



Costs Decision

Site visit made on 10 December 2024

by J Bowyer BSc(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10th January 2025

Costs application in relation to Appeal Ref: APP/P4605/W/24/3348311 Land at Mary Vale Road and Franklin Way, Bournville, Birmingham B30 2HP

- 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 Birmingham City Council for a partial award of costs against Bournville Land Ltd.
 - The appeal was against the refusal of planning permission for development originally described as 'removal of existing structures/fencing and 1no. tree (within a Conservation Area) and redevelopment of site with 74no. apartments with associated amenity space, parking, and landscaping'.
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Decision

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

Reasons

2. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance ('the PPG') advises that costs may be awarded against a party who has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Awards against appellants may be either procedural, relating to completing the appeal process or substantive, relating to the planning merits of the appeal.
3. In this case, the Council's third and fourth reasons for refusal concerned the scheme's failure to provide affordable housing and a contribution towards open space. As part of the appeal, the appellant provided a Financial Viability Assessment ('FVA'). An independent review of the FVA on behalf of the Council identified some points of disagreement, but ultimately accepted that the scheme could not sustain affordable housing or other contributions and the Council consequently withdrew the third and fourth reasons for refusal.
4. However, the Procedural Guide: Planning appeals – England notes that appeal submissions should not normally include new evidence or technical data not previously seen by the local planning authority and interested parties at the application stage.
5. While the appellant's Affordable Housing Statement referred to determining the correct level of affordable housing through presentation of viability, no detailed viability information was submitted at the application stage and the FVA comprises new evidence within the appeal submission.
6. I note that the Council validated the planning application without viability information, but despite the Affordable Housing Statement, the planning

application form did indicate that provision would be made for affordable housing. In any event, the validation of the application by the Council does not obviate the need to have regard to requirements of the development plan.

7. In that respect, Policy TP31 of the Birmingham Development Plan 2017 ('the BDP') is clear that where an applicant considers that a proposal cannot provide affordable housing in accordance with requirements, viability will be assessed using a viability assessment tool. It further specifies that costs associated with assessing the viability of a proposal shall be borne by the applicant. These costs would be additional to the planning application fee which would apply whether or not viability was in question.
8. An applicant could reasonably be expected to be aware of requirements in the development plan, particularly where professionally represented as here. Moreover, I have been provided with copies of emails from the Council to the appellant in January 2024 specifically referring to requirements for affordable housing and open space contributions, and advising that any shortfall in affordable housing provision from that required by the BDP would need to be supported by a viability appraisal. The appellant was further advised that they would be expected to cover the cost of review of any appraisal submitted.
9. The Council had clearly informed the appellant of the requirement for viability assessment and for the costs of review to be covered. Whether or not the Council specifically raised the matter of viability again following feedback from the Design and Conservation panel and the submission of amended plans, the appellant could therefore reasonably have anticipated that viability would be relevant to the assessment of the application. Further, it would be reasonable for the appellant to anticipate reasons for refusal if requirements highlighted by the Council had not been satisfactorily addressed prior to a decision, even if proposed reasons for refusal were not specifically set out in correspondence.
10. The Council is not obliged to 'chase' an applicant for information to support their case, and I have not been provided with any explanation of compelling grounds that might have prevented the appellant providing viability information, which the Council had highlighted would be required, prior to determination of the planning application.
11. The PPG indicates that only supplying relevant information at appeal when it was requested, but not provided, at application stage is an example of behaviour that may give rise to an award of costs against an appellant. From the information before me, the third and fourth reasons for refusal would have been avoided had the appellant provided the requested viability information at application stage and in my view, the submission of the FVA at the appeal stage, when the requirement for such information was raised by the Council at the application stage, constitutes unreasonable behaviour.
12. Furthermore, it is important for the Council to review viability information in order to ensure that conclusions are robust. This would be the case irrespective of the author of an appraisal or any reference to published guidance, and having regard to the nature and extent of the detail in the FVA, I consider it reasonable for the Council to seek specialist professional expertise that may not be available in-house. Whether independent or in-house though, there would be a cost associated with the provision of expert review and the delay in the submission of viability information until the appeal stage has meant that the Council was unable to directly require the appellant to cover the cost as

- would be standard at application stage in accordance with the terms of BDP Policy TP31. Instead, the Council has had to bear the cost of the review itself.
13. The timing of the submission of the FVA has therefore led the Council to incur expense in the appeal process associated with the review of the information that would not otherwise have been necessary.
 14. In addition, the appeal was initially allocated to be determined under the hearing procedure. However, a key factor in this decision was the potential need for questioning to test evidence and come to a view on viability matters given the lack of an agreed position between the main parties. Indeed, following the Council's review of the FVA and withdrawal of the third and fourth reasons for refusal and having regard to comments by both main parties on the procedure, the parties were informed that the remaining issues could be clearly understood from written submissions and a site inspection. A hearing was no longer appropriate, and the procedure was accordingly changed to written representations. On that basis, the appeal would likely have initially been allocated to be determined under the written representations procedure had the appellant submitted the requested information during the application process to enable viability matters to be settled prior to the Council's decision.
 15. Even under the written representations procedure, the Council would have been likely to undertake further work to inform their case. However, there would have been no requirement to make administrative arrangements for the hearing involving tasks such as booking rooms, liaison over dates and securing approval for spending in respect of attendance at the hearing. These tasks are unlikely to have occupied a large amount of time, but would nevertheless use Council resources and would not have been necessary had the appeal been proceeding by written representations from the start. I therefore consider the costs associated with making administrative arrangements for the hearing were wasted and were directly caused by the appellant's unreasonable behaviour in delaying the submission of viability information.
 16. For these reasons, I find that unreasonable behaviour by the appellant resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

17. 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 Bournville Land Ltd shall pay to Birmingham City Council the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in respect of the review of the submitted Financial Viability Assessment and making administrative arrangements for the hearing.
18. Birmingham City Council is now invited to submit to Bournville Land Ltd, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

J Bowyer

INSPECTOR