



Costs Decision

Hearing held on 14 May 2024

Site visit made on 15 May 2024

by O S Woodward MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 June 2024

Costs application in relation to Appeal Ref: APP/V1260/W/23/3333238 Advertising Corner, The Grove and Barrack Road, Christchurch BH23 2EX

- 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 Fortitudo Limited for a partial award of costs against Bournemouth Christchurch and Poole Council.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for outline planning permission for the erection of a drive-thru restaurant, selling food and drink for consumption on and off the premises (*sui generis*).
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Decision

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

The submissions for Fortitudo Limited

2. The costs application was submitted in writing ahead of the Hearing and was augmented by additional points made orally at the Hearing. I have reflected both the written and oral submissions as appropriate in my Reasons section below.

The response by Bournemouth Christchurch and Poole Council

3. The response was made in writing ahead of the Hearing and was augmented by additional points made orally at the Hearing. I have reflected both the written and oral submissions as appropriate in my Reasons section below.

Reasons

4. Parties in planning appeals normally meet their own expenses. However, Planning Practice Guidance (PPG) 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.

Retail

5. The initial putative reasons for refusal, submitted by the Council in November 2023, did not include reference to retail sequential assessment. However, the Council's Statement of Case for the appeal, dated January 2024, included a putative Reason for Refusal that the appellant had not adequately demonstrated its case with regard to sequential testing for main town centre uses not located in a designated town centre. This was in accordance with the agreed timetable for the appeal. The appellant had time to respond to this

Reason for Refusal through the normal appeal timetable. It was also not entirely unexpected information because the Council's policy response to the planning application the subject of the appeal, dated March 2023, highlighted concerns with the retail sequential test. I am therefore satisfied that there was no procedural unreasonableness on behalf of the Council in relation to this issue.

6. However, as set out in my Decision on the appeal, there is no requirement in adopted policy to consider cross-boundary effects. The Council also provided no substantiated evidence that the likely catchment area for the proposed drive-thru would include significant customers that would otherwise have visited Bournemouth. The Council did not, therefore, adequately substantiate its request for the sequential test to include consideration of sites within Bournemouth. The Council therefore behaved unreasonably in a substantive manner in relation to this issue.
7. The Council's behaviour led to unnecessary and wasted expense during the appeal process because the appellant was required to defend its position in relation to this main issue.

Highways

8. Whilst the traffic generation would be low and therefore the increase in queues and travel times likely not significant, Jumpers Roundabout and the surrounding roads are very busy as existing. It is therefore reasonable, in principle, to come to a conclusion that the proposal would harm highway safety and/or the free-flow of traffic. However, such a conclusion must be based on substantiated evidence.
9. In this regard, the Council's position in its Statement of Case was that the queuing of vehicles waiting to access the development would lead to the blocking of Jumpers Roundabout. As set out in my Decision on the appeal, the appellant's evidence is clear that there would be essentially zero likelihood of queuing outside the appeal site. There could not, therefore, be any materially harmful effect on highway safety or free-flow of traffic. The Council has not rebutted this evidence. It is also alleged that the appellant did not model access from The Grove. However, the appellant provided modelling at all stages of the application and appeal process, including when the location of the access to the proposal was changed.
10. The Council referenced the mass non-compliance of drivers with highways rules and management. However, the example provided was the first two days in June 2020 when the lockdown restrictions were lifted. This was an extremely unusual situation and not one which should be used to make predictions about driver behaviour in normal situations.
11. It was therefore unreasonable behaviour by the Council to maintain this objection to the appeal proposal. The Council's behaviour led to unnecessary and wasted expense during the appeal process because the appellant was required to defend its position in relation to this main issue.

Flood risk

Sequential Test

12. The planning application was submitted with a Flood Risk Assessment (FRA) but not a Flooding Sequential Test (FST). A FST was requested by the Council in March 2023. A FST was submitted by the appellant in October 2023, with the appeal. The Council provided its response in January 2024, in its Statement of Case. An Addendum FST was submitted by the appellant later in January 2024, which the Council subsequently agreed was acceptable in the Statement of Common Ground in May 2024.
13. The Council took four months to provide a response to the Addendum FST. However, in this period the appeal changed from a written representations procedure to a Hearing. The normal appeal timescales were therefore changed. In addition, the original FST was only submitted by the appellant with the appeal and not with the original planning application. In this context, I do not view it as unreasonable for the Council to have taken several months to respond to the additional flooding information. On substantive grounds, the approach of the FST to out-of-centre retail parks and superstores was a reasonable point of dispute for the Council to raise. The Council's behaviour was not, therefore, unreasonable with regard to the FST.

Flood Risk Assessment

14. A Flood Risk Assessment (FRA) was submitted with the planning application. The Council's policy comments during the course of the application did not mention any concerns with the FRA. The Council's putative Reasons for Refusal, as set out in its Statement of Case in January 2024, did not raise any concerns with the FRA. However, in the Statement of Common Ground, in May 2024, the Council raise objection with the FRA, specifically with regard to the creation of safe access and egress from the appeal site. This was unreasonably late in the process.
15. However, the issue raised regarding flooding at the proposed access point was based on evidence that the flooding would be at a level that would be 'danger for most'. This is a reasonable objection in substantive terms. It was therefore reasonable, in principle, of the Council to request additional information in this respect. The appellant produced an updated note in this regard which was submitted at the Hearing. The Council reviewed this information and concluded that the updated note demonstrated that suitably safe access and egress could be provided.
16. Overall, whilst the timing of the raising of the concerns was unreasonably late in the process, this did not give rise to unnecessary and wasted expense during the appeal process because the issues raised were adequately substantiated, the Council reviewed the additional information promptly when provided and withdrew its objection in this regard without requiring any undue discussion at the Hearing.

Other

17. The Council stated in the Statement of Common Ground that the appeal site falls within a Higher Potential Ecological Network, and that it is located close to the Green Belt with visual links to this green open space. These were both within the 'Matters of Disagreement' section of the document. Neither are in

the putative Reasons for Refusal. Neither are addressed in the Council's Statement of Case.

18. At the Hearing, the Council stated that these issues were being raised just for information. Neither point was adequately substantiated by the Council. As set out in my Decision, I did not therefore need to consider the matters further. However, it is disingenuous to raise issues of disagreement but not include them as a reason for refusal or a main issue for the appeal. Once raised by the Council, it was necessary for the appellant to respond on both points, because they could have potentially weighed against the proposal.
19. It was therefore unreasonable behaviour by the Council to raise these two issues. The Council's behaviour led to unnecessary and wasted expense during the appeal process because the appellant was required to defend its position in relation to them.
20. The appellant did not undertake pre-application discussions with the Council. Such discussions would likely have been beneficial to the consideration of the planning application, and are encouraged, as set out at paragraph 39 of National Planning Policy Framework (the Framework). However, pre-application engagement is not a requirement, as set out at paragraph 40 of the Framework. The Council has not made a claim of costs against the appellant. The costs application made by the appellant stands or falls on its own merits, as set out above.

Conclusion

21. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of retail, highways, ecology and the Green Belt as described in detail above, and a partial award of costs is therefore warranted.

Costs Order

22. 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 Bournemouth Christchurch and Poole Council shall pay to Fortitudo Limited, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in retail, highways, ecology and the Green Belt; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to Bournemouth Christchurch and Poole 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.

O S Woodward
INSPECTOR