



Costs Decision

Hearing held on 13 February 2024

Site visit made on 14 February 2024

by Melvyn Middleton BA(Econ), DipTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31st July 2024

Costs application in relation to Appeal Ref: APP/J3015/W/23/3322612 Land off Chewton Street, Eastwood, Nottinghamshire, NG16 3JR

- 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 Gleeson Homes for a full award of costs against Broxtowe Borough Council.
 - The appeal was against the refusal of planning permission for the erection of 251 two storey dwelling houses consisting of 2 and 3 bed semi and 3 and 4 bed detached units, including estate roads, public open space and drainage.
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Decision

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

A partial award of costs is made in favour of Gleeson Homes against Broxtowe Borough Council.

The submissions for Gleeson Homes

2. The costs application was submitted in writing at the Hearing. It is based on the applicant's assertion that the Council acted unreasonably when determining the application and subsequently.
3. It points out that the appealed application is consistent with the development plan and supported by technical information not objected to by any statutory consultee. It was recommended for approval by the Council's professional officers but was nevertheless refused because of the potential effects of an adjacent landfill site on human health and the adequacy of the proposed mitigation. In the applicant's opinion, the Council failed to produce evidence to substantiate its reason for refusal other than vague and generalised assertions about the development's impact.
4. The applicant quotes the Written Ministerial Statement of December 2023, which points out that the overturning of a recommendation made by a professional and specialist officer should be infrequent. With the support of its Environmental Health Officer, the Council's Planning Officer recommended the proposal for approval, subject to conditions. The submissions go on to point out that the Statement suggests that where the inspectorate cannot find reasonable grounds for the Committee having overturned the officer's recommendation, it should consider awarding costs to the appellant.

5. The Council has not provided any further analysis or explanation to demonstrate that the officer's recommendation was inappropriate or that the Appellant's technical case should not be relied upon. The tests in Policy 19 of Part 2 to the Broxtowe Local Plan (LP) refer to there being unacceptable levels of pollution or risks to safety, post mitigation.
6. It refers to paragraph 049 of the National Planning Practice Guidance (NPPG), which refers to a failure to produce evidence to substantiate the reason for refusal and unsupported vague, generalised, and inaccurate assertions about the development's impact. In the claimant's opinion, the Council's actions amount to substantive unreasonableness and a full award of costs is sought.
7. In response to the Council's case the Appellant pointed out that the members having the right to disagree with officers was not the point. The Council has a responsibility to substantiate its decision with evidence both in the reasons for refusal and in evidence presented to an appeal. In this case it needed to demonstrate that what is proposed produced a significant risk.

The response by Broxtowe Borough Council

8. The response was made orally at the Hearing. The respondent focuses on the claims that the Council's decision was based on vague and generalised assertions about the development's impact and that members decided against officer advice without good reason. It refers to three High Court cases¹ that point out that the purpose of an officer's report is not to decide the outcome of an application but to advise members of the facts and circumstances of the case (Luton paragraph 91), that decisions are made by democratically elected bodies, and that it is their job to weigh competing points of evidence and not the role of officers (Alconbury), also that it is assumed that members have local knowledge so that it is not always necessary to provide reports in great detail (Mendip).
9. In such circumstances the fact that the members went against an officer recommendation is not unreasonable, all they need to do is to demonstrate that they had a justified argument for their decision. In this context it points to the Environmental Health Officer's report to the Hearing. Additionally, that the site is unallocated in a Local Plan that allocates lots of housing and the Council currently has a five-year supply of Housing land.
10. Members also listened to the concerns of many members of the local community who had genuine fears about the ramifications of the proposal for their health and that of the residents of the appeal site. In that context the members concluded that it was not necessary to take a risk and therefore did not take one.

Reasons

11. Parties in planning appeals normally meet their own expenses. However, the NPPG 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.

¹ Regina and Luton Borough Council v Central Bedfordshire District Council, before Lord Justice Holgate in December 2014, paragraph 91. EWHC 4325
Regina v Mendip District Council ex parte Fabre, before Lord Justice Sullivan in 2000
Regina and Alconbury v Secretary of State before Lord Justice Hoffman in 2003, para 69

12. The Council's case at refusal was based on three strands. Firstly, the adjacent landfill site contains unknown levels of contamination, some of which could migrate to the appeal site and cause a risk to human health. Secondly the proposal does not provide sufficient protection for future residents of the development, there being insufficient evidence that the mitigation measures proposed are sufficiently adequate to ensure that the development will not pose a risk to human health and safety, and thirdly that it would adversely impact on the character of the area.
13. The proposal was considered to be contrary to Policy 19 of the Part 2 LP and part 15 of the National Planning Policy Framework (NPPF). Policy 19 prevents the granting of planning permission for development which would result in unacceptable exposure to sources of pollution or risks to safety. Paragraph 191 of the NPPF says that decisions should ensure that new development is appropriate for its location, taking into account the likely effects of pollution on health.

Levels of contamination

14. The tipped area, immediately east of Braemar Avenue, is still being monitored for emissions of methane and carbon dioxide and there are still operational vents on the site. Historically it has given rise to significant issues of contamination, and there are instances of escaping methane and carbon dioxide still being recorded. The levels of potential contamination, within the adjacent tip, are not specifically known. However, monitoring information is available and some was submitted with the application.
15. If produced in sufficient quantities and given the geological or infrastructure circumstances, that occur on and in the vicinity of the appeal site, these gases could migrate from the former waste site and into the appeal site, thereby causing a health hazard. To some extent, the potential risk is a judgement call, aided by measured data on the production of gases by the source material remaining in the tip, for which there is no accurate information. Given that gas production is not consistent, this is not clear cut. The uncertainties about gas production and movement, the history of pollution in the area and the extensive public concerns about the safety of the tip, all point to a difficult judgement call. In such circumstances I do not consider it unreasonable for the members of the Council to have adopted a precautionary approach and refused the application on this ground, whereas I chose not to.
16. The LP and NPPF require a judgement to be made as to whether the periodic emission of gases from the tip could create an unacceptable risk to health at the appeal site. This judgement has to be based on the available evidence. At the time of the application, the Appellant relied on gas monitoring at the site between April 2018 and the beginning of 2021. Subsequent updates were added periodically up until the Committee report was prepared in November 2022 and then until April 2023 as a part of the appeal process.
17. Additionally, the Appellant submitted a number of other supporting technical notes with the appeal, including historic data received from Veolia, the current managers of the tip. Much of this was available to members when they made their decision in December 2022.
18. Whilst I note that the generally accepted advice is for a monthly monitoring frequency over a period of 24 months and that at the time the Committee met,

the monitoring frequency had been more often and over a longer period, there is evidence of periodic high levels of gas emissions and the levels have not yet reduced to the threshold level at which the Waste Planning Authority would consider discharging the conditions that would end the monitoring. Whilst, for the reasons outlined in my decision letter, I reached a different conclusion to the Council, when assessing the current risks, my data set and the supporting information was more comprehensive than that which the Council members relied upon, and my decision was made some fourteen months later when the tip's rate of gas production had very likely declined further. I therefore find no unreasonable behaviour on this point.

On site protection

19. The claimant proposes to remove any preferential pathways for ground gases to migrate from the tip to the appeal site by installing clay stanks around existing and proposed services that could cross the site boundary with the adjacent tip. The residential properties are to be fitted with gas protection measures in accordance with BS8485. The claimant's appeal evidence refers to a number of examples where housing development has taken place on or adjacent to former landfill sites with protection fitted to dwellings to meet these standards. I was told that there is no evidence to suggest that there have been subsequent health issues. The Council did not dispute the claimant's findings on this point, nor did it suggest ways in which the proposed mitigation could be inadequate or offer any other counter evidence. At paragraph 049, when listing the behaviours that may be regarded as unreasonable, in relation to conduct at an appeal, the NPPG specifically refers to the failure to produce evidence to substantiate a reason for refusal. I therefore find that the Council's inclusion of inadequate on-site mitigation, in its reason for refusal, to be unreasonable.

Character of the area

20. During discussion at the Hearing, it became clear that the Council's inclusion of "adversely impact on the character of the area" referred to the potential for the site developer to come across unforeseen issues concerning gas migration into the site during development. That these could result in significant additional costs which could result in bankruptcy and that the development could consequently stall. If this happened, then the resulting part finished site would impact adversely on the character of the area.
21. All developments are at risk of circumstances that could lead to bankruptcy and a break in the development process. However, this is not usually a reason for refusing planning permission. In my view, although novel, the circumstances of this development are in principle no different to many others. If the risk of failure is high, then developers can insure against the risk in any event. The Council also failed to explain its meaning for including this concept in its decision until the Hearing itself and clearly inconvenienced the Appellant in that context. The submission of late evidence is another reason listed in the NPPG as a justification for an award of costs. I therefore find that the Council's inclusion of the concept of harm to the character of the area into its reason for refusal to be unreasonable.

Costs Order

22. In exercise of the powers under section 230(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 Broxtowe Borough Council shall pay to Gleeson Homes the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in preparing and presenting evidence concerning the on-site protection works and the harm to the character and appearance of the area, such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to Broxtowe 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.

Melvyn Middleton

INSPECTOR