



Costs Decision

Inquiry Held on 12 – 14 March 2024

Site visit made on 14 March 2024

by H Nicholls FdA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd May 2024

Costs application in relation to Appeal Ref: APP/Y0435/W/23/3333914 Former Newport Pagnell Police Station, 124 High Street, Newport Pagnell MK16 8EH

- 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 Churchill Retirement Living Ltd for a full award of costs against Milton Keynes Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for redevelopment of the site to form 45 retirement apartments, 3 retirement cottages including communal facilities, access, car parking and landscaping; and change of use of the former Police Station magistrates court and cell blocks for community use (class F2(b)).
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Decision

1. The costs application is partially allowed in the terms set out.

The submissions for Churchill Retirement Living Ltd

2. The costs application was made in writing during the Inquiry. It relates to the costs incurred by the Appellant on substantive grounds in pursuing the appeal from the date of submission until the mid-afternoon adjournment of the Inquiry on the 13 March 2024.

The response by the Council

3. The Council's response was made in writing during the Inquiry.

Reasons

4. The Planning Practice Guidance (PPG) advises that irrespective of the outcome of the appeal, 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. The PPG states that awards against a local planning authority may be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal.
5. The Appellant indicates that the Council accepted during cross examination that the first and second reasons for refusal (RfRs) were not justified. It is also stated that it was right that the third and fourth RfRs were withdrawn, and that consequently, the proposal should not have been the subject of any appeal and that the Council has unreasonably delayed development which should clearly have been permitted.

6. Further examination of these points is offered on behalf of the Appellant in relation to each RfR. In respect of number 1, it is stated that the evidential basis for the conflict with Policy NP1 of the Newton Pagnell Neighbourhood Plan (2021) (NPNP) has completely mutated from that presented in the decision and delegated report. In respect of RfR 2, it is suggested that the Council failed to take account of the absence of harm in flood risk terms and make an appropriate planning judgement. In respect of RfR 3, the Appellant alleges that no heritage harm was actually identified that would have justified the Council's position. And in relation to the fourth RfR on viability, the Council confirmed that the scheme meets with the requirements of policy in any event.
7. The Council's defence is based, in part, on the unexpected departure of its planning witness from the written evidence during cross examination in several material and important respects. It is stated that this departure from the written evidence can be explained by the difference in the case as it was presented at the Inquiry, compared to that on which the Council originally based its decision. A chronology and summary of the material changes is provided in respect of each reason for refusal.

RfR1

8. The decision notice records RfR1 as largely relating to the absence of robust information about the community use, in terms of need, value, method of conversion etc. The policy conflict identified in RfR1 is with Policy NP1 of the NPNP. Policy NP1 allocates the Police Station site purely for housing purposes and for approx. 14 total dwellings.
9. Other policies of the development plan support the development of the site for residential purposes. Ultimately, there is no dispute about the acceptability of a residential use of the site. However, the proposal is for a mixed use scheme of 48 dwellings and a community building whereas the policy allocations envisage approximately 14 dwellings and omit any detail as to what would become of the former Police Station.
10. The reason for refusal did not detail the conflict with the development plan policies in relation to the housing element and how it far exceeded the allocation for 14 units. It detailed the issue with the community building which would have introduced a mixed use without sufficient justification for such. By the time the Council's Statement of Case was submitted, the issue had morphed to become the scheme's significant exceedance of the unit numbers and mixed use nature of the scheme instead of being purely for residential purposes as envisaged by the Policies.
11. The reason for the morphing of the issue may be rationalised, in part, by the change in Council personnel between the handling of the application and the appeal. That there was a degree of conflict with the Policy is also not an illogical conclusion to reach. However, that was not the premise on which the RfR was framed, or the way it was rationalised in the officer's report. This suggests that, whilst the Council has not introduced an entirely new reason for refusal, it has introduced a new dimension to the stated reason. That it gave early notice to the Appellant and in doing so, sought to provide some synergy with RfR2 does not explain the necessity for this change of course.
12. Had the Council maintained the original premise of RfR1, it may have been possible for it to be withdrawn on the receipt of the information on the

community building from NPTC. That the Council sought to defend the newly introduced dimension to RfR1 only to withdraw it at the Inquiry suggests that the case on this reason was not well founded. I therefore consider that the Council acted unreasonably in relation to the first reason for refusal, from the time of refusal of permission through to the Inquiry adjournment late on 13 March 2024.

RfR2

13. The site falls partly within Flood Zone 2 and the aim of the development plan and national policy is to steer all new development towards areas with the lowest probability of flooding, i.e., sequentially preferable sites/areas. RfR2 concerns the lack of demonstration that the flood risk sequential test had been applied properly.
14. Though the site had been allocated in numerous development plan documents as far back as 2005, the sequential test had not been applied at the plan-making stage and it is thus necessary to undertake as part of considering any development proposals for the same.
15. The Appellant's originally submitted Sequential Test considers the parish of Newport Pagnell. Plan:MK Policy FR1 clearly indicates that the sequential approach will be applied across the Borough. The Council's Advisor indicates that the sequential test should be undertaken on a borough-wide basis as such. The Appellant's evidence rebuts the Council's request, and the proof of evidence merely provides further justification as to why a reduced search area is appropriate having regard to the likely occupants of the scheme, their desire to remain in the vicinity of Newport Pagnell rather than elsewhere within the Milton Keynes borough and the accessibility criteria at play in the consideration of age-restricted schemes.
16. By the time of the Inquiry and in its revised Sequential Test, the Appellant had not considered the availability of other sites elsewhere within Milton Keynes beyond the other neighbouring settlements of Olney and Woburn Sands. The Appellant's position at the time of the inquiry, not admitted beforehand, was that if there was an 'academic' or 'strict' breach of Policy or the Planning Practice Guidance (PPG), then harm should be identified that would arise from granting permission on the site.
17. However, a failure to demonstrate a lack of sequentially preferable alternative sites is a breach of the Policy, not an academic one. I consider that the Council was not unreasonable for refusing permission on the 11 August 2023 based, in part, on the lack of demonstration of there being no sequentially preferable sites. At the Inquiry, the Appellant's case changed to infer an acceptance of a breach of Policy and the need to exercise a planning judgement in light of the additional evidence which had been submitted.
18. The conclusion reached on examination of the evidence through the Inquiry was that the Council wished to withdraw this reason for refusal, thus acknowledging that there were public benefits sufficient to outweigh the identified harms. Ultimately, I do not consider that the Council unreasonably refused permission on the basis of RfR2 or acted unreasonably for having initially sought to defend its position in relation to the same.

RfR 3

19. In respect of RfR3, the Council indicate that the appeal application was absent of detail concerning the change of use of the former Police Station to a community use.
20. The building is agreed to be a non-designated heritage asset (NDHA) and evidence submitted by both sides indicate that some internal features, built fabric and plan form contribute to its significance.
21. NPTC provided written evidence ahead of the Inquiry about how it intended to use the Police Station. These submissions were sufficient for the Council to withdraw this RfR.
22. Though I am unable to impose a condition requiring the room functions to adhere specifically to the existing internal divisions and retain all features of special interest, the assurance I have from the submitted evidence enables me to reach the balanced judgement required by paragraph 209 of the Framework. Therefore, my view is that the Council was not unreasonable for refusing permission on this basis.

RfR 4

23. In respect of RfR4 concerning viability, there is no dispute that the offered affordable housing contribution falls significantly short of what the Council would typically expect of a scheme of this scale. The extent of the shortfall has been the subject of numerous viability assessments and analyses by expert consultants appointed on both sides.
24. The Officer's Report¹ sets out that the scheme could only viably deliver £145,064 in offsite affordable housing contributions which is a shortfall in relation to the expected amount in the order of £1.9 million. However, the Council went on to refuse the scheme for a reason relating to viability based on the residual confusion about the value of the Police Station.
25. Subsequent to the refusal of permission, further exchanges between the Appellant's and Council's specialist advisors allowed for further testing of the value of the Police Station. The outcome of this process allowed the reconfirmation that the scheme could only viably deliver £145,064, following which, the Council withdrew the fourth RfR on the 12 February 2024. The Statement of Common Ground² also confirms compliance with the relevant Policy (Plan:MK, Policy HN2). I do not consider that the Council behaved unreasonably concerning this aspect of the refusal or appeal process.
26. However, the Viability Proof submitted by the Council goes further than seeking to clarify the robustness of the viability evidence on the appeal scheme and looks at two alternative schemes for 14 units on the site, one excluding the former Police Station and the other including it as a conversion to 6 no. flats. The Council's viability expert also attended to give evidence and was cross examined in respect of the same. Given that the reason for refusal had been withdrawn, it seems illogical that this evidence was produced and inquiry time was taken for it to be presented and tested.

¹ See CD3.1

² CD5.3

27. This viability evidence appears to underpin the Council's argument that a 14 unit scheme, as envisaged by NPNP Policy NP1, would perform equally well or better than the appeal proposal by delivering a modestly greater off-site affordable housing contribution. However, as no proposal for a 14 unit scheme is before either me or the Council to consider, and as the Council had already agreed the maximum deliverable offsite contribution, I consider that the time spent on the viability evidence at the inquiry was needless.
28. Consequently, I consider that the Council has behaved unreasonably by insisting on the preparation, presentation and cross examination of viability evidence that goes beyond confirming how and why the RfR (4) was withdrawn prior to the Inquiry.

Conclusion

29. I accept that reaching the decision involved exercising a range of planning judgements and that the information submitted was incomplete in some respects at the time of the original decision. A different planning judgement was able to be reached on the basis of the changed circumstances of the case as it was presented at the Inquiry. On balance, I find that the Council have not unreasonably delayed the development by refusing it as at the 11 August 2023, but that it was unreasonable in some respects after this time, the result of which was to incur some delay and wasted expense on the part of the Appellant.

Costs Order

30. 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 Milton Keynes City Council shall pay to Churchill Retirement Living Ltd, the partial costs of the appeal proceedings as described above in relation to the first and fourth reasons for refusal; such costs to be assessed in the Senior Courts Costs Office if not agreed.
31. The applicant is now invited to submit to Milton Keynes City 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.

H Nicholls

INSPECTOR