The Planning Inspectorate

Costs Decision

Inquiry held on 4 February 2020
Site visit made on 5 February 2020

by Martin Whitehead LLB BSc(Hons) CEng MICE

an Inspector appointed by the Secretary of State

Decision date: 2nd March 2020

Costs application in relation to Appeal Ref: APP/V2255/W/19/3238171
Land west of Barton Hill Drive, Minster-on-sea, Kent ME12 3LZ

- 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 SW Attwood & Partners for a full award of costs against Swale Borough Council.
- The Inquiry was in connection with an appeal against the refusal of outline planning permission for the development of up to 700 dwellings and all necessary supporting infrastructure including land for the provision of a convenience store / community facility, internal access roads, footpaths, cycleways and parking, open space, play areas and landscaping, drainage, utilities and service infrastructure works.

Decision

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

Preamble

2. The application is made based on the guidance given in the national Planning Practice Guidance (PPG).

Summary of the written submissions for SW Attwood & Partners[1]

3. In support of the claim for a full award of costs, the appellant cited both procedural and substantive unreasonable behaviour by the Council. The Council acted unreasonably in imposing the reason for refusal based on the development not providing any affordable housing on a number of the grounds identified in the PPG, including a '*failure to provide evidence to substantiate each reason for refusal*' and '*not reviewing their case promptly following the lodging of an appeal against refusal of planning permission'*. Furthermore, it had no answer to the fact that policy required 0% affordable housing in this location.

4. The highways reason for refusal was withdrawn following a meeting on 27 January 2020. The basis for the withdrawal was that the appellant agreed to condition 19 and agreed to make a further contribution of £20,000 by way of traffic calming on Darlington Drive / Parsonage Chase. This behaviour was unreasonable by refusing planning permission on a planning ground capable of being dealt with by conditions or planning obligation.

[1] Documents C1: Application for costs, and C3: Reply to the Council's response, listed in the appeal decision letter

5. The issue of climate change was never raised as a reason for refusal, but it was raised through the Council's Statement of Case. Despite the Climate Change Emergency (CCE) declaration in June 2019, the Committee at the meeting on 23 July 2019 failed to identify climate change as a reason for refusal; nor was it added to the Decision Notice when that was issued in August 2019. It was unreasonable for the Council to seek to impose conditions which had no policy basis, either within the National Planning Policy Framework (Framework), PPG or, most importantly, the development plan.

6. The appellant incurred costs by reason of the unreasonable failure of the Council to adhere to timescales within the PINS guidance in relation to the provision of Statements of Common Ground (SoCGs) and to produce a full Statement of Case. The appellant was left substantially in the dark as to its case on each of the reasons for refusal, and incurred costs in seeking to second guess what lay behind the reasons for refusal. This conduct was unreasonable.

7. In terms of substantive unreasonable behaviour, two officers' reports recommended the grant of planning permission. The Council failed to take the balancing exercise in the Framework properly and its evidence of Ms Rouse and Mr Friend, on heritage and landscape, was based on vague and generalised assertions of harm. The Council failed to substantiate its case on the appeal. Mr Pestell failed to undertake the correct balancing exercise and his judgment on the planning balancing exercise was flawed. No expert witness could have professionally concluded that the harm significantly and demonstrably outweighed the benefits, even if he mistakenly believed the benefit was limited to an extra 80 additional market houses. The appeal scheme should never have been refused planning permission.

8. The unreasonable behaviour of the Council has caused the appellant to incur expense unnecessarily. The Council should therefore pay all the appellant's costs of the appeal.

Summary of the written response for Swale Borough Council[2]

9. The Council does not accept that it has behaved unreasonably and has submitted evidence to substantiate the reasons for refusal. Even if the Inspector should decide that permission should be granted on appeal, the Council considers that it has been reasonable for it to advance the case that it has and in the way that it has.

10. The reason for refusal on affordable housing was not pursued at the Inquiry. The appellant raised the issue of viability in its proof of evidence. At the Case Management Conference (CMC) the Council proposed to deal with affordable housing under the planning topic. The matter that the appeal scheme cannot make any contribution towards affordable housing was already agreed before the Council signed the topic specific SoCG on the third day of the Inquiry. No time was spent on this topic at the Inquiry and no time was wasted on it. It was not unreasonable behaviour, and considerable time was saved at the Inquiry in any event.

11. The Council provided expert evidence in support of the highways reason for refusal and justified why the Section 106 contribution and Grampian condition were required. Mitigation was identified, and the necessary contribution was

[2] Document C2: Response to the application for costs, listed in the appeal decision letter

agreed by the appellant, the local highway authority (Kent County Council) and the local planning authority (the Council). The appellant has not argued that it is not required. There was a substantial highways issue to resolve, which was the subject of detailed and substantial evidence. There has been no unreasonable behaviour, and no costs have been wasted.

12. It was agreed that climate change was a material planning consideration. The CCE indicates that development plan policies should be applied differently. At the Inquiry there was a reasonable disagreement over what conditions would be necessary and reasonable to address this matter. There has been no unreasonable behaviour.

13. The SoCGs on the different topics have proved useful and have saved considerable time at the Inquiry. If they were 'late' they have not caused unnecessary costs and expense. The Council's Statement of Case was supplemented following the CMC both on the climate change issue and more generally so that the appellant did know the case it had to meet by 13 December at the latest. The reasons for refusal are fairly fulsome and identify the relevant points, and the relevant policies, on landscape, highways and listed building matters.

14. In terms of substantive unreasonable behaviour, the planning witnesses have identified the correct planning tests about the tilted balance, and the normal balance for the heritage issues. The area of disagreement has been consistently set out in the draft and final versions of the SoCG. The opinions of both the Council's landscape and heritage witnesses were reasonable and soundly based and explained. These are matters of professional opinion. The Council has provided evidence to substantiate the remaining reasons for refusal, and why the appeal scheme should be refused.

Reasons

15. Irrespective of the outcome of the appeal, costs may only 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.

16. The Council refused planning permission for 4 reasons. The third reason for refusal on grounds of affordable housing contribution was withdrawn, with the Council suggesting that it informed the appellant on 18 December. However, this does not appear to me to have been conclusive as the Council pursued this matter with regard to the Section 106 planning obligation contributions. In this respect the appellant's evidence on viability that it provided for the Inquiry could have been avoided, even though the Council has claimed that it was related to the level of secondary education contributions. Therefore, I find that the Council acted unreasonably in refusing planning permission for this reason, which clearly was not supported by the evidence or development plan policies, and failing to produce evidence to substantiate this reason for refusal. As a result, the appellant incurred unnecessary expense in its preparation of evidence on affordable housing and viability for the Inquiry.

17. In terms of the fourth reason for refusal on highway grounds, the Council only withdrew it following a meeting on 27 January 2020. This was based on agreement to a planning condition and a planning obligation to secure mitigation. Kent County Council as the local highway authority had not supported the reason for refusal and, although it agreed to the mitigation

measures, it did not object to the proposal on highway grounds. As such, the Council had gone against the expert advice of the local highway authority and its own planning officers, who recommended the grant of planning permission. Although it provided expert evidence to support this reason for refusal, this evidence was not examined at the Inquiry. In my opinion, this ground for refusal could have been resolved without the need for the appellant to provide evidence to contest it at the Inquiry and therefore the appellant has incurred unnecessary expense in providing this evidence.

18. With regard to climate change, although it was not given as a reason for refusal, the Council did raise it as a matter of concern in its Statement of Case and at the CMC. It did not pursue this matter as a reason for refusal but did call an expert witness at the Inquiry to support its proposed conditions to address this matter. Although the appellant has produced evidence for the Inquiry in this regard, it did not call an expert witness and I do not consider that the Council acted unreasonably in raising this matter, given the government's stance and development plan policies that deal with it. Whilst I have not agreed with the detailing of the suggested planning condition, I do not consider that the appellant has wasted any expense in dealing with this matter at the Inquiry, as it was necessary to address it by an appropriate condition.

19. The reasons for refusal on character and appearance and heritage are complete, precise, specific and relevant to the application. The Council's expert evidence on landscape, heritage and planning matters provided more than a vague and generalised assertion about the proposal's impact and were supported by objective analysis. I am satisfied that the Council has provided sufficient evidence at the Inquiry to demonstrate that it has applied the correct planning balance in determining the application.

20. Whilst I have not agreed with the weight that the Council has attached to the harm in the overall planning balance or the arguments to support the degree of harm that it has claimed that the development would cause to the landscape and listed building, I have found that the proposal would have an adverse effect on the character and appearance of the area and would fail to accord with development plan policy. As such, I do not consider it to be unreasonable to refuse outline planning permission on these grounds. Therefore, I find that the Council has not acted unreasonably in this respect.

21. The Council did not agree the SoCG or provide sufficient evidence in its Statement of Case in a timely manner. Whilst it did submit supplementary Statements of Case and agree topic based SoCGs, which were found to be useful at the Inquiry, these had not been agreed at the dates given in the timetable. However, the failure to agree the topic based SoCGs within the agreed timetable set at the CMC has not been shown to have been due entirely to the Council. Whilst I accept that the costs regime can be used to encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case, I have insufficient evidence to demonstrate that the appellant incurred additional expense directly as a result of the Council failing to agree the overall SoCG or provide a sufficiently detailed Statement of Case on time.

22. For the reasons given above, I find that the Council has not prevented or delayed development which should clearly be permitted. However, I consider that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has been demonstrated in respect of the reasons for refusal 3 and 4 on affordable housing and highways. I therefore conclude that a partial award of costs is justified in this respect.

Costs Order

23. 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 Swale Borough Council shall pay to SW Attwood & Partners, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in dealing with the appeal on the grounds of reasons for refusal 3, regarding affordable housing and viability, and 4, regarding highway and traffic impacts; such costs to be assessed in the Senior Courts Costs Office if not agreed.

24. The applicant is now invited to submit to Swale 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.

M J Whitehead

INSPECTOR