



Costs Decision

Hearing held on 6 September 2023

Site visits made on 5 & 6 September 2023

by Mr JP Sargent BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19th October 2023

Costs application in relation to Appeal Ref: APP/M2840/W/23/3320660 4 Higham Road, Rushden, NN10 6DZ

- The application is made under sections 78, 322 and Schedule 6 of the Town and Country Planning Act 1990, and section 250(5) of the Local Government Act 1972.
 - The application is made by Mr Michael Phillips for a full award of costs against North Northamptonshire Council.
 - The appeal was against the refusal of planning permission for the creation of 33 flats and 3 townhouses and retention of existing hot food takeaway by the demolition of rear warehouse, the extension to and conversion of the frontage building, and the erection of rear block.
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Decision

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

Case for the applicant

2. This submission follows a refusal of a similar scheme in 2021 (the 2021 scheme) and its subsequent dismissal on appeal later that year (the previous decision). Mindful that the previous decision is a material consideration, the Council has acted inconsistently in relation to drainage. This is because, although the current proposal is on the same footprint as the 2021 scheme, although the Flood Risk Assessment was the same for the 2 cases, and although there had been no material change in circumstance in the meantime, the Council now raised concerns about drainage when they had not been raised before. Inconsistency is also apparent as the larger 2021 scheme was recommended for approval by Officers whilst they then refused the proposal subject of this appeal, which has a lesser impact.
3. Furthermore, over the course of the application the Council altered its view from considering at the outset that the current proposal was '*fundamentally changed*' when compared to the 2021 scheme, to saying, at the point of determination, that any difference was '*notional*' and the '*bare minimum*'.
4. Finally, there was a failure to weigh the benefits to the non-designated heritage asset adequately, which again is at odds with the assessment in the Officer report on the 2021 scheme.
5. The Council also showed unreasonable behaviour as it never notified the applicant of concerns over drainage. Moreover, the Local Lead Flood Authority (LLFA) took over 7 months to respond to the application consultation, and was also slow to respond during the course of the appeal.

6. Finally, the Council misled the applicant into agreeing an extension of time on the basis of a Committee meeting it never intended to make. Rather, having agreed the extension, it then gave the applicant only 3 business hours' notice to respond before refusing permission under delegated powers. Had the Council had a fundamental concern with the scheme, it should have been much firmer about it earlier in the process, in line with the its *Development Management Charter*.
7. The Council has therefore conflicted with advice in the *Planning Practice Guidance* (the PPG) in that it has not determined similar cases in a consistent manner, it has prevented or delayed development that should clearly be permitted, and it refused to provide information where a more helpful approach would have narrowed the issues or avoided the appeal altogether.
8. This behaviour by the Council has meant that expense has been involved pursuing the appeal, and, because of the slow response on drainage, the evidence has been more detailed than necessary on that matter and a Hearing, rather than the written representations procedure, had to be followed.
9. A full award of costs is therefore sought.

Response by the Council

10. The Council determined this current proposal having regard to the previous decision. Although improvements had been made to the visual impact, in the Council's judgement they were not sufficient to allay the concerns that decision had raised.
11. Whilst the LLFA delayed its response there was an objection nonetheless, with the information sought being necessary to establish whether, in principle, the scheme could proceed. Moreover, the proposal's viability was only confirmed late on.
12. Accordingly, the application for costs is not justified.

Reasons

13. Parties in planning appeals normally meet their own expenses. However, the 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. Starting first with the effect on the non-designated heritage asset, the report that recommended the 2021 scheme for approval was the view of the Officers and not that of the Council. As such, it is not binding on how the Council now determines subsequent schemes. Moreover, no matter what opinions have been expressed earlier, when considering this proposal regard has also to be given to the previous decision, which to some extent is a benchmark concerning how the development of this site can move forward. Indeed, the Council clearly took this previous decision into account as its concerns about parking, which it had raised before, were no longer identified.
15. The previous decision broadly concurred with the refusal by the Council (rather than the view in the Officer report), in that it found the relationship then proposed between the rear block and the non-designated heritage asset, when taken with the balconies on the Higham Road frontage, caused '*some low-level*

harm' to the building's historic significance. In the light of this, I therefore understand why Officers might have subsequently changed their position with regard to the effects of the rear block on the non-designated heritage asset.

16. It is a matter of planning judgement as to whether or not this current proposal has satisfactorily allayed the concerns expressed in the previous decision about the relationship between these 2 buildings. Whilst I have disagreed with the Council on this point, I nonetheless find that the judgement it made, supported by the evidence presented, was not unreasonable. To my mind, this is therefore not a case where the acceptability of the development is so apparent that it should clearly be permitted. Furthermore, in relation to this matter I see the Council exhibiting no inconsistency between its decisions on this proposal and the 2021 scheme.
17. Turning to the issue of drainage (reason 2 on the Notice of Refusal), no concerns were raised in this regard against either the 2021 scheme or the submission before that, with the matter identified as capable of being addressed through conditions. I note too that it is a sloping area of previously developed land in Flood Zone 1 on which the current building has stood since the 1930s, and I was told of no specific issues in this regard that were directly attributable to the site. In any event, this scheme would be an opportunity to introduce a drainage system here that was as good as or better than its current arrangements.
18. Given all these factors, I have no basis to find that this development would exacerbate any existing problems of drainage, that the effect on drainage was a matter that went to the principle of the proposal, or that it was reasonable to dismiss the scheme in the absence of the level and nature of information requested by the LLFA. The concerns in this regard therefore appear to be assertions about the proposal's impact that are unsupported by any objective analysis. Instead, having regard to the circumstances of the case, this appears to be a planning ground capable of being dealt with by conditions, and such an approach would have meant this reason for refusal would not have been one the applicant had to defend or address in the appeal process. Therefore, I find the Council acted unreasonably and caused the applicant to incur unnecessary expense in relation to this matter.
19. In coming to such a view, I note the advice in the document entitled *Local Standards and Guidance for Surface Water Drainage in Northamptonshire*. However, the fact that requirements are included in such a document does not mean those requirements are then reasonable. I recognise too that the Council withdrew this concern, but this was in the late afternoon of 4 September, little more than one day before the opening of the Hearing, and by then it had been in receipt of the decisive information submitted by the applicant for some time.
20. Finally, with regard to the other matters, had the case been determined sooner, or had the applicant had longer to respond to being told of the Officers' intentions to refuse, I have no reason to find it would not still have been dismissed and so the appeal would still have been necessary. If drainage had not been a reason for refusal, in my opinion a Hearing would still have been required given the unresolved matters around the various outstanding payments. I have no reason to consider the benefits of the scheme to the non-designated heritage asset were not weighed appropriately. This is especially so as the previous decision had undertaken that balance and found the concerns it

identified outweighed that benefit, and when this current case was determined, in the Council's opinion, the majority of those concerns still applied.

Conclusions

21. I therefore find the Council's unreasonable actions in relation to the second reason for refusal have incurred unnecessary or wasted expense for the applicant. However, the concerns relating to the impact on the significance of the non-designated heritage asset and the absence of various payments were reasonable, and so, notwithstanding the position in relation to drainage, the Hearing would have proceeded. Accordingly, I conclude a partial award of costs is justified.

Costs Order

22. 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 North Northamptonshire Council shall pay to Mr Michael Phillips the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in addressing Reason 2 on the Notice of Refusal; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to North Northamptonshire 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.

JP Sargent

INSPECTOR