



Costs Decision

Hearing held on 28 February 2024

Site visit made on 29 February 2024

by R Hitchcock BSc DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 May 2024

Costs application in relation to Appeal Ref: APP/P3040/W/23/3333863 Hillside Farm, Bunny Lane, Keyworth, Nottinghamshire, NG12 5LP

- 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 Barratt David Wilson Homes for a full award of costs against Rushcliffe Borough Council.
 - The appeal was against the refusal of planning permission for the erection of 73 dwellings including landscaping, public open space, and associated infrastructure.
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Decision

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

The submissions for Barratt David Wilson Homes

2. The costs application was submitted in writing.

The response by Rushcliffe Borough Council

3. The response was also made in writing.

Reasons

4. Parties in planning appeals normally meet their own expenses. However, 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.
5. In this case the Council's officer had recommended the application for approval. Whilst the Council is not duty bound to follow the advice of its professional officers, if a different decision is reached the Council must clearly demonstrate why a proposal is unacceptable on planning grounds and provide clear evidence to substantiate that reasoning.
6. The Council's single reason for refusal incorporated a number of concerns relating to the proposed development. It is the applicant's position that the Council has failed to substantiate its reason for refusal. The applicant has set out its costs claim under sixteen grounds on procedural and substantive grounds.
7. The applicant highlights that the effects of the proposal on the living conditions of prospective residents due to the effects of noise, odour, dust and flies was supported by consultees at the time of the planning application. This included the Council's Environmental Health advisor and Severn Trent Water. An

independent assessment¹ commissioned by the Council prior to its decision also raised no objection.

8. However, Severn Trent Water's comments seem restricted to the detail of sewage management from the site. Whilst concluding no objection overall, the Miller Goodall review identified several weaknesses in the assessments. At the hearing the Council's professional representation on the matters of odour and noise² highlighted those weaknesses and additional concerns. Some technical limitations, the failure to establish the profile of worst-case scenarios, and the cumulative impacts to the intended highly sensitive end user were raised in the appeal.
9. Taken with my own concerns, that potential changes to the operational regime of the farm and wastewater treatment works (the WWTW) and any associated likely effects on residential occupiers had not been duly considered, it does not appear that the advice provided to the Council, including its own Environmental Health advisor, was sufficiently encapsulating. Consequently, it follows that the adequacy of any proposed mitigation falls into question. Given the defence of its position in relation to noise and odour, I find that the Council has not acted unreasonably.
10. The Council's consideration of flies as a concern in the locality were well founded. Despite no direct reference to flies in development plan policies, as an environmental factor fully capable of affecting residents living conditions and enjoyment of their properties, I find there was nothing unreasonable in that approach.
11. The reason for refusal includes the effects of dust on prospective residents. Aside from highlighting a lack of scientific measurement by the applicant, no substantive case was made in this regard. Accordingly, the applicant is entitled to costs associated with addressing that matter in the appeal.
12. Of the remaining issues raised in the reason for refusal, I heard sufficient evidence at the hearing to support rightful policy concerns. However, as highlighted by the applicant, some of those were issues substantially rehearsed during the refusal, in November 2021, of a similar development proposal (20/02670/FUL) on the site (the 2020 scheme). The refusal of that scheme made no reference to garden sizes, garden enclosures and the effects of the proposed mitigation fencing on the character and appearance of the locality.
13. The Council's reason for refusal of the 2020 scheme referred only to Part a) of Policy 4.4 of the Rushcliffe Local Plan Part 2 (the LP2). Despite the reason referring to the WWTW and flies, that part of the policy only relates to specified environmental factors associated with the adjacent farm. It was not open to the Council to revisit matters outside the scope of the earlier reason for refusal given they were not materially different (unless improved) to that scheme.
14. Despite that the Council's case was made out on the basis of cumulative effects, this leads me to conclude that the Council is guilty of not determining cases in a consistent manner in relation to those matters. Regardless of my own findings on those aspects of the scheme, I find this approach conflicts with the legitimate expectation the applicant is entitled to in relying on the Council's

¹ Miller Goodall Ltd. Odour, Dust and Noise Review (Rpt: 103022) 26 May 2023.

² Michael Bull & Associates and Auricl Acoustic Consulting

earlier decision. I find that unreasonable, and defence of those matters at appeal has caused the applicant to incur costs.

15. The applicant contends that, for the purposes of the appeal, the Council sought to refer back to Policy 4.4 of the LP2 to reintroduce its requirements despite its absence from the Council's reason for refusal. It is indeed unfortunate that the Council's statement to the appeal has overly referenced Policy 4.4. However, it must be appreciated that there is a significant degree of cross-over between Policy 4.4 and other policies; not least because Policy 4.4 refers to and requires compliance with other relevant development plan policies (part d). It is not a policy that is entirely irrelevant.
16. The Council's Decision Notice refers to policies relating to living conditions, healthy environments and amenity, amongst other things. Those are matters that are potentially affected by noise, dust, odour and flies. However, Policy 4.4 only directly refers to those relevant issues associated with the adjacent farm. As much of the Council's case relied on cumulative effects beyond just the farmstead, it was appropriate to exclude Policy 4.4 from the Decision Notice.
17. Although reference to Policy 4.4 was strictly unnecessary, I find it difficult to conclude that it was anything of greater significance. The reason for refusal necessitated discussion of the effects of the farm on residential amenity at the hearing. Reference to Policy 4.4 in that context was unsurprising but, in any case, did not result in wasted time at the event.
18. An error in quoting the incorrect paragraph of the National Planning Policy Framework (the Framework) in the Council's Decision Notice is unfortunate. However, as the Framework was reissued only a matter of days before the decision was issued, I find this likely administrative error nothing more than that. Furthermore, the parties were given specific opportunity to comment on the revised Framework prior to and during the hearing event. I find no injustice has arisen from that minor error.
19. The applicant contends that the conclusion reached in the officer report to the Committee was the correct one. It is asserted that it reflects a balanced view having considered the development plan 'as a whole'. The applicant alleges that the Council has erred in requiring the development to 'fully' comply with the development plan to be acceptable. It is unclear as to how that view has been reached however, particularly as reference to Policies 4.4 or 19 of the LP2, for example, did not appear in the reason for refusal. Accordingly, I cannot be sure that that was the approach taken by the Council.
20. A planning balance is a matter for the decision maker based on the weight applied to any relevant considerations. The Council's Committee was therefore entitled to come to a different conclusion. However, the absence of reference to the Written Ministerial Statement issued on 8 September 2023, 6 days before the committee resolution on the 14 September 2023, is a significant omission on the part of the Council.
21. As a statement material to the assessment of the planning application, that information should have been highlighted at that time. Notwithstanding my own conclusions, as a matter that may have influenced the Council's decision-making process, I find this a procedural failing. However, despite this significant concern, I cannot be sure that consideration of that matter would

have changed the Council's position to avoid the necessity for the appeal. Accordingly, it is not a matter for which an award of costs can be made.

22. There is little before me to demonstrate that the Council's timeliness in response to the applicant's proposed amendments of the unilateral undertaking (UU) was unreasonable. Although it is asserted that the level of response to its requests for information and feedback to their proposed changes was uncooperative, as a UU, it is substantially for the appellant to finalise this aspect of their proposal. As some correspondence was entered into in the run up to the hearing sufficient to allow a draft to be tabled, I cannot conclude that the Council's responses were tantamount to unreasonable behaviour.
23. The applicant alleges 'bias, collusion, prejudice and predetermination' by elements of the Council. It is suggested that 'hearsay and supposition' have replaced objectivity and open-mindedness in its decision-making. However, there is little evidence provided to support those accusations. I note the consultation responses of 2 ward Councillors. These suggested that they would be submitting strong objections. However, according to the Committee Minutes, neither was present in discussing or deciding the application. In the absence of other substantive evidence of those claims, I cannot be certain whether the applicant's allegations are true or not.
24. The applicant also contends that the Council could have imposed conditions to address their concerns. However, as I have found that the results of monitoring have likely underestimated the potential effects of adjacent land uses on prospective residents, the necessary mitigation, or their effects, are unknown.
25. As the proposed mitigation fencing conflicts with the character of the area and no detail of alternative means of ventilation of the proposed houses was provided, it is not for decision-makers to second guess the policy implications of any subsequent necessary mitigation measures. It would therefore have been unreasonable to propose or impose a condition/s that could nullify the benefit of any permission it was attached to.
26. The applicant's concerns in relation to highways issues that were not in dispute are immaterial to the application for costs.

Costs Order

27. 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 Rushcliffe Borough Council shall pay to Barratt David Wilson Homes, the costs of the appeal proceedings described in the heading of this decision. This is limited to the costs incurred in relation to the matters of the design of gardens, garden enclosures, the western boundary fencing, and the amenity effects of dust. Such costs to be assessed in the Senior Courts Costs Office if not agreed.
28. The applicant is now invited to submit to Rushcliffe Borough 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.

R Hitchcock INSPECTOR