
Costs Decision

Inquiry Held on 27 September 2022

Site visit made on 29 September 2022

by J P Longmuir BA(Hons) DipUD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 March 2023

Costs application in relation to Appeal Ref: APP/W1905/W/22/3300254 90 Fairmead, Cuffley Hill, Goffs Oak EN7 5EX

- 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 Countryside Properties (UK) Limited and Landowners for a full award of costs against Broxbourne Borough Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for the erection of 58 dwellings with associated infrastructure.
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Decision

1. Partial costs are awarded as set out in the terms below.

The submissions for Countryside Properties (UK) Limited and Landowners

2. The applicant suggests there were no sensible grounds to refuse the proposal. The site is allocated for development in the current Local Plan, providing much needed market and affordable housing. Both policies in the reason for refusal were satisfied. There was a failure to engage with the case officer's detailed analysis and conclusions. At the appeal stage there was a failure to produce evidence to substantiate the grounds.
3. The only advice on biodiversity was from the Wildlife Trust, who had no objection and the Council's witness accepted in cross examination that the Trust were better placed to reach a conclusion. Similarly, no evidence was produced on the inputs or outputs of the metric.
4. The allocation in Policy GO5 does not require the retention of a semi-rural character. A change would be inevitable with the fulfilment of an allocation. It was accepted that the number of dwellings was indicative and neither a minimum or maximum but the effect was not substantiated. The proposal is an efficient use of land. The Council did not substantiate its concern over the density and the witness was not qualified on such matters. The Council's position exceeded the requirements of Policy GO5.
5. The Council was late in responding to the Draft Statement of Common Ground, leading to unnecessary and wasted expense.
6. The Council was inconsistent in its approach to housing land supply, having indicated that it would not contend the matter and then did, which led to late evidence.

7. Evidence on the planning obligations was late which did not help resolve matters. There was a lack of co-operation to discuss the requirements.

The response by Broxbourne Borough Council

8. The Council indicated early on that it would not be providing an ecological witness. The Trust merely did not object to the application rather than actually supporting it. The applicant relied upon the Malmesbury appeal case as a precedent to vindicate the biodiversity test which is not necessary to follow here. The Trust would have favoured a 10% net gain.
9. The Council stated at the Case Management Conference (CMC) that it would be submitting evidence on the housing land supply. There was disagreement over the results but not a lack of co-operation.
10. It is disputed that there was a lack of co-operation on the Statement of Common Ground. The Council participated as evident by the ex-change of e-mails.
11. It was not surprising the Council objected to the scheme which was more than double the houses foreseen in the Local Plan. The effect on the character and appearance was a matter of judgment. The Council's case was consistent with the reason for refusal. The applicant mis-interpreted the wording of Policy DSC1, in particular the reference to 'must'.
12. This Section 106 agreement was unusually complicated and made more complex by the involvement of the County Council.

Reasons

13. 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.
14. The Council did advise on its approach to housing land supply at the Case Management Conference on the 15 August, and both sides were able to accordingly reflect this in their written evidence. The disagreement was also clear at the Inquiry and both parties substantiated their positions. Consequently, I doubt that the land supply would have been particularly clarified by fastidious communication.
15. The Statement of Common Ground was late but in this particular case it was not important in clarifying or reducing the issues under consideration. It did not significantly save inquiry time and consequently did not lead to wasted time or expense.
16. Consequently, in terms of the general proceedings above, I find that the Council did not act unreasonably. I consider the substantive points below.
17. The Section 106 agreement was particularly complex and late in being finalised. However, there was a sound policy basis, supporting the CIL Regulations, for the required obligations. As I found there was no justification to depart from this policy basis, I do not find fault with the Council.

18. The single reason for refusal had two limbs: the overdevelopment of the site to the detriment of its semi-rural character and whether a net gain to biodiversity would result.
19. The Council's evidence on the overdevelopment of the site to the detriment of its semi-rural character, set out the site's character and the relationship of the site to the settlement and the surrounding countryside. The Council also explained the effect of the proposal. Such an assessment indeed is a matter of judgment rather than a precise science.
20. Reference was made to Policy DSC1 in the Council's evidence and the component criteria were used to judge the proposal, rather than relying on the numbers foreseen in GO5.
21. Whilst I did not agree with the Council in the main decision, they were entitled to come to their view and did articulate their concerns on the overdevelopment of the site to the detriment of its semi-rural character.
22. In respect of the biodiversity limb of the reason for refusal, the Council did not provide a witness qualified in ecology or experienced in using the metric. Their evidence did not question the input, outputs or workings of the metric¹. Their position solely relied upon the mathematical margins of the result which they suggested could easily be eroded². However, their evidence did not show how and why the enhancement measures could fail and why the net gain would not be achievable.
23. Neither Policy NEB1 or the Framework specify the extent of a biodiversity gain, only that there is a gain. There was no justifiable basis currently to require any more.
24. The applicant needed to address this element as it was part of a reason for refusal and could not simply be ignored. The workings of the metric needed to be understood to make an informed decision. The biodiversity assessment is derived from a specialist and technical process on which the Council failed to provide substantive evidence.
25. Paragraph 049 of the Ppg states that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing a planning application and failure to produce evidence to substantiate each reason for refusal on appeal.
26. I therefore find that unreasonable behaviour resulting in unnecessary and wasted expense, as described in the Planning practice guidance, has in part been demonstrated and that a partial award of costs is justified in terms of the matters related to biodiversity net gain.

Costs Order

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 Broxbourne Borough Council shall pay to Countryside Properties (UK) Limited and Landowners, the costs of the appeal proceedings described in the heading of this decision limited

¹ Jenifer Thompson Proof of Evidence paragraph 3.2

² Jenifer Thompson Proof of Evidence paragraph 5.23

to those costs incurred in respect of the biodiversity net gain; such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to Broxbourne 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 Longmuir

INSPECTOR