The Planning Inspectorate

Costs Decision

Inquiry held on 21, 22, 23 and 24 April 2015
Site visit made on 23 April 2015

by Brendan Lyons BArch MA MRTPI IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 1 July 2015

Costs application in relation to Appeal Ref: APP/P1045/A/14/2227116 Land at Asker Lane, Matlock, Derbyshire

- 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 Richborough Estates Partnership LLP for a full award of costs against Derbyshire Dales District Council.
- The inquiry was in connection with an appeal against the refusal of outline planning permission for residential development of up to 110 dwellings and associated open space (outline).

Decision

1. The application for a full award of costs is refused.

2. The alternative application for a partial award is allowed in part in the terms set out below.

The submissions for the appellants

3. The appellants' written application for an award of costs was submitted at the Inquiry, and was supplemented by oral submissions at the event.

4. The application seeks a full award on substantive grounds, with regard to the Council's ability to substantiate its reason for refusal of the planning application. Alternatively, a partial award is sought on procedural grounds, in respect of the Council's inclusion in its case of matters that the appellants consider went beyond the scope of the reason for refusal.

Substantive award

5. The application for a substantive award refers to paragraph 49 of the Government's Planning Practice Guidance ('PPG') on Appeals, which lists examples of types of behaviour by a local planning authority that may give rise to a substantive award. Three of these behaviours are relevant: preventing development which should clearly be permitted, acting contrary to established case law, and not determining similar cases in a consistent manner. The essence of the application is that the Council's case for refusing planning permission lacks any respectability.

6. The requirements of the balancing exercise set by paragraph 14 of the NPPF mean that permission must be granted unless any adverse impacts would significantly and demonstrably outweigh the benefits. This had been upheld in

a previous costs award for an appeal on a site at Malpas, Cheshire[1], where the Inspector found that the Council's simple balancing of harms against benefits, contrary to the advice of its officers, did not reflect the policy guidance and had been unreasonable.

7. In this case, once it had become clear that the Council no longer had a five-year land supply, the officers altered their assessment and recommended approval of the second planning application. As concluded in the Malpas case, the Council must then show reasonable grounds for taking a contrary decision.

8. In considering a separate appeal at Ashbourne[2], Council members had accepted a recommendation not to defend the case, because the original reason for refusal could no longer be sustained owing to the altered housing land supply position, and the landscape harm would not significantly and demonstrably outweigh the benefits. The same should have occurred in the present case, where the reason for refusal does not make sense in the absence of a five-year supply.

9. The officers' report on Ashbourne had explained why LP Policy SF4 was no longer up-to-date and that reliance upon it could trigger an award of costs. The Council's insistence in the present case that the policy remains applicable is contrary to well established case law, where policies of this type have been held to be out-of-date when there is no five-year supply and modest landscape harm has been found not to outweigh the benefits of increased housing provision. In the absence of an objection from the Council's landscape officers, persistence with this approach shows a failure to decide similar cases in a consistent manner.

10. Instead, the Council has sought to 'ramp up' the landscape harm. The evidence of its independent landscape witness agreed that the impact on the character of the area as a whole would be modest and that any substantial visual impact would be limited to close range views. This level of harm could not outweigh the benefits, and certainly not significantly and demonstrably.

11. The Council has ignored the conclusions of the Inspector who examined the 1998 Local Plan that the site did not contribute positively to the character and appearance of the area, and has not taken account of the site's subsequent allocation for development and resolution to grant planning permission.

Procedural award

12. The Council's behaviour has been analogous, but not identical, to examples given in paragraph 47 of the PPG.

13. Following agreement of the Statement of Common Ground, the Council's Statement went on to raise almost every issue conceivable in opposition to the appeal (including ecology, arboriculture, conservation area, urban design) and cited a host of policies not mentioned in the narrowly drawn reason for refusal. A wholly new case was put forward with regard to the ability to fit the development onto the site.

14. The appellants sought without success to persuade the consultant that this was unreasonable. It was only after the appellants had substantially prepared their

[1] Appeal Ref APP/A0665/A/13/2193956
[2] Appeal Ref APP/P1045/A/14/2218952

evidence that the Council's witness provided a Position Statement confirming that the additional matters were not to be relied on. But later evidence continued to include complaints on ecology, conservation area and infrastructure grounds, as well as introducing a new issue of lack of public open space.

15. The decision to defend an appeal is a matter of judgement for the planning authority and should not lie in the hands of a consultant. The appellants would not have submitted ecological evidence if the point had not been raised by the Council's Statement, and could have provided a Parameters Plan if asked to do so.

16. The Council's behaviour cannot be reasonable and has caused the appellants unnecessary expense in the preparation of their case and by prolonging the Inquiry.

The response by the Council

17. The Council provided a written response and both parties made further oral submissions at the event.

Substantive award

18. When the Council realised that it could no longer demonstrate a five-year housing land supply, it reappraised the reason for refusal through experienced and independent consultants. The subsequent decision to continue to defend the appeal was based on the proper and lawful application of the presumption in favour of sustainable development, as evidenced for the Inquiry by the Council's planning witness.

19. The Council's independent landscape witness formed his own judgment of potential impacts of the scheme and confirmed his willingness to defend the reason for refusal. A difference between his assessment and that of the Council's landscape officer on the second planning application does not amount to unreasonable behaviour. His evidence withstood detailed scrutiny at the Inquiry.

20. The evidence of the Council's planning witness, which was also scrutinised, fully justified the assessment of the NPPF paragraph 14 balancing exercise. The appellants acknowledge that absence of a five-year land supply does not necessarily equate to a need to grant planning permission for the appeal proposal.

21. The reason for refusal expressly relied upon the policies of the NPPF. Therefore, the approach to LP Policies SF4 and NBE8 in other cases is not relevant. The Ashbourne case was for a different proposal on a different site, but was also appraised by the Council in the light of NPPF policies following the engagement of independent consultants. Unlike in this case, the independent landscape consultant did not consider the landscape harm to be sufficient to sustain the reason for refusal.

22. It is not unreasonable to fail to give weight to a decision made 20 years ago to grant approval for development of an omission site added by the LP Inspector.

23. In a recent costs decision from Gloucestershire[3], the Inspector considered that the Council had not acted unreasonably in maintaining that they had a five-year land supply until the Inquiry had closed. The fact that the appeal was allowed did not render the Council's case unreasonable.

24. The Council's witnesses are suitably qualified professionals who have brought their own independent judgment to bear. Disagreement between rival witnesses is to be expected, but the Council's landscape evidence was clear and robust. The paragraph 14 assessment was correctly carried out, and is a matter of planning judgement. Environmental harm is not necessarily outweighed by benefits.

Procedural award

25. The Council's Statement of Case was subsequently clarified by its Position Statement, but it had earlier confirmed that reliance would only be placed on the reason for refusal.

26. The Council's concerns on ecology reflected those of interested parties and needed to be addressed in evidence to the Inquiry. Mr Williams was able to deal with urban design matters, including the issue of how design parameters would be fixed in any permission granted.

27. It has not been shown that the appellants suffered unnecessary expense.

Reasons

28. The PPG 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.

29. The appellants do not claim that the Council's original refusal was unreasonable, as there appeared at the time to be a five-year housing land supply in place. The need for the Council to review its position arose from the Inspector's interim findings on the replacement LP and its subsequent withdrawal. Following the officer recommendation of approval on the second application, I agree that it became necessary for the Council to be able to justify its continued resistance to the appeal proposal.

30. The appointment of independent consultants to represent the Council's position at appeal is not unusual in such circumstances and both witnesses have confirmed their professional assessment of the case. The judgement of the Council's own landscape and planning experts, while material, was no longer of determinative significance.

31. The case turns on the effect on character and appearance, which is a matter heavily reliant on informed judgement. I agree with the Council that the landscape evidence offered was robust and withstood cross-examination. The witness's assessment of impacts did not differ greatly from that of the appellants' expert, but it still encompassed findings of moderate-major adverse landscape impacts and major visual impacts. The appeal site has its unique characteristics in its relationship with the surrounding townscape, the presence of heritage features, and the contested degree of use by local residents. The appeal decision does not support the factors of value and rarity on which

[3] Appeal Ref APP/P1615/A/14/2220590

weight was placed, and does not endorse the overall assessment, but the evidence was not unreasonably framed.

32. The evidence of the Council's planning witness includes a balancing exercise in accordance with NPPF paragraph 14. I acknowledge, as my colleague had in the Malpas decision, that 'significantly and demonstrably' represents a high bar. In this case, a considerable degree of harm would be required to outweigh the proposal's potential benefits. The appeal decision concludes that adequate justification has not been provided. But I accept that, based on the landscape evidence, it has been possible to present a respectable argument to the contrary. The planning evidence is adequate, by a narrow margin, in showing that the Council's conclusion was not unreasonably maintained after the change in housing supply.

33. For that reason, the application for a full award of costs must be refused.

34. However, the use of independent consultants to present a case does not absolve the Council from all responsibility for the content of the argument. To be seen to behave reasonably, the Council must maintain a consistent position on the application of policy.

35. In this case, the evidence for the Council sought to maintain that LP Policies SF4 and NBE8 were not out-of-date and should attract full weight, even though the Council had conceded the opposite at two previous appeals and had more recently resolved at the Ashbourne appeal not to defend the reason for refusal as Policy SF4 was out-of-date and NBE8 could not sustain refusal on landscape grounds.

36. It is not clear whether or not the reliance on these policies in the Council's Statement of Case stemmed from the views of the consultant witnesses. But it was manifestly unreasonable for the Council to seek to take a different position on the applicability of policy in comparable appeals. While the strength of the landscape objection may have been different in the Ashbourne case, and hence the overall balance of considerations, the issue of whether a relevant housing supply policy is up to date cannot vary between different housing appeals.

37. It is rather disingenuous to imply that the issue is of little consequence as the evidence went on to assess the proposal in the terms of NPPF paragraph 14. The original reason for refusal mentioned NPPF policies but, as it also relied on up-to-date development plan policies, the balancing exercise would not have been the same. Following the acknowledgement of the altered housing land supply position, the applicability of Policies SF4 and NBE8 was critically relevant to the balance. The appellants incurred unnecessary expense in dealing with this in the preparation of their case and in exploring the matter at the Inquiry in evidence and cross-examination.

38. Other aspects of the Statement of Case clearly went beyond the terms of the reason for refusal. Although labelled by the appellants as a procedural matter, this also goes to the substance of the case. I accept that it is analogous to the matters set out in paragraph 47 of the PPG, by introducing fresh material that would prolong the proceedings, and by lack of co-operation in persisting to defend inclusion of a broad range of concerns even when the unreasonableness of this position was pointed out. The exchanges in the run-up to the submission of evidence show that the appellants suffered unnecessary expense in the preparation of their case. However, following the submission of the Council's

Position Statement on 17 March 2015, the degree of unnecessary expense was minimised.

39. Not all matters were unreasonably raised. As part of the site lies within the conservation area, and the remainder forms part of its setting, the effect on its character and appearance is a legitimate facet of the wider issue set by the reason for refusal, and its assessment a statutory requirement. The Testing Layout, which formed an important part of that assessment, was included in the evidence of Mr Carr, who was not called at the Inquiry. The Testing Layout was also useful in dispelling concern about the site's ability to accommodate the amount of proposed development. Although not explicitly raised in the reason for refusal, I consider this to be a not unreasonable concern, falling within the ambit of the character and appearance issue.

40. The addition of ecology objections was unreasonable. But I agree that the appellants would probably have needed ecological evidence in order to respond to detailed submissions by interested parties.

41. In my judgement, unnecessary expense was not incurred on these items. Therefore, the appellants' suggestion that liability for costs should extend to all matters other than character and appearance is not sustainable.

42. Unnecessary expense was incurred in the preparation of evidence up to the submission of the Council's Position Statement on the following matters, which went beyond legitimate interpretation of the reason for refusal: residential amenity; easements; internal access, parking and circulation; inconsistencies with drainage strategies. This is in addition to the unnecessary expense outlined above on the matter of Policies SF4 and NBE8.

43. I conclude that the Council has behaved unreasonably in its inconsistent application of LP Policies SF4 and NBE8 and the inclusion of these and other issues in its Statement of Case and evidence for the appeal. A partial award of costs is justified.

Costs Order

44. 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 Derbyshire Dales District Council shall pay to Richborough Estates Partnership LLP the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the preparation of evidence and time spent at the Inquiry on the matters outlined in this decision.

45. The applicant is now invited to submit to Derbyshire Dales 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. 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.

Brendan Lyons

INSPECTOR