



Costs Decisions

Hearing Held on 4 March 2025

Site visit made on 4 March 2025

by Mr Cullum Parker BA(Hons) PGCert MA FRGS MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 12th March 2025

Costs application A in relation to Appeal Ref: APP/C3810/W/24/3354570 (Former) Travis Perkins, The Causeway, Arundel, West Sussex BN18 9JL

- The application is made under the Town and Country Planning Act 1990(TCPA), sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Birchside Developments Ltd for a partial award of costs against Arun District Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for a *Change of use of Engine Shed (Listed Grade II) to provide 6 residential units, and to construct one block of 15 units and one block of 6 units, associated parking, landscaping and bin storage.*
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Costs application B in relation to Appeal Ref: APP/C3810/Y/24/3354700 (Former) Travis Perkins, The Causeway, Arundel, West Sussex BN18 9JL

- The application is made under the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 89 and Schedule 3, and the Local Government Act 1972, section 250(5).
 - The application is made by Birchside Developments Ltd for a full award of costs against Arun District Council.
 - The hearing was against the refusal of listed building consent for *A change of use and alterations to former Engine Shed (Listed Grade II) to provide 6 residential units.*
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Decisions

Application A

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

Application B

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

Procedural Matters

3. This costs decisions letter considers costs applications for two appeals which are related. Costs Application A relates to an application for partial costs in relation to an appeal for planning permission under s78 TCPA.
4. Costs Application B related to an application for full costs in relation to an appeal seeking listed building consent for one of the buildings on the above appeal site, that is a Grade II Listed Building.

The submissions for Birchside Developments Limited

5. The applications were made in writing before the Hearing opened. Following the Council's written response, the Applicant provided oral final comments.
6. A partial award of costs is sought in relation to Application A in respect of the matters of heritage, sequential testing, surface water drainage, viability/affordable housing, and the tilted balance.
7. A full award of costs is sought for Application B. Put simply, the Applicant feels that the matter could have been resolved either at the time the decision was made (if the Council's heritage adviser had been able to provide detailed comments to the Council's Planning Officer), or prior to the hearing taking place by the Council agreeing the Rev D plans as that for which listed building consent and planning permission was sought for and thus obviate the need for a Hearing.

The response by Arun District Council

8. The Council provided a rebuttal in writing at the Hearing, which refuted the claims of the Applicant.

Reasons

9. The national Planning Practice Guidance (the 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.

Heritage (A & B)

10. In terms of heritage matters for both Applications A and B, the Rev D plans were submitted prior to the determination, and refusal, of both the planning and listed building consent applications. The Council indicate in their rebuttal that the newer set of plans (Rev D) were not received prior to a decision¹. The Council's Decision Notices are dated 13 May 2023. In the Council's Statement of Case relating to LY/12/23/L, it indicates at paragraph 5.4, that:

'Further comments were received following a revision to the plans (Rev C) which echoed these points. Subsequent Amended plans (Rev D) were submitted however no additional comments were received and in the absence of these, the application was determined based on the previous plans that had been reviewed as it could not be determined at the time whether these were sufficient to overcome the concerns raised.'

11. It appears clear from this statement that the Council had the Rev D plans before them, and rather it was a matter of internal consultation responses not being received that caused the Council to revert to the Rev C plans in determining the appeal schemes. I am reinforced in this logic, given that the Council's case, sustained throughout its defence or the reasons for refusal, was that it was up to the appointed person as to whether or not the Rev D plans were accepted or not.
12. I accept that there was scope for the appointed person to determine whether or not the Rev D plans were accepted and used as part of the appeal

¹ Council's Rebuttal, Paragraph 1.6

determination. Such acceptance was subject to natural justice and principals such as those set out in *Wheatcroft*. These were fulfilled here, given that at the Hearing, the Council confirmed that the Rev D plans had been available for public viewing on their website for a number of months. It is also clear in the written submissions for the Hearing that the Rev D plans were an important element to the determination of the schemes; this would have enabled interested parties to have commented on these drawings.

13. It was not unreasonable for the Council to have refused the proposal on heritage grounds. The issue on this matter is that the Council continued to pursue and defend the reasons for refusal on the basis of the Rev C drawings. Whilst they pointed out that the scheme was acceptable on heritage grounds when the Rev D plans were considered, little evidence was provided that reasoned why these plans should not be accepted. Instead the Council maintained its objection to the scheme on heritage grounds when its own professional heritage expert had, in essence, withdrawn their objection to the scheme due to the Rev D plans.
14. As such, I find that on heritage matters, the Council did act unreasonably. Rather than agreeing common ground and, in essence 'withdrawing' its reasons for refusal on heritage, or conversely, explaining why the Rev D plans should not be accepted, the Council demonstrated unreasonable behaviour.
15. Furthermore, were such actions to have occurred, and at an earlier stage, it is highly likely that the Hearing relating to Listed Building Consent (Application B here) could have been avoided altogether. In relation to heritage matters, whilst this did not take up any significant portion of the Hearing time itself, the preparation for dealing with such matters and then heritage experts attending the Hearing, represent wasted expense.

Sequential Testing

16. In terms of the sequential test, the Guidance is clear in that the appropriate search area is to be set by the planning authority. Whilst I note the Applicant's arguments in respect of the need for consistency in the application of planning policy and guidance, the Council had indicated for some time that it sought flood risk information that included the Arundel and Ford parishes.
17. Whilst the reasons for these areas and not others being included could have been clearer, it was not unreasonable for the Council, acting in its capacity as the Local Planning Authority, to have suggested a search area which was wider than that used by the Applicant's flood risk experts. Indeed, such a position is set out in the Guidance.
18. I do not, therefore, find that unreasonable behaviour was demonstrated in respect of this matter of the costs application.

Surface Water drainage

19. With regard to surface water drainage, on the 25 February 2025, the Local Lead Flood Authority (LLFA), West Sussex County Council, withdrew its objections to the scheme in relation to surface water drainage, subject to the use of planning conditions. The Applicant considers that had the Council shared the response from the Environment Agency (EA), made in November 2024, the LLFA would have likely withdrawn its objections to the scheme

earlier, and thus removed the need for this issue to be considered at the Hearing.

20. However, an email has been provided in Appendix B of the Council's rebuttal. This indicates that on 25 November 2024, the LLFA saw a copy of the representation from the EA; indicating that the LLFA would be providing a response shortly. It was not until 25 February 2025 that the LLFA provided a response that the updated Drainage Strategy Report adequately addressed the LLFA concerns.
21. Indeed, in that same appendix, there is an email where the LLFA provides a response on 18 February 2025 where it states *'I've worked with appellants drainage engineer to resolve our concerns and the drainage strategy is now at a point where we can recommend conditions to inspector. What's the next step-writing letter to PINS with suggested condition wording?'*
22. The delay in the LLFA providing a response that overcame the reason for refusal cannot be laid at the door of the Council. It is clear that it was not until 18 February 2025 the LLFA indicated to the Council that surface water drainage matters could be addressed by conditions; – though these were not provided by the LLFA until 25 February 2025. I appreciate that a week before the Hearing opened is rather late in the overall process. However, this information was in the public realm at the time the Hearing opened. Furthermore, it was not until 25 February 2025 the LLFA formally withdrew its objections to the scheme.
23. I do not find that Arun District Council acted unreasonably in terms of seeking to find common ground with the Applicant in respect of surface water drainage matters. The delay, such as it was, arose from the activities of the LLFA. In any case, the Applicant would have needed to have provided the updated Drainage Strategy Report in order to allow the imposition of the conditions and address the LLFA's concerns in respect of this matter.

Viability/affordable housing

24. The appeal was submitted on 28 November 2024. The Applicant submitted a viability report as part of its application. The Council indicated that it wanted the viability report to be independently assessed, and the Applicant had agreed to contribute to the cost of this.
25. On 27 February 2025, without any prior indication to myself or the Applicant, the Council submitted a report, undertaken by an independent party. Put simply, this found the findings of the Applicant's viability report was acceptable. That being the scheme could not provide any form or contribution towards affordable housing.
26. The Council did not provide any other justification in its rebuttal for why its viability review report was not undertaken earlier. The application was made in December 2023, it was determined in May 2024; a period of 5-6 months. I appreciate that the Council may have been reluctant to seek an independent assessment of the viability report given the costs involved and that the scheme was potentially to be refused on seven other grounds.
27. However, the Applicant indicated that they would contribute to an independent assessment of the viability report. Moreover, even between November 2024 and February 2025 the Council does not appear to have informed either myself as the appointed Planning Inspector or the Applicant that it was having

this review done. Earlier notification of this activity being undertaken would have enabled the main parties to have narrowed the issues subject of the appeal.

28. There is little before me to indicate why this assessment could not have been undertaken earlier. Nor that this report would have been anything different than the Council using its own sourced independent experts, with the costs covered by the Applicant. This is a common approach adopted in such situations, so that the Applicant can have independent validation of its viability report, and the Council is able to satisfy itself and local residents as to why this scheme cannot provide affordable housing.
29. In the absence of any justification as to why the Applicant's offer of an independent review was not taken up, or as to why a review of the Applicant's viability report was not undertaken earlier in the process, I find that the Council did act unreasonably. This is unreasonable behaviour which, had it not occurred, is highly likely to have resulted in this matter no longer requiring preparation for and time at the Hearing, and therefore avoided unnecessary costs involved. Its withdrawal as a contested matter shortly before the Hearing opened would not have made much difference to the already wasted expense incurred in preparing for it.

Application of the tilted balance

30. In terms of the tilted balance – set out in Paragraph 11 of the *National Planning Policy Framework* - it was and remained common ground between the main parties that it applied to the appeal scheme. The dispute revolved around the application of Footnote 7. This was because the Council considered that the heritage and flooding issues presented assets of particular importance that engaged part i. of Paragraph 11 (d).
31. The Applicant argues, in an approach latterly adopted in the planning appeal decision, that with heritage and flooding matters no longer being contested (subject to the reasoning set out on the Sequential and Exception tests), it is Paragraph 11 (d) part ii. that should be applied. Moreover, when that is applied, the scheme falls to being granted planning permission.
32. I note the Applicant's point. However, the Council did not rescind its concerns over the appropriate search area for the Sequential Test, for example; as this remained an issue at the application and appeal stages. Following such a position, which the Council indicated followed the Guidance's approach, it was entirely reasonable for the Council to have applied and followed an assessment in line with Footnote 7 of the Framework. If the Council had conceded that the Sequential Test was passed against the parameters it had defined in line with the Guidance, then it would have been unreasonable in not applying Paragraph 11 (d) ii of the Framework. I note that heritage matters were addressed successfully upon the adopted of the Rev D plans. However, this does not alter the fact that an objection remained from the Council on the basis of flood risk in terms of the Sequential Test.
33. In applying national planning policy in a proportionate manner, I find that the Council did not act unreasonably. Even if the Council had conceded on the matters related to Footnote 7, the tilted balance would still need to have been applied – albeit part ii. rather than i.. However, in the absence of the

Sequential Test matter being withdrawn by the Council, the application of part ii. and Footnote 7 was reasonable.

34. I acknowledge that the appeal decision found in the Applicant's favour in respect of the Sequential and Exception Tests. However, that was on the basis of the Inspector, acting as the planning authority at the appeal stage, of agreeing with the Applicant's appropriate search area. For the reasons given therein, that was an acceptable approach in those circumstances.

Conclusions

Application A

35. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated and that a partial award of costs is justified. The partial award of costs is related to the matters of heritage and viability in relation to the planning permission appeal reference 3354570.

Application B

36. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated and that a full award of costs is justified in relation to the listed building consent appeal reference 3354700.

Costs Orders

Order A - Application A

37. 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 Arun District Council shall pay to Birchside Developments Ltd, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in heritage and viability matters; such costs to be assessed in the Senior Courts Costs Office if not agreed.
38. The applicant is now invited to submit to Arun District 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.

Order B - Application B

39. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 3 of the Planning (Listed Buildings and Conservation Areas) Act 1990, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Arun District Council shall pay to Birchside Developments Ltd, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
40. The applicant is now invited to submit to Arun District 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.

C Parker INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Scott Stemp

Counsel, instructed by Susan Leeson

Susan Leeson, BSc(Hons) M.Phil (TP)

Planning Consultant

Mark Nicholls

Appellant, Birchside Development Ltd

Euan Clark, BA(HHons) BArch MA RIBA ARB

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Mark Sanderson, BA (Hons) MA IHBC

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Keith Miller, BA (Hons), MALA, CMLI

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Michael Duff, Beng(Hons) CEng MICE

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Peter Griffiths, CIHCM Level 4 Diploma Housing

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Anita Gardner, BSc (Hons) BTP

Smith Simmons & Partners

FOR THE LOCAL PLANNING AUTHORITY:

Amber Willard, MRTPI

Principal Planning Officer

Simon Davis

Principal Planning Officer

INTERESTED PERSONS:

Two members of the public attended the Hearing to observe proceedings.