The Planning Inspectorate

Costs Decisions

Inquiry held on 5 – 6 December 2023 & 31 January – 1 February 2024

Site visit made on 1 February 2024

by H Nicholls FdA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7th May 2024

Costs application A in relation to Appeal Ref: APP/K1128/W/23/3326235
Former Dairy Crest Site, Totnes, TQ9 5JR

- 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 Fastglobe Mastics Ltd for a partial award of costs against Totnes Community Development Society.
- The inquiry was in connection with an appeal against the refusal of planning permission for a Hybrid planning application for mixed use development comprising: Outline application with some matters reserved for mixed use re- development site comprising circa 80 Residential Units, circa 1100sqm Commercial space, demolition of existing structures excluding Brunel building & chimney, provision of open space & surface water attenuation, parking & associated infrastructure. Full Permission for the change of use of the Brunel Building to community uses (Use Classes F1/F2).

Costs application B in relation to Appeal Ref: APP/K1128/W/23/3326134 (withdrawn Appeal A)
Former Dairy Crest Site, Totnes, TQ9 5JR

- 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 Tones Community Development Society for a partial award of costs against Fastglobe Mastics Ltd.
- The inquiry was in connection with an appeal against the refusal of planning permission for an Outline application comprising circa 25 Residential Units, circa 20 Holiday Lodges, a Spa/Concierge building (circa 500sqm), circa 1100sqm Commercial space, demolition of existing structures (apart from Brunel building & chimney) provision of open space & surface water attenuation, parking & associated infrastructure. Full Permission for Change of Use of Brunel building**.**

Decisions

1. Costs Application A – The application for costs is refused.
2. Costs Application B – The application for costs is refused.

Costs Overview

3. The Planning Practice Guidance 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. Costs awards can be allowed if a party demonstrates unreasonable behaviour of either a procedural or substantive nature. The procedural aspects concern the process and timeliness and the substantive issues relate to the issues arising from the merits of the appeal.

Costs Application A

The submissions for the Appellant

4. The application was made in writing before the close of the Inquiry, as was the response by Totnes Community Development Society (TCDS) (the Rule 6 Party). The Appellant seeks a partial award of costs from the TCDS, to cover the expense incurred in dealing with the issue of viability, including the consideration and preparation of evidence as well as the costs of the Appellant's team attending the inquiry on the relevant sitting days.

5. The Appellant indicates that TCDS's viability case is substantively unreasonable for a number of reasons, including that there is no development plan policy to require a demonstration of viability as a pre-requisite for permission to be granted, nor is there in either the National Planning Policy Framework or the Planning Practice Guidance. The Appellant also indicates that as the appeal scheme was agreed to be in accordance with the development plan (subject to S106 and conditions), and that no derogation from policy requirements were sought (based on viability or otherwise), that permission should not be refused on the basis that the development is not viable.

Reasons

6. The situation is relatively uncommon insofar as TCDS have previously benefited from a planning permission on the site for which it had undertaken extensive site investigation and preparatory work. This has led to TCDS possessing a wealth of information about the site constraints and likely costs involved in bringing a scheme forward. This information cannot be dismissed as entirely irrelevant as it has contextualised the site and the various entries in the planning history. The information extracted in the examination of the viability evidence has proven that there is a difference of opinion on whether the scheme will be economically unviable.

7. My view is that the case made by TCDS on viability is a material consideration of relevance. The evidence that has come to the fore throughout the inquiry process has been enlightening and has informed some of the conclusions I have reached. Had I agreed with TCDS that the scheme were economically unviable based on the evidence presented, or had further concessions been made by the Appellant, it could have been a determinative issue.

8. Consequently, though the situation is relatively unprecedented, I do not consider that TCDS have acted unreasonably for pursuing a viability case or adding the inquiry time that it took to examine the associated evidence. TCDS approached the matter with a willingness to engage with the Appellant in the production of the evidence such that the inquiry time could have been further minimised or the outcomes made more directly comparable, but the opportunity was not taken by the Appellant.

Costs Application B

The submissions for Totnes Community Development Society

9. The application from TCDS was made in writing before the close of the Inquiry and seeks costs incurred in preparing its case for Appeal A. Appeal A was withdrawn by agreement between the Appellant and Council in a Statement of Common Ground dated 29 November 2023 and submitted on 30 November

2023. As the inquiry opened on the 5 December, the withdrawal of Appeal A occurred some 4 days prior.

10. TCDS indicate that Appeal A was clearly contrary to the development plan and there were no material considerations of sufficient weight to outweigh that conflict. It is suggested that the Appellant pursued it needlessly and unreasonably and then withdrew it at a very late stage in the proceedings.

11. The Appellant responded in writing and verbally before the close of the Inquiry.

Reasons

12. The Appellant opines that the withdrawal of Appeal A was in response to the Council confirming it no longer opposed the grant of permission for Appeal B, subject to conditions and a S106, and that consequently, it was perfectly reasonable to withdraw Appeal A.

13. TCDS objected to both Appeals A and B and indicated in its Statement of Case that it did not intend to simply repeat the Council's grounds for refusal, but instead, wished to focus on the importance of its own proposal, the 'Atmos Scheme' and the benefits it could offer as a comparator to the Appeal A scheme (and Appeal B scheme). It attempted to do so, in part, through highlighting the constraints and costs of developing the Site which it is alleged the Appellant had not properly understood.

14. The main parties had been advised to work collaboratively between the Case Management Conferences and the opening date of the inquiry. A number of issues fell away during this time. This collaboration resulted in the narrowing of controversial issues, such that one appeal was withdrawn in its entirety. This was an outcome that ultimately saved inquiry time.

15. The material change in circumstances that led to the withdrawal of Appeal A was that the Appellant and Council agreed that there were no in-principle issues on the Appeal B scheme. This is satisfactory reason enough for the Appellant to decide to pursue only one of its two alternative schemes, even if relatively late in the proceedings. TCDS's assertion that it was contrary to the development plan and that no material considerations existed that would have outweighed this conflict has not been tested.

16. Ultimately, my view is that the decision by TCDS to pursue its own case against both Appeals was at its own risk and that the Appellant has not behaved unreasonably by withdrawing Appeal A such that it has resulted in unnecessary or wasted expense.

Conclusions

16. For the above reasons, I have found that unreasonable behaviour has not been demonstrated by either party in either case. Consequently, both applications for costs are refused.

Hollie Nicholls

INSPECTOR