Costs Decision

Site visit made on 27 October 2023

by Thomas Bristow BA MSc MRTPI AssocRICS

an Inspector appointed by the Secretary of State

Decision date: 06 December 2023

Costs application in relation to Appeal Ref: APP/Q1153/W/22/3309313
Land north of A30 Junction, Whiddon Down, Drewsteignton

- The application is made under the Town and Country Planning Act 1990 as amended, sections 78, 322 and Schedule 6, and the Local Government Act 1972 as amended, section 250(5).
- The application is made by West Devon Borough Council ('WDBC') against JW Mann Ltd.
- The appeal was against WDBC's refusal of planning permission ref. 2530/19/FUL, by decision notice dated 29 April 2022, for development described on the application form as 'a farm shop and ancillary cafe, with supporting secondary areas consisting of storage, WC's, offices and preparatory kitchen space.'

Decision

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

Reasons

2. As set out in the Planning Practice Guidance ('PPG'), parties to planning appeals normally meet their own expenses.[1] Nevertheless provision exists for an award of costs against a party who has behaved unreasonably and thereby directly caused another party to incur unnecessary expense at appeal.[2] Costs applications may relate to events, but not to expenses incurred, before an appeal was brought.[3]

3. WDBC's application for a full award of costs is on the basis that, in their view, the appeal had 'no reasonable prospect of succeeding'.[4] That position is founded on two principal arguments. The first is that the Council are of the view that the scheme clearly conflicted with the development plan, and that the appellant's case was absent robust substantiation as to countervailing material considerations.

4. In that context WDBC point to what they consider to be the appellant's unreasonable position in respect of the interpretation of, and case for, 'exceptional circumstances' existing under part 1 of policy TTV26 of the Plymouth and South West Devon Joint Local Plan 2014 – 2034 (adopted by WDBC on 26 March 2019, the 'JLP'). They also aver that the appellant's position in respect of the relationship of the scheme to retail implications under JLP policy DEV16 and paragraphs 87-91 of the National Planning Policy Framework ('NPPF') was flawed.

[1] Reference ID: 16-028-20140306.
[2] Ibid.
[3] PPG Reference ID: 16-032-20140306.
[4] PPG Reference ID: 16-053-20140306.

5. The second is that WDBC are of the view that little had meaningfully changed since an appeal here in 2020,[5] and that there had also been no 'credible advance in the appellant's case'. I note in that context that failing to determine 'similar cases in a consistent manner' is separately given in the PPG as a type of behaviour that may give rise to a substantive award against a local planning authority.[6] That, alongside case law, alludes to the need for appropriate justification for departing from earlier decisions.[7]

6. The appellant's case at appeal was far from straightforward, and not always cogently presented. There was also a lot of argumentation that was incidental to the substantive merits of the scheme. As noted in the associated appeal decision, the appellant's arguments occasionally come across as convoluted or contradictory. In fairness to the appellant, that may be somewhat inevitable given the long history to the appeal (and in part a response to the previous Inspector's findings). However it comes to the fore where the appellant appears to argue that 'exceptional' is less stringent, or a lower bar or policy test, than 'significant.' That simply defies logic.

7. In the associated appeal decision I reasoned that the benefits of the scheme, as advanced by the appellant, fell well short of collectively amounting to circumstances that might be deemed 'exceptional' with reference to the provisions of JLP policy TTV26.1. I also set out how the appellant's position in terms of the potential retail effects of the scheme did not, and arguably could not relative to the particular nature of the scheme proposed, demonstrate compliance with relevant provisions of the JLP or NPPF. I further explained how additional tree planting proposed would not obviate harm to the character and appearance of the area. The Council's motivation for application for an award of costs is therefore entirely understandable.

8. However each of the foregoing findings reached in the appeal decision is reliant on exercising judgement based on a thicket of evidence. That evidence, in this specific instance, has arisen as a result of an intricate series of circumstances including the quashing of an appeal. Evaluating a healthy amount of conflicting evidence is, in large part, the function of an appeal. Whilst the scheme itself is little altered since that considered by the previous Inspector, additional tree planting was proposed (and was welcomed by WDBC).[8]

9. Neither the appellant's legal opinion, nor Planning Retail Policy Assessment ('RPA'),[9] in my view overcame the harm that would result from the scheme or led me to a different overall outcome to the 2020 appeal. However the legal opinion raises relevant points regarding JLP policy TTV26, irrespective of wider arguments made by the appellant in respect of exceptional circumstances as above. The RPA also addresses the (retail) sequential test and attempts to address points raised by virtue of WDBC's critique of work in that regard.

10. Moreover, the proposal in respect of application ref. 2701/18/FUL, the subject the appeal here in 2019, was recommended at Council officer level for approval. The 2019 appeal was also allowed, albeit subsequently quashed. In

[5] Ref. APP/Q1153/W/19/3230781.
[6] Reference ID: 16-049-20140306.
[7] Addressed in the associated appeal at paragraph 4.
[8] Statement of case, paragraph 7.17.
[9] ID Planning, July 2021, building on their earlier work including a Retail Impact Assessment of June 2019.

my view that is relevant in respect of their being, at least an arguable case in favour of the current proposal. The outcome of a planning application or appeal is inevitably binary however finely-balanced arguments may be.

11. In short, and notwithstanding various complexities in the appellant's case and its presentation, I am not of the view that the appeal inherently had no reasonable prospect of succeeding. The appellant made relevant, if ultimately inadequate from their perspective, arguments regarding the development plan and other material considerations. Those arguments and underpinning evidence had, albeit to a qualified degree, moved on since the 2020 appeal.

Conclusion

12. As such, with reference to the approach in the PPG, no action or inaction of the appellant amounts to demonstrably unreasonable behaviour justifying an award of costs. For clarity I have been careful to turn my mind to what work has, for want of a better phrase, been undertaken by the appellant as a result of Inspectors' decisions as opposed to the position of WDBC (cross-referencing my reasoning in paragraph 5 of this decision).

Tom Bristow
INSPECTOR