



Costs Decision

Inquiry held between 30 April 2024 and 24 May 2024

Site visit made on 30 April 2024

by C Dillon BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5th July 2024

**Costs application in relation to Appeal Ref: APP/P4605/W/23/3336011
334-340 High Street and 8-22 Harborne Park Road, Harborne,
Birmingham, West Midlands, B17 9PU**

- 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 Midland Properties and Finance (Birmingham) Ltd for a full award of costs against Birmingham City Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for development described as demolition of existing buildings and construction of 83 residential apartments across two new development blocks, central amenity space including soft landscaping and planting, cycle storage, bin stores, plant store and enabling works.
-

Decision

1. The application for an award of costs is refused.

The submissions for Midland Properties and Finance (Birmingham) Ltd as applicant

2. A summary of the costs application was made orally at the Inquiry and submitted in writing. Overall, the applicant believes that the Council has acted unreasonably in both procedural and substantive terms and that this behaviour has led to unnecessary or wasted expense because the case should have never reached the appeal stage. Following the submission of the Council's rebuttal, the applicant took up the opportunity to respond. For the reasons summarised below the applicant has requested that a full award of costs be granted against the Council.
3. In terms of procedural arguments, the applicant claims that the Council failed to disclose the consultation responses on highways and design matters in their totality. They consider this denied them the opportunity to negotiate further to narrow or resolve the disputed matters which form the basis of 2 of the reasons for refusal. The applicant argues that this demonstrates that these 2 reasons could have been avoided.
4. The applicant also claims that the Council refused the application without waiting for a revised viability appraisal which the case officer knew was to be prepared. They point out that the Council withdrew the relevant reason for refusal at the appeal stage once that viability evidence was submitted and verified. The applicant argues that this demonstrates that the related reason for refusal could have also been avoided.

5. The applicant states that the Council included a reason for refusal relating to the appropriateness of the proposed housing mix without having raised this as a concern. Furthermore, the advice that the Council had provided was inconsistent with the eventual reason for refusal relating to this. They draw attention to the fact that the Council changed its stance once the applicant had produced further analysis and evidence at the appeal stage. The applicant argues that had they been given the opportunity to respond and provide the evidence earlier, then there would have been no such reason for refusal.
6. The applicant also argues that the Council raised a dispute relating to amenity unexpectedly and belatedly as part of another reason for refusal. The applicant argues that had they been given the opportunity to respond and provide the evidence earlier, then this matter would have also been addressed.
7. The applicant points out that the Council did not correctly list the development plan policies cited on the decision notice.
8. In terms of substantive arguments, the applicant states that the Council has continued to defend 3 of its 6 reasons for refusal, while offering no credible evidence in support.
9. The applicant also draws attention to the Council's acceptance of the parking impact commuted sum, despite them having reservations about its effectiveness.
10. The applicant believes that no harm would arise and that it was unreasonable for the Council to defend the decision in light of the lack of a 5 year housing land supply and the accordance of the appeal scheme with the most important policies in the development plan when read as a whole.
11. The applicant maintains that there were no material considerations that could have outweighed such compliance and the benefits of the scheme. However, even if there is some harm the applicant asserts that it defies logic that it could outweigh the identified benefits of the scheme.

The response by Birmingham City Council

12. The Council's response was made in writing. For all the reasons summarised below the Council maintains that an award of costs against them should be refused.
13. In response to the procedural arguments made by the applicant, the Council draws attention to the fact that it continued to keep the case under review throughout the appeal process. Furthermore, the Council points out that by working with the applicant the matters of disagreement were narrowed and 3 of the reasons for refusal were conceded before the opening of the Inquiry. They maintain this was entirely reasonable behaviour which saved substantial inquiry time.
14. The Council does not consider that their actions caused any additional expense to the applicant over and above what would have been required to address the concerns relating to the proposed housing mix at the planning application stage.
15. Similarly, the Council believes that their failure to allow the independent viability study review to progress to a conclusion prior to making its

determination; the delay in providing the full extent of consultee comments; and revealing further concerns about amenity have not added to the costs of the appeal. The Council draws attention to the fact that it refunded the sum that the applicant had paid for the Council to instruct viability consultants.

16. Furthermore, the Council believes there is no evidence that further negotiation on those outstanding disputed matters of design, highway safety and amenity would have led to the approval of the application. Overall, the Council maintains that the applicant's procedural arguments in regard to these remaining disputed matters stands or falls on whether the substance of those reasons for refusal were unreasonable, not the process.
17. In response to the substantive arguments made by the applicant, the Council argues that there is no evidence that the scope of policies included on the decision notice caused any additional expense or prejudice at all. They believe that it was a point put to the Council's witness in order to make him feel uncomfortable.
18. The Council maintains that although they did not call a design or highways expert, that is not unreasonable, nor is it unreasonable on the facts of this case. The Council argues that the matters raised were capable of being dealt with by an experienced planning officer and was not an unreasonable approach, particularly given the well-known overall financial position of the Council.
19. The Council maintains that consistency in views were maintained throughout both the pre-application and application process and evidence is cited to demonstrate that.
20. The Council asserts that it is wrong to suggest that either the design or highways evidence of the Council lacked any proper assessment. The Council maintains that the impacts were considered, and judgments reached.
21. The Council maintains its approach to the planning balance does not defy logic and states that substantial harm arising from a small number of matters can significantly and demonstrably outweigh a longer list of benefits, even when the tilted balance is applied. The Council maintains that in the overall balance of adverse impacts and benefits nothing substantial was left out and the weight to these matters is always a matter for professional judgment. The Council agrees that as the applicant has argued, this is neither a mathematical nor scientific exercise. The Council asserts that the planning judgments reached were properly considered against the appropriate policy framework.
22. The Council maintains that their agreement to the parking monitoring proposals and the securing £25,000 contribution was a pragmatic approach to ensure that there was a means to try and address any residual parking concerns even, though it was felt that the measures would not be likely to be entirely effective.
23. Overall, the Council argues that although their judgments were not shared by the applicant, that does not mean that they were not credible or unreasonable. The Council is of the opinion that even if the applicant's arguments were proven, for any such procedural breach to give rise to an award of costs, it must be clearly shown that the breach caused or gave rise to additional expense that was incurred as a result. It is maintained that is not the case here.

Reasons

24. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the applying party to incur unnecessary or wasted expense in the appeal process. The PPG sets out a non-exhaustive list as to when an award of costs may be made against a local planning authority. Notably that includes delay in providing information and the withdrawal of any reason for refusal. Account can be taken of behaviour and actions that occurred at the time of the planning application.
25. In terms of the procedural arguments submitted, the available evidence indicates that there was consistency on the Council's part throughout both the pre-application and application process. Even though there is some discrepancy between the officer and consultee views on design and highways matters, the extent to which that advice was to be heeded is a matter of judgement for the decision maker at the time to make.
26. There is evidence that during the determination period the main parties worked together to narrow differences and that led to the submission of revised proposals. This dialogue continued at the appeal stage. This all makes the unexplained failure on the Council's part to share some consultation responses in full and convey further concerns when they first became apparent all the more disappointing. As does the decision on the Council's part to halt the independent review of the viability study and the oversight in respect to the lack of precision in identifying all relevant policies on the decision notice.
27. There is no doubt that a more open and considered approach on the Council's part would, at the very least, have avoided the 3 reasons for refusal relating to housing mix, affordable housing and open space provision.
28. Nonetheless, the Council maintained their resistance to the scheme in terms of design, highways and living conditions throughout the Inquiry. Therefore, I cannot be certain that a different stance on the Council's part in regard to any of these would have resulted in a favourable outcome for the applicant. Furthermore, the Council's oversight in respect to the citing of local policies was not determinative to the decision reached. Although the totality of the Council's objection regarding living conditions was a surprise to the applicant, it is a matter which is governed by a degree of subjectivity. This matter was sufficiently unpacked in the Council's appeal submissions and was able to be swiftly covered off by the evidence of the applicant's witnesses and in the planning conditions session.
29. The main parties both signed up to a planning obligation to monitor and mitigate, if required, the future parking demands of the area post development. Although I found that this approach did not align with Regulation 122 of the Community Infrastructure Levy Regulations (2010) and the Framework, I do not find the Council's reluctant pursuit of this to be a matter that should give rise to a costs award given it relates to the content of the Council's adopted supplementary planning document on highway matters. Furthermore, it is something that the applicant also accepted, prior to them proposing during the Inquiry that a 'blue pencil' clause should be included within the section 106 legal agreement.

30. It is evident to me that the Council continued to keep their case under review throughout the appeal process, working with the applicant to narrow the matters of disagreement. Undeniably, this resulted in 3 reasons for refusal being withdrawn. On that basis the applicant's concern is not to be unexpected. However, as I have found that the Council's behaviour at the planning application stage was no more than disappointing, it follows that this continued review in itself was entirely reasonable behaviour that saved substantial inquiry time and resources.
31. In terms of the substantive arguments submitted, all of the matters raised through the reasons for refusal were perfectly capable to being dealt with by an experienced planning officer. It was not unreasonable for the Council to have adopted this approach.
32. The necessary planning judgments on these issues fall to be made by planning professionals and these were explored thoroughly through cross-examination. Despite the Council's oversight on the scope of relevant policies, from what I heard from the Council's witness I am satisfied that those judgements were in practice duly made in the context of the appropriate policy context.
33. In connection with the disputed matters of parking and living conditions, through the course of the Inquiry I identified additional planning conditions; the need to reword some of those contained in the main parties' agreed suggested conditions schedule; and also the need for a further planning obligation to secure the implementation of the submitted Travel Plan. It is not unreasonable on the Council's part to have been accepting of these in narrowing the dispute whilst still maintaining their overall stance on the appeal scheme.
34. Given the precise travel habits of future residents are unknown, assumptions have had to be made in order to assess the likely effect on local parking conditions. This introduces a significant degree of subjectivity into the assessment. Whilst I have found that the Council's highways case in that regard was the weaker of those put before me, given this degree of subjectivity and absence of an adopted methodology for parking surveys, I do not find that the Council fell into the realms of being irrational or unreasonable.
35. I am satisfied that the Council did not fail to produce evidence in a bid to substantiate each reason for refusal on appeal. I do not find that the Council's case falls into realms of being labelled vague or generalised. Neither has the Council advanced inaccurate assertions about the proposal's impact which are unsupported by any objective analysis. Rather, subsequent to having heard and examined the entirety of the evidence before me and undertaken my site visit, on balance the Council's judgments were not ones which were sufficiently convincing for me to share in this instance. Whilst the Council's case was the weaker of those put before me, I do not find that it fell into the realms of being irrational or unreasonable.

Conclusion

36. In exercising my own professional judgement on all of the evidence put before me and having explored the careful use of further planning conditions and obligations, I have arrived at a different overall stance to the Council. Some of the Council's approach at the planning application stage was at worst disappointing. However, although I have not concurred with the Council's

stance for all of the reasons set out in this Decision, their behaviour in procedural and substantive terms does not fall within the realms of unreasonableness in terms of preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

37. Furthermore, the Council's approach did not result in additional expense to the applicant over and above that of dealing with the substance of the relevant disputed matters had they been fully made known at the planning application stage. Neither is there sufficient substantive evidence to assert that the narrowing of the dispute in those regards at the planning application stage would have altered the Council's decision.
38. Therefore, unreasonable behaviour resulting in unnecessary or wasted expense has not occurred and an award of costs is not warranted in this instance.

C Dillon

INSPECTOR