



Costs Decision

Hearing Held on 9 January 2024

Site visit made on 9 January 2024

by J Wilde C. Eng M.I.C.E.

an Inspector appointed by the Secretary of State

Decision date: 16th February 2024

Costs application in relation to Appeal Ref: APP/Y3940/W/23/3328710 Land to the north of Horton road and south of London Road and west of Wellington Drive, Devizes

- 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 Berkley Strategic Land Ltd for a full award of costs against Wiltshire Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for up to 25000 Sqm of Use Classes B2 (General Industrial), B8 (Storage and Distribution) and E (Commercial, Business and Service) (g) (i-iii), with landscaping and associated infrastructure.
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Decision

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

The submissions for Berkley Strategic Land Ltd

2. Firstly the Council has failed to provide relevant information and adhere to deadlines with respect to the preparation of the Section 106 Agreement (S106) associated with the appeal. A draft S106 was submitted to the Council on 3 November 2023. This draft contained a number of queries.
3. An updated version of the S106 was received by the appellant on 16 November 2023 but there was no clarity or suggested wording with respect to the queries. Consequently the appellant contacted the Council again on 17 November seeking clarity in order to agree the wording and contributions relating to these outstanding matters. Alongside this the appellant also contacted the Council's appointed planning consultant expressing concern about the delays.
4. A partial response to the queries was received by the appellant on 6 December 2023 and the appellant emailed several times in December to try and obtain a resolution and an updated draft of the agreement. A response was received on 20 December saying that an updated draft would be issued later that day. This did not arrive, and the following day the appellant made the Planning Inspectorate aware of their concerns.
5. An updated draft was received by the appellant late in the day of 22 December. However, this updated draft, whilst clarifying wording relating to Biodiversity Net Gain, changed the requested contributions from those originally set out in the Officer's report to committee. This matter is still not resolved.

6. Secondly, the Council has tried to introduce fresh evidence at a late stage in the appeal process via an additional draft highways-specific Statement of Common Ground (SOCG), an agreed SOCG having been signed by both parties on 20 November 2023.
7. The appellant and Council met on 5 December to discuss the potential for agreeing a further SOCG, the intention being to identify areas of agreement and disagreement. Following the meeting a series of email exchanges took place in which the Council asked for a point of clarification regarding the TRICs analysis contained within the appellant's Transport Assessment. However, the appellant considers this request unnecessary as the trip generation had been agreed at planning application stage. Following this the Council initiated a further draft Highways statement of case which seemed designed to either introduce new matters or change the position previously held by the Council.
8. Thirdly it should be noted that the appeal site is a strategically important allocated site and the proposed development was considered by officers to comply with the development plan. The Council has failed to produce evidence to substantiate each reason for refusal and in doing so has acted unreasonably in preventing development which should clearly have been permitted.
9. In particular the Council's planning evidence rests on the assertion that harm would be caused because the appeal site does not include all the land allocated under Core Policies 2 and 12. However, as the case officer pointed out in the Committee Report, there is nothing within the policies that stipulates that the whole site should be developed at the same time.
10. In respect of the Council's highways evidence, it rests on the assertion that Horton Road is less suited to taking traffic than the A361. However, there is no requirement that access should be only from the A361 in either of the Core Policies mentioned above. The assertion that using Horton Road for the access will be harmful to the amenity and safety of local residents and the travelling public is at odds with the conclusions reached by the Council's highway officers and does not stand up to close scrutiny.

The response by Wiltshire Council

11. The Council has sought to proactively work with the appellant's team in order to produce an agreed bilateral S106 agreement. It was agreed with the Planning Inspectorate that a copy of the S106 would be submitted by 5 January 2024. In the event a draft copy was submitted by this date.
12. There have been no substantive changes to the planning obligations originally requested and the Council's CIL Compliance Statement provides details and a justification for the required planning obligations.
13. The Council did not seek to introduce fresh evidence. At the time of the submission of the SOCG it was agreed that the parties would continue discussing areas of both agreement and disagreement. This is a perfectly normal scenario. Given that the appellant agreed to this it is unclear how the original SOCG can be described as all encompassing. What was determined in consideration of the Planning Application was that the traffic impact of the proposals on Horton Road justified refusal of the application. There is a fundamental difference between what was agreed originally with Council officers and what was determined pursuant to the planning application.

14. The appellants have themselves caused delay in proceedings by not responding, or responding only partially to a request for information by the Council on 19 October 2023.
15. Whilst the Council's statement of case indicated that the issue of trip generation need not take up time at the Hearing, the matter had nonetheless been raised.
16. The Council has not behaved unreasonably in refusing the planning application. The purpose of a planning committee is to ensure that the planning process is democratic and that decisions are made in the open. The Planning committee is not obliged to agree with the Officer's recommendation. The members of the planning committee were fully briefed, asked technical questions of the officers during the meeting and considered representations from local residents and the appellant.
17. The reasons for refusal clearly provide a reasoned and evidenced argument for the refusal of outline planning permission.

Reasons

18. I have considered this application for costs in the light of the Government's Planning Practice Guidance (PPG). This advises that an award of costs against a local planning authority may be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal. It makes clear that a local planning authority are required to behave reasonably in relation to both of these elements and provides examples of unreasonable behaviour¹.
19. In relation to substantive behaviour they include unreasonably refusing planning applications and promoting vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis. In relation to procedural behaviour, they include a lack of cooperation, delay in providing information, or introducing fresh and substantial evidence at a late stage necessitating an adjournment.
20. The starting point in this case seems to me to be the reason for refusal. This was against officer advice. Whilst it is perfectly in order for a committee to go against such advice, it is incumbent on that committee to produce reasons for refusal that are clear and precise. In this particular case the reason for refusal was very lengthy and contained a number of issues, several of which were conflated.
21. The first issue that was discussed at the Hearing was whether or not the proposed development had come about as part of a masterplan approach. This discussion was held on the grounds that the issue was included within the Council's statement of case and consequently had been in the SOCG.
22. However, nowhere within the reason for refusal is the lack of a masterplan explicitly stated as actually being a reason for refusal. The first two paragraphs of the reason for refusal merely recite the requirements of various policies. The

¹ Paragraph: 047 Reference ID: 16-047-20140306 and Paragraph: 049 Reference ID: 16-049-20140306

third paragraph starts with the observation that *the application is accompanied by a masterplan plan*, which in itself seems to indicate that a masterplan approach has been followed.

23. At the Hearing it was identified that the Council considered that the lack of a masterplan approach was indicated by firstly, an alleged contravention of the development template in that a review of potential accesses had not been undertaken, and secondly, that the whole of the site was not included within the application. I acknowledge that the issue of accesses was included within the Council's statement of case.
24. However, the issue of the inclusion of the whole of the site is limited to one sentence, which states that *the original planning application did not include a comprehensive masterplan for the development of the entire strategic site*. Furthermore, I have shown in my accompanying planning decision that there is no policy imperative for the whole site to come forward at once.
25. The next identified limb of the reason for refusal relates to the status of the road. The reason for refusal talks about this in the fourth paragraph, but then goes on to conflate this issue with that of character. The reason for refusal merely states that *Horton Road is considered less suited to taking traffic to the application site, particularly commercial traffic, than the A361*. The Council's statement of case reiterates this by stating that the A361 is considered better suited to serve the type and frequency of movements than the 'C' class Horton Road, but no substantive evidence is given to enlarge on this assertion, despite the fact that the Council have earlier confirmed that *Horton Road is a distributor road*. Also, once again, this issue is then conflated with the issue of character.
26. I now turn to the issue of character. The reason for refusal talks about *the particular characteristics of the area through which the road passes, notably with residential neighbourhoods to its south side*. Nowhere in either the reason for refusal or the statement of case is there any serious objective analysis of this issue.
27. In respect of highway safety the reason for refusal merely states that *and potentially to the detriment of highway safety*. Nowhere in the reason for refusal or the statement of case is there a reasoned case made for the proposed development being detrimental to highway safety.
28. As far as the issue of air quality goes, the Council's case rests on the fact that any additional traffic would exacerbate an existing area of poorer air quality. This is an assertion, with no accompanying evidence, that completely ignores the evidence given in the appellant's Air Quality Assessment which was accepted by officers.
29. The Planning Practice Guidance makes clear that a type of behaviour that may give rise to a substantive award of costs is *vague, generalised or inaccurate assertions about a proposals impact, which are unsupported by any objective analysis*. To my mind this is exactly what the Council have done.
30. I will now move on to the appellants claim that the Council tried to introduce fresh evidence. This was in the form of questioning TRICs data following the Council's introduction of a highway consultancy. Once again I return to the reason for refusal. Whilst this mentions the status of the various roads and

comments that Horton Road is less suited to taking the generated traffic, nowhere is there mention of any traffic figures. To attempt to introduce this during the appeal process is to my mind an example of unreasonable behaviour.

31. Lastly, I come to the appellants concerns regarding the alleged tardiness of the Council in relation to the S106. Such documents are difficult to produce due to the number of people and departments involved. It is not at all unusual for a S106 to be supplied during or even after an event. In this case a completed S106 was supplied by 19 January. Whilst I acknowledge the appellants frustration with this process, I do not consider that the Council have acted unreasonably in this matter.

Conclusion

32. Notwithstanding this however, I have found that the council have failed to produce evidence to substantiate each reason for refusal and have made vague and generalised assertions regarding the impact of the proposed development. They have also tried to introduce evidence at a late stage that bore no relation to information given within the reason for refusal. This to my mind constitutes unreasonable behaviour that has resulted in unnecessary or wasted expense, as described in the Planning Practice Guidance. Therefore a full award of costs is justified.

Costs Order

33. 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 Wiltshire Council shall pay to Berkley Strategic Land Ltd the costs of the appeal proceedings described in the heading of this decision, such costs to be assessed in the Senior Courts Costs Office if not agreed.
34. The applicant is now invited to submit to Wiltshire 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 Wilde

INSPECTOR