour.

Potential future uses

14. It is clear that the proposal seeks planning permission to make and sell cold food, this matter could have been controlled by the imposition of a condition. Any comments by the Council, that the business could evolve to sell hot food are speculative. Whilst such evolution could happen this would require further consent from the Council which would be subject to assessment and consultation. I took the Council's concerns as stated, purely concerns, it was clear to me that future changes to the nature of the business were outside the scope of the current proposal. Consequently, this accrued no weight in my consideration of the current scheme.
15. Therefore, the Council's comment was not an inaccurate assertion and would not amount to unreasonable behaviour.

Unsubstantiated issue with respect to food safety

16. In its discussion of suggested conditions, the Council has stated that due to the proximity of the domestic kitchen there is a potential risk of cross contamination. I recognise that the Council's Environment Health officer raised no objection to the scheme from a food safety perspective and found it would comply with relevant regulations. However, these comments also identified that a food hygiene inspection would consider a range of issues including controls to prevent cross contamination. It was therefore reasonable for the Council to consider this matter in drafting its suggested conditions.
17. Therefore, this does not amount to unreasonable behaviour.

Conclusion

18. Consequently, of the five claims made by the Appellant I have only found that the Council acted unreasonably in consideration of the second claim. Nonetheless, the Council's comment that the proposal would detrimentally affect the town centre did not trigger a substantive response from the Appellant or supplementary evidence to address the point made. Therefore, I am unconvinced that this singular issue, and the response provided to it by the Appellant, created undue wasted expense.
19. The Council's Statement of Case, in respect of the other matters raised, demonstrated reasonable behaviour and the decision itself was not fundamentally flawed or without foundation. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has not been demonstrated.

Ben Plenty

INSPECTOR