
Costs Decision

Hearing Held on 15 November 2022

Site visit made on 15 November 2022

by Graham Wraight BA(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 February 2023

Costs application in relation to Appeal Ref: APP/K2420/W/22/3300552 Land North East Of Ashby Road, Markfield Easting: 448791, Northing: 310724

- 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 Penland Estates Limited, RV Millington Limited, Sarah Higgins and Gavin Higgins for a full award of costs against Hinckley and Bosworth Borough Council.
 - The hearing was in connection with an appeal against the refusal of outline planning application for residential development of up to 93 dwellings, public open space, landscaping and SuDS. All matters reserved except for access.
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Decision

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

The submissions for the applicant

2. The applicant's initial costs application was made in writing and their final comments were made verbally at the hearing, a transcript of which is appended to this decision (Appendix A). It is made on substantive grounds with respect to the approach that Hinckley and Bosworth Borough Council (HBBC) took in determining the planning application. In summary, the thrust of the costs application is made on the basis that only Charnwood Borough Council (CBC) has the authority to grant or refuse planning permission on land in its area. The correct forum to consider the impact of development within CBC is therefore through the determination of that application.
3. Legal advice obtained by HBBC has not been disclosed despite a number of requests. HBBC's own legal advice set out that the approach that CBC took was legally correct. It cannot be the case that CBC's approach was correct, but that HBBC's approach was incorrect, given that both approaches were identical. However, notwithstanding this HBBC adopted a different approach. This was perverse and has resulted in an appeal that had no reasonable chance of being successfully defended. When considered against the correct legal approach, HBBC Planning Officers determined that planning permission should be granted.
4. The Council changed its position on paragraph 14 of the National Planning Policy Framework (the Framework) being engaged. This can only be related to HBBC taking the stance that the application involves the provision of housing, that housing at this location is contrary to the Markfield Neighbourhood Plan

2021 (NP) and that the conflict with the NP means that the adverse impacts of granting planning permission do significantly and demonstrably outweigh the benefits. However, no housing would be provided in the NP area, and it would be solely within the CBC area. It is therefore impossible to see how the development conflicts with the NP and therefore how paragraph 14 is engaged.

The response by Hinckley and Bosworth Borough Council

5. The Council set out their response in writing at the hearing. In summary, HBBC did follow CBC's approach. HBBC's final decision whether to grant or refuse development recognised only the part of the development that fell within its area was the area it had control over. That does not mean the impact of the rest of the site is immaterial. CBC did not say they could not, as a matter of law, consider the impacts of the development that arose from the development of HBBC's area as something material to their decision.
6. The description of the development before HBBC includes the provision of housing for the purposes of paragraph 14 of the Framework. This triggers paragraph 14 and there is nothing which allows the trigger to be disapplied once engaged. HBBC then concluded that there was a breach of Policy M1 of the NP as a result of the conflict with Policy DM4 of the Site Allocations and Development Management Development Plan Policies 2016 (SADMDP). Ultimately, HBBC concluded that the adverse impact of development contrary to the NP did significantly and demonstrably outweigh the benefits.

Reasons

7. The 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.
8. There is an absence of caselaw or comprehensive guidance with regard to the cross-boundary scenario that arises in this appeal. In that context, both main parties have put well-argued, but contrasting, cases before me in terms of what can and what should be considered in reaching a decision on the HBBC planning application which is now subject to the appeal. In reaching my own conclusion on the appeal, I have found in favour of the appellant's approach to determining the application. But, given the uncertainty on the approach to take, I do not consider it was unreasonable for the Council to adopt the counter view it did.
9. It is clear from the planning balance section in the 14 December 2021 and the 15 February 2022 HBBC Committee reports, both of which recommended approval, that a conflict with Policy DM4 of the SADMDP (and resultantly M1 of the NP) from the proposed works in HBBC had been identified at that point. The harm arising was classified as moderate. Therefore, even in recommending approval, HBBC Planning Officers considered there to be a policy conflict and it is not correct to say that the Council's position at that point was that there was no harm arising from the conflict with Policies DM4 and M1. The conflict identified was weighed in the overall planning balance.
10. In refusing planning permission, Council Members took a different view on paragraph 14 of the Framework than had been set out by their Officers. The applicant states that this can only be because they were under the

misapprehension that the whole of the development could be considered and therefore the application included the provision of housing. However, it was discussed and agreed between the main parties at the hearing that, based on the description of the development and on the principle that the application is made in outline form, the 7% in the HBBC area should be considered as being an application for housing. Having engaged paragraph 14 in that context, HBBC applied different weighting to the relevant considerations than the applicant, but that relates to planning judgement and is not unreasonable behaviour.

11. In defending its position at appeal, HBBC has set out why it considers there to be conflicts with the relevant policies of the development plan and why in its view paragraph 14 of the Framework means that the presumption in favour of sustainable development does not apply. These matters then feed into the planning balance and a judgement as to whether or not planning permission should be granted. That is a matter for the decision maker and whilst I have found against HBBC when I have made my own judgement, again this does not mean that they acted unreasonably.
12. The submissions made by HBBC during the course of the appeal are clear in their current view that they have no jurisdiction over the land which falls within the CBC area, although as the applicant alludes to this is less clear when earlier documents are considered. There is also the matter of the HBBC legal advice finding the CBC approach to be legally correct and the question mark about if and why a different approach was then taken by HBBC. But, in any event, these matters do not alter my finding that ultimately the decision of HBBC to refuse planning permission was based on an exercise of their planning judgement.
13. Nonetheless, I have considered whether a partial costs award is justified in light of those specific points raised by the applicant. However, even when only the 7% in HBBC is considered there is still a conflict with the policies of the development plan which needs to be balanced against the benefits of the proposal and a judgement to be made as to whether the presumption in favour of sustainable development applies. In that context and based on all I have read and heard, I do not consider that the appeal could have been avoided in any circumstance. Accordingly, the applicant has not been put to any unnecessary or wasted expense in having to pursue that course of action. A partial costs award is therefore not justified.

Conclusion

14. 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 and the application for costs fails.

Graham Wraight

INSPECTOR

Appendix A – Appellant’s final comments

Paragraph 1 – this is where the error comes in, in terms of the impact of the development of the 93%, whether on CBC or HBBC, had to be considered by CBC – it was a material planning consideration and they considered it. This idea that CBC did not consider what they should. Cannot do it again as part of this appeal, have to consider what is the impact on HBBC and CBC. Told in the penultimate paragraph that CBC only determined part in CBC. Must be immaterial as a point of law. What is the point of considering the 93% when this appeal cannot permit or prevent the 93%?

Don’t understand paragraph 2. It is for HBBC and the Inspector to ask the question what are the impacts on CBC. No one is saying there is an impact on CBC.

Paragraph 3 – Told didn’t proceed under the misapprehension, if that is the case then again it is difficult to understand why HBBC is concerning itself with the impact. Not being asked to authorise and cannot reverse the 93%.

Paragraph 5 – familiar discussion, whether involves housing. Yes it does then told once involves housing paragraph 14 of the NPPF is engaged. Once that taken into account conceded breach of Policy M1. Not an accurate summary of what happened. Note no difference in terms of the Policy M1 in the Council’s case. Breach of DM4 so breach of M1.

Conclusion that DM4 protects countryside but no harm so planning permission should be granted. Whole debate regarding paragraph 14 does not go anywhere. If 14 is engaged would it significantly and demonstrably outweigh – answer is no – what is the conflict with the neighbourhood plan? Only M1. Then ask what is the conflict with M1 – the conflict is with DM4 – and the Council said no harm. Doesn’t move the matter forward.

Paragraph 14 is a figment to disguise no undermining of the neighbourhood plan. Council’s own case, early response to Committee, hasn’t said why. Was it sensible to refuse? No, and it was perverse. No reasonable LPA or Inspector could refuse based on the impact on the countryside.