
Costs Decision

Inquiry Held on 29/30 November and 1 December 2022

Site visit made on 1 December 2022

by John Wilde CEng MICE

an Inspector appointed by the Secretary of State

Decision date: 1st February 2023

Costs application in relation to Appeal Ref: APP/H1515/W/22/3301674 Land at Wates Way, Ongar Road, Brentwood, Essex

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Lidl Great Britain Ltd for a partial award of costs against Brentwood Borough Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for the development proposed is the demolition of all buildings and structures and the construction of a class A1 foodstore and class C3 dwellinghouses, together with access/egress from Ongar Road and Burland Road, car parking, landscaping, replacement substation, and associated engineering works.
-

Decision

1. The application for an award of costs is allowed in the terms set out below.

Reasons

2. I have considered this application for costs in the light of the Government's Planning Practice Guidance (PPG). This advises that an award of costs against a local planning authority may be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal. It makes clear that a local planning authority are required to behave reasonably in relation to both of these elements and provides examples of unreasonable behaviour¹.
3. In relation to substantive behaviour they include unreasonably refusing planning applications and promoting vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis. The appellant's costs application is in two parts and I will deal with each in turn.

Air quality

4. Firstly the appellant alleges that the Council has not provided any evidence in relation to the reason for refusal (2) relating to air quality. The reason states that *the increase in prolonged traffic delays would exacerbate an area of poor*

¹ Paragraph: 047 Reference ID: 16-047-20140306 and Paragraph: 049 Reference ID: 16-049-20140306

air quality to the detriment of the health of pedestrians and nearby residents. However, the Council give no empirical evidence to support their case whatsoever. They give no baseline measurements of air quality in the area of the appeal site nor any empirical evidence to show how the proposed development would make matters worse.

5. The Council's whole premise is that increased traffic must worsen the air quality situation which I accept is not unreasonable in itself, but no evidence is provided to demonstrate the link between traffic and air quality. The Council's evidence on this matter consists entirely of phrases such as *it is considered that the additional queuing and congestion associated with the appeal proposals would lead to a corresponding increase in emissions.*
6. Conversely the appellant has provided empirical evidence from a qualified witness which shows that the proposed scheme would not lead to any material change in air quality within the local Air Quality Management Areas (AQMA's).
7. Furthermore, on 25 October 2022 the Council sent an email to the appellant in which they stated that that they would not give evidence on this reason for refusal as they considered that the matter could *be adequately addressed by infrastructure contributions.* The Council went on to say that *we wish to confirm that the second reason for refusal will not be pursued by the Council as a reason for refusal and no further evidence will be submitted in respect of air quality on the basis the appellant agrees to the attached planning obligations summary.*
8. The Council continued *we wish to confirm, that, whilst technically still designated as an AQMA, having reviewed its own data and the additional information submitted by the appellant in relation to the appeal, the Council accepts that if it were to be proposed to de-designate AQMA7, it would likely meet the criteria to be de-designated.*
9. The only conclusion I can come to on this issue is that the Council have been unreasonable in pursuing this reason for refusal and in doing so has made the appellant incur unnecessary costs. However, as the email of the 25 October makes clear that the air quality reason for refusal would not be pursued after this date then that date should be the cut off date for any costs.

Viability

10. The second part of the costs application relates to the fourth reason for refusal concerning the viability of construction due to the presence of services. At the Inquiry two alternative conditions were proposed that would have the effect of preventing either any development or any development other than demolition until such time as it had been demonstrated that construction was viable.
11. Whilst I accept that there is disagreement between the parties in relation to which of these conditions is acceptable, I cannot agree that a reason for refusal was necessary on this issue. There is no requirement in planning to demonstrate deliverability of a scheme and any such risk is the developers'. In this case the appellant has incurred costs in addressing this issue at the Inquiry which it should not have done.
12. I therefore conclude that the Council have acted unreasonably in this matter, and that that behaviour has made the appellant incur unnecessary expense in pursuing the matter at the Inquiry.

Costs Order

13. 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 Brentwood Borough Council shall pay to Lidl Great Britain Ltd the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to the Authority's reason for refusal relating to air quality up to 25 October 2022 and those costs incurred relating to the Authority's reason for refusal relating to viability; such costs to be assessed in the Senior Courts Costs Office if not agreed.
14. The applicant is now invited to submit to Brentwood Borough 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.

John Wilde

Inspector