
Costs Decision

Inquiry held on 11, 12, 13 February and 5 March 2014

Site visit made on 5 March 2014

by Brendan Lyons BArch MA MRTPI IHBC

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

Decision date: 12 June 2014

Costs application in relation to Appeal Ref: APP/H1033/A/13/2205644 Land off North Road, Glossop, Derbyshire SK13 7AX

- 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 Gladman Developments for a full award of costs against High Peak Borough Council.
 - The inquiry was in connection with an appeal against the refusal of outline planning permission for residential development of up to 150 dwellings, including 'affordable housing', highway works, public open space and associated works.
-

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 parties

3. The appellants' written application for costs was submitted during the adjournment of the Inquiry, in accordance with a previously agreed timetable. The Council's written response was also received during the adjournment.
4. At the close of the Inquiry, the appellants opted not to add to the application, but the Council made further oral submissions. The appellants then provided their written response to the Council, supplemented by brief oral submissions.
5. Following the close of the Inquiry, new planning practice guidance ('PPG') was published by the Government and much former guidance was cancelled, including DCLG Circular 03/2009 *Costs awards in appeals and other planning proceedings*. The costs application and responses were framed in the terms of the Circular. Both main parties availed of the opportunity to make written submissions on the implications for the appeal of the PPG, with the Council's including reference to the guidance on costs awards. These have been taken into account in the consideration of this costs application, which is informed by the new guidance.

Reasons

6. The PPG advises that costs may be awarded where a party to an appeal has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process¹.
7. The appellants seek a full award of costs or, in the alternative, a partial award in respect of the matter of housing land supply. The grounds for a full award are that an appeal should not have been necessary, as planning permission should have been granted on its merits, and that information was withheld.

Biodiversity

8. The main issue in the appeal related to the effect on the biodiversity interest of the site. The appeal decision concludes that there would be some residual harm to biodiversity with the proposed mitigation in place, but that this harm would not be significant enough in its own right to justify dismissal of the appeal, and would not significantly and demonstrably outweigh the benefits of the proposal, primarily in its contribution to housing need and provision of affordable housing.
9. The PPG advises that a planning authority may be at risk of an award of costs if it relies on vague, generalised or inaccurate assertions, unsupported by objective analysis. The Council's case did not fall within that description and provided a respectable basis for the authority's position. Its expert biodiversity evidence, provided by the Derbyshire Wildlife Trust ('DWT'), was thorough and comprehensive.
10. The evidence made a credible case for the value of the site. The fact that the appellants' experts took a different view does not render the Council's stance unreasonable. The Council accepted at the Inquiry that the site's lack of formal designation meant that saved Local Plan Policy OC8, cited in the reason for refusal, did not technically apply. However, the DWT assessment that the site met the criteria for designation as a Local Wildlife Site provided an important material consideration, on which the Council was entitled to place some reliance. The appellants' amendment to the original proposal to allow for retention of part of the most important area of the appeal site provides some endorsement of the Council's position.
11. The appeal decision acknowledges that the previous decision for a site at Calow, Derbyshire, was relevant in emphasising the ability for site management to change, but did not provide a strong precedent for the current appeal. National policy strongly supports the protection of valuable sites even where management cannot be enforced.
12. The Council did not fail to engage with the appellants' ecological proposals, as claimed by the appellants. The benefits of the other elements of the scheme were acknowledged but found not to outweigh the main harm. Reservations expressed by the DWT witness, and endorsed by the Council, were about the overall effectiveness of the proposed mitigation package, encompassing the size of the plots and their future management, as well as their implementation by means of a condition rather than an obligation. Although not upheld in the appeal decision, the view taken was not unreasonable.

¹ PPG Paragraph 030 Ref ID 16-030-20140306

13. Correspondence exchanged on the successor planning application, while the current appeal was in progress, gives an indication of the Council's view on how a greater part of the biodiversity interest of the site could be retained, while allowing development of the remainder of the site, consistent with the emerging Local Plan proposed allocation.
14. The Council's planning evidence seeks to balance the proposal's environmental harm against its wider social and economic benefits. The appeal decision reaches a different conclusion but the evidence provides a respectable basis for the authority's stance.
15. I conclude that the Council's evidence shows that refusal of the application on biodiversity grounds was not unreasonable. It follows that the expense of the appeal was not unnecessarily incurred.

Co-operative approach

16. The costs application also complains of lack of co-operation by the Council in the handling of the planning application. Particular concerns are raised about:
 - 1) refusal to validate the application because it was not accompanied by a full draft S106 agreement capable of being executed;
 - 2) unwillingness to provide information about the condition of the Council-owned reservoir adjoining the site;
 - 3) late transmission of the response to consultation from the Derbyshire Wildlife Trust and unwillingness to extend the time limit for the application to allow the matter to be addressed.
17. The PPG advises that costs cannot be claimed for the period during the determination of a planning application, but that all parties are expected to behave reasonably throughout the planning process. Behaviour and actions at the time of the planning application can be taken into account². However, the focus of the costs system remains on the appeal itself.
18. The requirement to provide a full draft planning obligation was published on the Council's Validation Guidance Local List. Therefore, the Council's reluctance to validate the application was in line with adopted guidance and cannot be said to be spurious. The Planning Statement submitted with the application expresses no preference for the mechanism by which affordable housing would be secured. It was not unreasonable for the Council to pursue its published standard.
19. The Council has explained that its concern related to the absence even of Heads of Terms for an obligation, to cover other topics as well as affordable housing. Some flexibility was shown by the Council in agreeing to validate the application in anticipation of receipt of Heads of Terms. But the appellants could have exercised their right to register a validation dispute that would have provided an avenue to appeal. It appears to be they who retreated from their original position rather than the Council. Having taken that decision, continued criticism of the Council's unwillingness to apply a condition for affordable housing does not appear justified.

² PPG Paragraph 033 Ref ID 16-033-20140306

20. The appellants complain of time lost, but the time period for determining the application can only begin at validation. The evidence of e-mails exchanged at the time suggests that the appellants were seeking an even earlier validation date. Had the appellants chosen to engage in pre-application discussion with the Council, as strongly encouraged by national guidance, mutual expectations could have been resolved, without delay after submission of the application.
21. The appellants' ultimate agreement to alter the planning obligation to meet the Council's concerns about timing of provision of the affordable housing suggests that these concerns were not unreasonable. By then, the appeal was well advanced and the appellants could have chosen to leave the issue in dispute, for resolution in the appeal decision.
22. Pre-application discussion with the planning authority could also have been instrumental in resolving the appellants' difficulties in gaining information about the condition of the reservoir. The appellants have confirmed that when the matter was ultimately raised with the planning case officer, she was helpful in seeking to progress a possible solution. But in the absence of any clear progress, the planning authority had little option but to give weight to the Environment Agency's objection.
23. The refusal of the application on this ground did not cause the appellants to incur costs that they were not already willing to spend during the application period. If the Council was in any way at fault in the matter, it was clearly in its role as landowner and asset manager rather than as planning authority. Any public law duty on maintenance of reservoirs must be a separate matter from the determination of planning applications. Other avenues of complaint would therefore be more appropriate than the appeals costs system.
24. The Council has explained that DWT's response to additional information was not delayed, but quickly turned round. The judgement on whether to agree an extension of time in the hope of resolving outstanding issues on an application must be weighed against the likelihood of achieving successful outcomes, in the light of demanding targets for decision making. In this case, the parties' inability to reach common ground on the biodiversity issue right through to the end of the appeal process suggests that the Council's unwillingness to allow an extension of time was not unreasonable. The appellants do not state whether efforts were made to resolve matters in the period between publication of the officer report and the committee meeting, at which time any progress could have been updated.

Housing land supply

25. The appellants raise concern that new information on housing need for the emerging Local Plan was not disclosed by the Council in negotiations on the appeal. In the light of the witness statement by the Council's solicitor, I accept that this related to very poor internal communication at the Council rather than any deliberate attempt to withhold important data. Some documents complained of, including an updated SHMA and SHLAA, were not yet published by the time of the Inquiry.
26. The very recent Court of Appeal judgement in the *Hunston* case was not reflected in the Council's original written evidence, but was acknowledged in later rebuttal evidence. The Council conceded at the Inquiry that the judgement necessitated a different approach to the calculation of its housing

- requirement. But the Council's different interpretation from the appellants' of the implications of the judgement was not unreasonable.
27. The alternative application for a partial award of costs relates to the content of rebuttal evidence submitted by the Council in respect of housing land supply.
 28. The absence of a five-year supply was common ground in the appeal. The appeal decision concludes that a precise calculation of the shortfall between requirement and supply is not necessary, but that substantial weight can be given to the matter, based on the range of figures advanced at the Inquiry. The Council's rebuttal evidence did not alter the balance of considerations.
 29. In the absence of an agreed Statement of Common Ground ('SoCG') on housing land supply, there was no firm commitment to an agreed base date, but both main parties worked to a common base of 1 October 2013. However, the appellants' original written evidence did not adhere strictly to the base date, by seeking to omit sites on which permission had lapsed since that date.
 30. During negotiation on the land supply position, the appellants commented on the prospect of the Council producing an update of the supply after exchange of written evidence, without raising any objection in principle to the reasonableness of this approach³. The only caveat was that any updated information on supply would need to be matched by updated records of completions.
 31. However, by the time the Council brought forward its list of sites granted permission from October 2013–February 2014, or with a resolution to grant, it was too late for the appellants to respond. The PPG advises that introducing fresh and substantial evidence at a late stage may result in an award of costs. In this case, the appellants chose not to respond in detail but will have incurred some lesser expense in considering the Council's case and framing a reply.
 32. The appellant's evidence explained the difficulty of seeking to include applications under consideration. This was borne out by the Council's attempt to include two sites with applications to be recommended for approval at a committee meeting in the run-up to the Inquiry. At the time, the appellants did not have access to the committee reports in order to interrogate the evidence. It transpired that only one application was approved, subject to later completion of an obligation. It was unreasonable to seek to include these sites, and the appellant incurred unnecessary expense in preparing counter-rebuttal evidence and in agreeing a supplementary SoCG.
 33. It was also unreasonable to seek to include a draft allocation⁴ that was contrary to the current adopted plan, and without explaining the site's preference over the appeal site, which had similar status. Expense was incurred in counter-rebuttal. Windfalls were also introduced. While supported by some statistical evidence on past performance, there was potential for double counting and the case for future expectation was not fully made out.
 34. I have sympathy with the Council in that they sought at an early stage to avoid the need for line-by-line examination of the claimed supply. In response to a request to the Planning Inspectorate, the parties were advised to seek to agree common ground to as great an extent as possible. The decision to persist with

³ Evidence of M Hourigan Appendix 2

⁴ Hawkshead Mill, Glossop

an adversarial approach appeared to lie with the appellants. Nevertheless, having chosen to present detailed evidence on the supply, the Council had to do so in a reasonable manner. In respect of the four issues outlined above, the effort to present the supply in the most favourable light became unreasonable.

Conclusion

35. For the reasons set out above, I conclude that it has not been shown that the Council's refusal of the planning application was unreasonable, so that the expense of an appeal could have been avoided. The Council's behaviour was not unreasonable in respect of the main issue of biodiversity or in regard to its co-operation with the appellants. Accordingly, the application for a full award of costs must be refused.
36. In respect of housing land supply, the Council's introduction of late evidence was unreasonable and caused the appellants to incur additional expense in responding to the matters of: sites granted permission after October 2013; sites recommended for approval in February 2014; inclusion of a draft allocation site; inclusion of windfalls. A partial award of costs, restricted to the response to these four items, is therefore justified.

Costs Order

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 High Peak Borough Council shall pay to Gladman Developments the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the response to aspects of rebuttal evidence on housing land supply.
38. The applicant is now invited to submit to High Peak 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. 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