



Costs Decisions

In-Person Hearing Held on 22 November 2022

Site visit made on 22 November 2022

Virtual Event Held on 9 December 2022

by Nicola Davies BA DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 April 2023

Costs A application in relation to Appeal Ref: APP/F0114/W/22/3300847 Frome House, Lower Bristol Road, Bath, BA2 1EY

- 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 Crossman Acquisitions Ltd for a full award of costs against Bath & North East Somerset Council.
- The hearing was in connection with an appeal against the refusal of planning permission for enlargement of Frome House and associated change of use from office (use class E(g)) (excluding existing ground floor tyre repair centre) to 66 student bedspaces and associated works.

Costs B application in relation to Appeal Ref: APP/F0114/W/22/3304204 Frome House, Lower Bristol Road, Bath, BA2 1EY

- 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 Crossman Acquisitions Ltd for a full award of costs against Bath and North East Somerset Council.
 - The hearing was in connection was an appeal against the refusal of planning permission for change of use of the existing building (excluding ground floor tyre repair centre) to 25 student bedspaces and associated works.
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Decision

1. The applications for costs are granted in the terms set out below.

Preliminary Matter

2. In regard to Costs application A, having read the applicant's submissions, the costs claim relates to three of six reasons for refusal. Whilst it was suggested at the in-person hearing that the application related to all six reasons for refusal, as no grounds have been alleged against three of the refusal reasons, I do not consider that costs have been applied for. The Council points also to this being the case.
3. At the subsequent Costs virtual event the applicant advised again that a full application on both Costs applications were being sought. It was advised that it was not intended to repeat cases. However, no submissions have been provided by the applicant in respect of character and appearance of the area, listed buildings and the impact upon the living conditions of the existing occupiers at 26 Argyle Terrace. Therefore, I do not consider that clear

applications for costs have been made against those three reasons for refusal. I have dealt with the applications for costs below that are clearly set out within the applicant's submission in regard of Costs application A that relate to office space, housing mix and need and the World Heritage Site (WHS).

4. Subsequent to the in-person hearing, site visit and virtual event taking place, the Council has adopted the Bath & North East Somerset Local Plan Partial Update (19 January 2023) (the Local Plan Partial Update). The costs applications all relate to unreasonable behaviour of the Council prior to the adoption of the Local Plan Partial Update and to apply the Local Plan Partial Update retrospectively to these costs applications would be unreasonable. I, therefore, have considered these costs applications as originally made.

The submissions for Crossman Acquisitions Ltd

Office space (Costs A and B)

5. The supporting text to Policy ED1B of the Bath and North East Somerset Placemaking Plan 2017 (the Placemaking Plan) confirms that where a proposal is for student accommodation, Policy B5 of the Bath and North East Somerset Core Strategy July 2014 (the Core Strategy) will be used in decision-taking. The planning officer, within the Council's committee report, confirmed this interpretation of Policies ED1B and B5, however at planning committee members disagreed with this policy position. Furthermore, members did not give any consideration to the applicant's legal advice in respect of this matter.
6. Members debated whether there was any marketing evidence for the building for office purposes, despite no development plan policy basis or requirement for such an exercise to be undertaken. Irrespective of this the applicant has undertaken a marketing exercise but this fact was not acknowledged by councillors.
7. From Members discussion the concern related to the loss of 'commercial job generation space'. It is put forward that this is un evidenced and not substantiated and is not founded upon any development plan policy. Furthermore, there is suggestion that student accommodation should be resisted when there is not a shortfall and in this regard seeks to oppose the permissive nature of policy ED1B toward student accommodation. This approach disregards the primacy of the development plan and introduces a new requirement, that is, a case for demonstrating a need for student accommodation. The debate was devoid of any discussion on other material considerations that would justify a departure from Policy ED1B.
8. The Council have had to argue a non-compliance case at appeal and noted the implications of the Covid-19 pandemic on office demand. In members of the planning committee not finding conflict with Policy ED1B, this has resulted in flawed arguments having to be advanced by the Council in an attempt to defend its position. Furthermore, this has resulted in the Council having to argue non-compliance with Policies B1 and B5 of the Core Strategy, despite these not being cited in the refusal reason and despite the proposal conforming with Policy B5.
9. It is considered that unreasonable behaviour has been demonstrated on the basis that the professional opinion of the Council's economic officer was ignored, there was a failure to substantiate the case for loss of the existing

employment use and failure to have proper regard to the development plan policy or other material considerations and vague, generalised and inaccurate assertions about the proposal's impact on the Council's strategic objectives were made.

Housing mix and need (Costs A and B)

10. Policy CP10 of the Core Strategy seeks to provide an appropriate mix of housing type and tenure. The planning officer's report to committee set out that Policy CP10 is not utilised by the Council in the determination of any applications for Purpose Built Student Accommodation (PBSA). A summary report was produced to aid the chair of the planning committee which confirmed that student accommodation and students are not referenced within this policy and is not classified as housing development for the purposes of this policy. This indicates that Policy CP10 is not engaged in relation to PBSA proposals and has never in fact been used in the determination of such proposals.
11. When considering the proposals at planning committee the issue of housing mix and local student population was debated by some councillors with concern expressed to the imbalance between student and non-student numbers in the area. There was also debate relating to the number of existing PBSA in the area, as well as dominance of Houses in Multiple Occupation (HMO) in the area despite the proposal being for a PBSA, which is for a different land use that demonstrated a flawed opinion of the proposed development.
12. The planning committee was critical of the perceived number of students in the locality, which is not a planning consideration. The debate itself was limited in its extent and did not assess what better alternative housing might be more suitable or how the proposal might prevent delivery of alternative types of housing elsewhere. Although imbalance in tenure was clearly a concern, no evidence was presented to substantiate the claims and was misdirected to concerns over loss of council tax income.
13. The Council has had to argue a non-compliance case at appeal. In presenting an argument that seeks to control development based on a social group who would reside in the development and an over provision of PBSA locally it has sought to capture student accommodation for consideration under Policy CP10. On this basis, the Council's evidence is useless as it cannot be an informed assessment.
14. It is considered that unreasonable behaviour has been demonstrated on the basis that the professional opinion of the Council's economic officer was ignored. There was a failure to substantiate the case for loss of the existing employment use and a failure to have proper regard to the development plan policy or other material considerations were vague, generalised and inaccurate including assertions about the proposal's impact on the Council's strategic objectives.

Living conditions (Costs B)

15. The proposal was supported by a preliminary noise assessment. The planning officer concluded that there would be no harm to the amenity of existing and future residents of the development, subject to the imposition of conditions

- requiring compliance with the submitted student management plan and noise mitigation measures.
16. The planning committee has again departed from the recommendations of its professional officers, including that of the Council's environmental health officer. No specific issues were raised by councillors in respect of existing residential amenity. However, concern was expressed with regard to the proximity of Bathwick Tyres and noise, along with road traffic noise, and latterly to the Golden Fleece public house despite this premises having no recent history of disturbance. There was no debate relating to the mitigation. Furthermore, no concerns were raised over the larger 66 student accommodation scheme that would host more students than this latter 25 student bedspace scheme.
 17. The Council alleges that the over-intensification of the site by way of residential occupancy would lead to harm to occupiers by increased noise notably by comings and goings and internal circulation in the building and social areas. A student management plan has been provided that sets out how noise would be managed and dealt with. This is similar to other PBSA schemes that have been granted planning permission by the Council and is a recognised standard approach. Other mechanisms are at the disposal of the Council to control noise disturbance, most notably through environmental health regulations. There would, therefore, be control of noise and to say there would be no control over noise would be baseless.
 18. It is considered that unreasonable behaviour has been demonstrated on the basis that the Council has failed to provide evidence to substantiate its case for harm to existing and future residents and provided vague, generalised and inaccurate assertions about the proposal's impact in respect of noise. It refused planning permission when planning conditions would have enabled the development to go ahead and failed to determine the planning application in a consistent way with the earlier proposal for 66 student bedspaces.

World Heritage Site (Costs A)

19. To inform the planning application a historic environmental assessment was undertaken. A Landscape and Visual Impact Assessment (LVIA) also considered views towards the green hillside of the city and concluded that the proposal would lead to very minor, if not negligible, harm to one of the outstanding values and the WHS's significance.
20. The Council's heritage officer did not make observation or conclude that the proposal would cause harm to the WHS and the planning officer did not grapple with the assessment of impact upon the WHS within the committee report and come to a different view.
21. However, Members of the Council's planning committee considered that views of the green hillside would be obscured, when stood in a specific location, with this causing harm to the WHS. This conclusion needs to be substantiated to determine the impact of harm to the significance of the WHS. The Council's statement of case does not substantiate this. Rather the officer has unreasonably assumed that change equates to a negative impact and that less than substantial harm would occur that has not been substantiated. This constitutes unreasonable behaviour. Furthermore, it is claimed that the Planning committee members, at no time during the debate, assessed the

degree of harm or whether the harm would be outweighed by the public benefits, despite citing harm to the WHS as a reason for refusal.

22. It is noted that the Council's greatest concern relates to viewpoint E in the photomontage and the development impact upon the skyline. The Council also raised concern in respect of viewpoints D and 2, however at the hearing it was clarified that the Council's concern primarily related to viewpoint E.
23. The Council introduced new material cross referenced 'panoramic setting view PS5' which is contained in the Bath Building Heights Strategy. However, viewpoint PS5 is not a verified image, no information has been provided on its location, and as such should not be used in a technical capacity to inform assessment. Regardless of viewpoint PS5 the proposed development would be nestled amidst existing development in the valley floor and would have no impact on the green hillside.
24. It is considered that unreasonable behaviour has been demonstrated on the basis that the professional opinion of the Council's heritage officer was ignored, there was a failure to substantiate the case for harm to the WHS and vague, generalised and inaccurate assertions about the proposal's impact on the WHS were made.

Other comments

25. The applications for costs are made in relation to the time and costs associated with rebutting the appeal. This has involved the engagement of technical teams, numerous meetings to rebut evidence, preparing evidence, and attending the hearing. The Council did not engage with the appellant post decision through the production of statements of common ground, and it is suggested that meaningful dialogue could have avoided the appeals in respect of many of the issues.

The response by Bath and North East Somerset Council

Office space (Costs A and B)

26. The applicant raises concerns that the Council's planning committee refused planning permission contrary to the advice of the Council officers. It should be noted that the Economic Development team did not respond to a consultation request on the planning applications, thereby there was an absence of support or objection by way of response. Therefore, the allegations the members of the committee ignored professional recommendations is inaccurate. There is no evidence that would demonstrate that committee members ignored or failed to have regard to advice.
27. Committee members reviewed the recommendations in advance of the meetings, listened to public representations and other material considerations, discussed relevant issues and reached their own conclusions, as is their entitlement under the democratic process. As decision makers they are entitled to their own interpretation and application of planning policy.
28. The Council have clarified this decision in its statement of case. The reason relates to the loss of office space and the adverse effect this would have on the realisation of other aspects of the vision and spatial strategy for the city in relation to delivering housing and economic development. This took into consideration the perceived limited need for proposed student accommodation

as well as greater demand for affordable housing. This also took into consideration development plan policy that relates to loss of offices. This is a valid material consideration when reading the development plan as a whole.

29. It is considered that the Council's statements of case have provided evidence to support this reason for refusal and has been obtained from the evidence relating to the adopted development plan. It is acknowledged that policy relating to strategic issues are typically more generalised, nonetheless the evidence produced has been applied and relates to Frome House. The Council has substantiated its case in a manner appropriate to the development.

Housing mix and need (Costs A and B)

30. The applicant alleges that the Council has inappropriately applied policy to the development when refusing planning permission based on housing mix. The Council reiterates those points set out in paragraph 29 above.
31. The applicant alleges that the Council have not previously used Policy CP10 in respect of student accommodation, but this is not accurate. The Council applied Policy CP10 when refusing planning permission at the Plumb Centre site which a subsequent Planning Inspector considered for the development of student accommodation in the context of that policy. Whilst the Inspector found that the proposal accorded with Policy CP10, there was no finding that the policy did not apply. The Council considers that this demonstrates that it has not acted unreasonably in considering compliance of this development plan policy.
32. It is again considered that the Council's statements of case provide further evidence of housing mix in the area that has been reliably obtained by means of planning and Council Tax records and Census data. This corroborates evidence provided by local residents which must be given weight due to their knowledge of the area and is a matter of judgement for the decisionmaker.
33. The Council's evidence presented in its statements of case is specific to the development and relevant to the case. The Council has had regard to development plan policies and material considerations and has subsequently evidenced its position at appeal.

Living conditions (Costs B)

34. It is alleged that the Council's planning committee did not have regard for professional recommendations of its officers or professional reports that supported the planning application. The Council point out that this is a subjective judgement.
35. The Council's statement of case addresses the noise assessment that supported the application and does not consider that the applicant's assertions that no regard has been given to the noise assessment is not accurate. Although committee members have reached a different conclusion to their officers, technical advisers and the appellant, this does not demonstrate unreasonable behaviour. Although the applicant says that conditions could have been imposed to overcome member concerns, the members had concerns about the enforceability of such conditions. This is not considered to be unreasonable.
36. Whilst the applicant suggested that a student management plan is a standard approach used by the Council, the Council advises that such conditions have

been used in the past but there is not a standard condition and no standardised approach has been adopted. Rather conditions are considered on a case-by-case basis.

37. With regard to the Council being inconsistent in respect of amenity impacts both planning applications were refused for reasons based upon harmful amenity impacts, although those issues differed in either case. The planning application for the 66 student bedspaces had been refused, therefore the Council was not acting contrary to something that it had previously accepted. Each application should be assessed on its own merits. The Council does not consider that this amounts to unreasonable behaviour or the disagreement between parties would constitute unreasonable behaviour.

World Heritage Site (Costs A)

38. The applicant's case raises concerns regarding the different conclusions reached by the Council's conservation officer, planning officer and its committee and to those of the applicant and their advisors. The parties have made independent assessments based on the evidence before them and have produced evidence to substantiate the assessment made.
39. The Council's planning officer used the applicant's LVIA to inform judgement in relation to the WHS. This provides evidence relating to landscape impact irrespective as to whether a historic environments assessment was used instead. The LVIA has clear relevance to the assessment of impact of the WHS and its Outstanding Universal Values being the green setting of the city. It is explained that the LVIA was reviewed in conjunction with other application documents, such as, the historic environments assessment.
40. The ICOMOS Heritage Impact Assessment guidelines are not adopted national or local planning policy and the update to this has only recently been published in July 2022 after the determination of the planning application. The Council's approach to assessment has been consistent with other planning applications in the WHS which are all considered to have taken account of relevant legislation, policies and are considered to be procedurally robust and legally sound.
41. Development obscuring hillsides is clearly a matter that is capable of resulting in harm to the WHS. It is highlighted that the applicant's case refers to an appeal where the green hillside and sylvan skylines at key viewpoints formed part of the considerations of that appeal. Therefore, it is considered that loss of views of green hillsides is a relevant material consideration and notes the Council holds adopted guidance in relation to impact to the WHS.
42. The impact and harm perceived is a matter for the decisionmaker based on their interpretation of policy and the facts of each individual case. A subjective judgement and inconsistency between those parties does not amount to unreasonable behaviour. The appellant presents several concerns regarding the Council's assessment; however, these are largely subjective points, dependent upon interpretation, application of weight and professional judgement.

Other comments

43. The Council does not accept the allegation that this has resulted in substantive unreasonableness that has directly caused the applicant wasted expense in the appeal process. It does not consider that the applicant's legal input into the

planning application process was necessary. Furthermore, even if discussions took place post decision, as the Council's opinion in respect of the proposal had not materially changed, discussions would not likely have resulted in any of the refusal reasons being withdrawn. Although post deadline for submission, a statement of common ground was provided. Both parties were engaged in the preparation and completion of that document.

Reasons

44. 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.

Office space (Costs A and B)

45. There is contention between parties that Policy ED1B of the 2017 Placemaking Plan has been misapplied. The pre-amble to this policy states that where a proposal is for student accommodation, Policy B5 of the Core Strategy will be used in decision-taking. This text has been agreed between parties as common ground. This supporting text makes it clear that Policy ED1B of the 2017 is not engaged in the determination of student accommodation applications. Subsequently, the Council has adopted the Bath & North East Somerset Local Plan Partial Update (19 January 2023) and the text to Policy ED1B has been updated to include PBSA. Notwithstanding this, I agree the applicant's contention that Policy ED1B has been misapplied in this case at the time the planning applications were considered and determined by the Council. Whilst consideration was given to the perceived limited need for proposed student accommodation as well as greater demand for affordable housing, this does not disengage the correct application of development plan policies.

46. I consider that the Council have behaved unreasonably in respect of this matter.

Housing mix and need (Costs A and B)

47. There is also contention between parties that Policy CP10 of the Core Strategy has been misapplied. It is common ground between parties that the appeal proposals comprise PBSA which is a sui generis use and not a HMO C4 Use Class. The language of the Policy CP10 is directed at housing in C3 (dwellinghouses) and the pre-amble involves itself with C3 housing. PBSA is not a C3 use class. For this reason, and in the absence of evidence setting out the quantum, size and type of student accommodation required, it is not possible to structure an application for PBSA against Policy CP10. Irrespective of how a different Inspector's consideration of Policy CP10 has been applied, I conclude that Policy CP10 has been misapplied in this case.

48. I consider that the Council have behaved unreasonably in respect of this matter.

Living conditions (Costs B)

49. Policy D6 of the Core Strategy requires development to provide an appropriate level of amenity. Whilst other legislation may deal with some aspects of amenity, Policy D6 allows for such consideration as part of the planning process, as does the National Planning Policy Framework.

50. Council members raised concern relating to noise generated by the commercial car repair garage despite the applicant providing an assessment of this matter. The assessment provided by the appellant had been subject to the Council's technical advice provided by the Environmental Health Officer, who recommended that an acoustic assessment be undertaken prior to the occupation of the building by students to ensure a satisfactory living environment would be achieved for future occupiers.
51. With regard to a student management plan condition, although such a condition has been imposed upon other student accommodation permissions, the Council advises that there is no standardised approach, and this is considered on a case-by-case basis. However, if there were concerns about enforceability of student management plans the fact that such plans have been utilised at other student accommodation does not reinforce or substantiate this concern. Furthermore, I have not been directed to any examples where enforceability of student management plans has been an issue.
52. There is no clear indication that would demonstrate that the development could not be made acceptable through the use of planning conditions or that such conditions could not be enforced. Whilst members may have concerns over noise, I do not consider that the planning committee gave due consideration to the conditions put forward by its technical adviser and the potential for those conditions to make an unacceptable development otherwise acceptable in planning terms.
53. On the evidence before I do not consider this to be simply a disagreement between parties. Furthermore, the earlier application for a larger student accommodation development of 66 bedspaces did not host a similar reason for refusal despite that proposal potentially causing harm to a greater number of future residents. I consider this demonstrates an inconsistent approach to decision-making by the Council.
54. I consider that the Council have behaved unreasonably in respect of this matter.

World Heritage Site (Costs A)

55. The proposal needs to be considered in terms of its impact upon the WHS. The applicant provided a LVIA to assist with this. The Council has also utilised its own strategies and guidance, including the Bath Building Heights Strategy, to assist with consideration of matters pertaining to the WHS. The Bath Building Heights Strategy has been in existence for some time and, as such, 'panoramic setting view PS5' which is contained in the Bath Building Heights Strategy would not necessarily constitute new material. It is open for the Council to reference elements of this strategy as part of its case.
56. Members of the Council's planning committee considered that views of the green hillside would be obscured, when stood in a specific location, with this causing harm to the WHS. This is a subjective matter, and it is open for Council members to come to a different conclusion to their officers and technical advisors on this matter. The Council's statement of case evaluates how the proposal would impact upon the viewpoint E in the photomontage and the development impact upon the skyline. This was the viewpoint identified to be of particular contention.

57. I am satisfied that the impact on the surrounding green hills and skyline has been considered on its own merits in light of policy considerations and the site falling within the WHS designation and those considerations relevant to the WHS. I also consider the Council has substantiated its reason for refusal in this respect. The fact that Council members came to a negative decision is a matter for their discretion. The fact that I have arrived at a contrary view does not, of itself, show that the Council has behaved unreasonably.

Conclusion

58. I conclude that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has been demonstrated, and a partial award of costs should be granted in so far as they relate to office space (Costs A and B), housing mix and tenure (Costs A and B) and living conditions (Costs B).

Costs Order

59. In exercise of 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 this behalf, IT IS HEREBY ORDERED that Bath & North East Somerset Council shall pay to Crossman Acquisitions Ltd, the cost of the appeal proceedings described in the heading of this decision limited to those costs incurred; such costs to be assessed in the Senior Courts Costs Office if not agreed.

60. The applicant is now invited to submit to Bath & North East Somerset Council, to whom a copy of these decisions has been sent, details of those costs with a view to reaching agreement as to the amount.

Nicola Davies

INSPECTOR