



Costs Decision

Inquiry opened on 21 May 2013

Site visit made on 22 May 2013

by P J Asquith MA(Hons) MA MRTPI

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

Decision date: 17 July 2013

Costs application in relation to Appeal Ref: APP/X1735/A/13/2192777 Land north of Goldring Close and south of Beech Grove, Mengham, Hayling Island

- 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 Havant Borough Council for a partial award of costs against Tolcarne Drive Developments Ltd.
 - The Inquiry was in connection with an appeal against the refusal of planning permission for the erection of 131 dwellings with associated residential curtilages, parking and turning areas, public open space, new vehicular access from Beech Grove and new pedestrian and cycle access from St Margaret's Road.
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Decision

1. The application for an award of costs is refused.

The submissions for Havant Borough Council

2. Paragraph B13 of Circular 03/2009 indicates that for the applicant the right of appeal should be exercised in a reasonable manner, used as a last resort and with the applicant being ready to proceed with the appeal once it is submitted. An applicant is at risk of an award of costs being made against them if on the basis of available evidence the appeal or any individual ground of appeal plainly had no reasonable prospect of succeeding.
3. The applicant did not use the Council's formal pre-application service available. This is surprising considering the scale of the proposal and the constraints applicable and despite being recommended to do so by the Council. The National Planning Policy Framework (the Framework) indicates at paragraph 188 that early engagement has significant potential to improve efficiency and effectiveness of the planning application system for all parties. Good quality pre-application discussion enables better coordination between public and private resources and improved outcomes for the community. Further, paragraph 190 states that the more issues that can be resolved at the pre-application stage, the greater the benefits.
4. Although this is not a reason for costs to be awarded in itself it has resulted in an application and subsequent appeal which the Council believed had no real prospect of succeeding. This is on the basis of it being contrary to national planning policy, with inefficient work done at the correct point in the process to even attempt to adequately demonstrate sufficient material considerations to justify planning permission. The applicant made little attempt to establish a

position or enter into discussion with the Council relating to the case prior to the submission of an appeal.

Habitat mitigation

5. The applicant appeared to continually change the importance attributed to Legion Field as mitigation. The idea that this open space could be used as mitigation for impact on protected species was first brought to the Council's attention just two days prior to the delegated decision to refuse the application was issued. No further correspondence on this matter was then received until after the application was determined. The use of this space for habitat mitigation was found to be not deliverable in planning terms because of the short lease remaining on the site which is outside the Council's ownership. Its delivery would have required additional parties to the S106 Agreement. During the appeal process the apparent importance of this site as a mitigation appeared to decrease when the issues of deliverability arose.
6. The implications of the above were that significant time (and cost) from multiple officers had to be spent to pursue/address this potential mitigation measure and the subsequent discovery of the lease issue (which brought into question deliverability). This could have been avoided had the applicant properly investigated this solution prior to the appeal submission or ideally through the chargeable pre-application service. It is unreasonable for Council tax payers to incur the cost of the implication of this unreasonable behaviour.

Housing land supply

7. The application and subsequent appeal were submitted despite clearly being contrary to the adopted Local Plan (both current and emerging). The applicant's case at both stages was therefore largely reliant on the Council's land supply data and the applicant's ability to undermine it. Therefore it is surprising that no dialogue was entered into with the Council relating to the five-year supply position or the position with individual sites featuring in the Council's five-year land supply data either before the application or after submitting the appeal. This is evident from the following:
 - There was no information or analysis relating to the Council's five-year land supply position submitted as part of the application.
 - No clear dialogue was set up or sought with the Council relating to the five-year land supply prior to submitting the appeal.
 - The applicant appeared not to have been ready to proceed with the appeal at the point it was submitted; analysis relating to the Council's five-year housing supply position was clearly undertaken post-submission of the appeal and in the days leading up to the submission of proofs of evidence. The lack of appropriate preparation and analysis prior to submission of the appeal was evident from factually incorrect and outdated information referred to in the applicant's evidence and the inability to establish common ground on the matter. This deflected Council officers' time in preparing the Council's own response to the appeal and required time to be expended in producing information to assist the applicant. This would have been avoided had appropriate pre-application dialogue been entered into.
 - The Council's 2012 Annual Monitoring report (used as a basis for the applicant's analysis of the five-year supply position) showed sufficient housing supply plus

23%. It was even more appropriate that the applicant should have engaged in discussion prior to submission of the appeal as this significant percentage buffer would have suggested that paragraph 49 of the Framework would not apply and therefore that relevant policies on the supply of housing should be considered up-to-date.

8. The implications of the above are that the submission of the appeal remains contrary to policy and this led to significant additional preparation time for the Council as officers had no specifics as to which sites forming part of housing supply were in contention. They had therefore to pre-empt and deal with the entire supply position in their preparation of proofs. This led to rushed, unnecessary and abortive work by officers, especially when coupled with a period of about two weeks when the applicant asked for this information.
9. It is clear that the principle of the development is contrary to the current and emerging Local Plan as the site is unallocated (with the exception of reserve status to just part of the site) and is outside the urban area where countryside policies apply. The key matter that then remains is whether the proposal is acceptable in relation to national policy and the Framework references to the position on five-year housing supply and whether this should result in the proposal being allowed. Therefore, as the only remaining key matter it is unreasonable behaviour for the applicant to have not properly addressed or be prepared on this matter prior to the submission of the appeal. The applicant's behaviour on this point suggests that it has tried to compile a case to justify the appeal after the appeal had been submitted, which is unreasonable.
10. The applicant produced insufficient evidence that the habitat impacts would not be unacceptable, particularly in relation to cumulative impacts. It suggested mitigation provision (at a late stage) that is uncertain in terms of delivery and it altered the importance of this provision during the appeal process, although it is acknowledged that there is a s106 Agreement that deals with mitigation.
11. The Council believes that the appeal plainly had no prospect of succeeding and significant officer time and time at the Inquiry was given over to matters that could have been resolved through more thorough investigation and timely discussion with officers into matters relating to the five-year housing supply and specific habitat mitigation.

The response by Tolcarne Drive Developments Ltd

12. The Council's claim is based on three principal grounds which are addressed in turn.

Pre-application discussions

13. The applicant's planning consultants had been in discussion with officers regarding development of the site since before the Inquiry into the Local Plan in 2002. Access issues were discussed with the County Council at that time. They continued to monitor and advise on key issues in the run-up to the application in 2012 as they were actively involved in a number of local housing cases. Therefore there was no need for pre-application advice on planning policy. The applicant's highways consultant had detailed pre-application discussions with the County Council, as highway authority, leading to its acceptance of the proposal following detailed design and a checking exercise. The applicant's ecology consultant has been in active and ongoing discussion with English Nature and the County Council's Biodiversity Unit; these were the

relevant bodies with which to be discussing these matters. The applicant complied with consultation requirements, including holding their own exhibition which Council officers did not attend. There was early engagement with all relevant experts relating to the proposals.

Habitat mitigation

14. The applicant's ecology case is quite clear that no off-site mitigation is needed. The scheme would yield benefits which would reduce effects on the nearby Special Protection Area. Off-site mitigation regarding Legion Field was raised at a late stage in the processing of the application. The Council's ecological adviser made it clear in an e-mail of 19 December 2012 that the scheme yielded benefits and it was officers not the applicant who should consider the scope for improvements to Legion Field. This repeated a stance in an earlier response asking officers to look at this. The matter was whether the footpath link to Legion Field could be improved to make sure that those in the southern part of the appeal site could easily access Legion Field. In these circumstances it was the job of the case officer to liaise on open space. What transpired was an attempt by the Council to place matters back in the applicant's court simply by referring to the lease situation at Legion Field. Such a position is ridiculous; the Council has had long-term control over the site, has managed and maintained it, invested in it and continues to do so, and it features in the Council's programmes for open space works. The Council relied on this programme to seek open space funding through the S106 Agreement.

Housing land supply

15. The bulk of the site is allocated in the Local Plan and the whole site complies with the criteria of the relevant Core Strategy policy. Whilst the site was allocated in the emerging plan when the application was prepared, the applicant simply does not need to rely on the housing land supply position for planning permission to be granted. The site is sustainable, it is Government policy to boost housing supply and housing targets are minima not maxima. There is no reason to refuse permission irrespective of the housing land supply position.
16. The Council's case is muddled to suggest that it is wrong of the applicant's witness to utilise the most up-to-date housing land supply figures. It is not normal to refer to five-year figures at the application stage. The question of land supply was raised in the applicant's statement of case and in its version of the Statement of Common Ground (SoCG). Six days prior to the deadline for the SoCG the applicant's witness confirmed with the Council's housing land supply witness that he couldn't agree matters on which she sought confirmation. The Council's witness indicated that time would need to be spent on evidence preparation rather than the SoCG. The Council agreed to a date for submission for the SoCG but couldn't keep to this.
17. The Framework requires a step change in delivery, wanting sustainable development and housing development to be boosted. The applicant's case is not reliant on housing land supply; it is simply supported by it. There has been no unreasonable behaviour on the applicant's part.

Reasons

18. Circular 03/2009 advises that, 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.

19. Paragraph B13 indicates that the right of appeal should be exercised in a reasonable manner. An appellant is at risk of an award against them if, on the basis of the available evidence, the appeal or ground of appeal plainly had no reasonable prospect of succeeding on the basis of the submitted application. This was not the case here. The applicant put together substantial evidence and mounted a respectable case with which I have agreed in allowing the appeal.
20. It is clear that the applicant was not unfamiliar with the planning background within the Borough, having been advised by consultants who had long experience of this. Active discussions had taken place with relevant consultees prior to submission of the application. In these circumstances there was no obligation for a potential applicant to have to use the formal, paid-for, pre-application service offered by the Council. It was not unreasonable for the applicant to proceed to submit their application on the basis on which they did and the advice and information received.
21. There is no reason to suppose that the applicant was not ready to proceed with the appeal once it was submitted. There might not have been a full marshalling of evidence relating to the five-year land supply situation at the time of submission but its case was not in any event predicated on the absence of such supply. It is clear that there was dialogue between the applicant's relevant consultant on this issue and the Council prior to the Inquiry and efforts made to establish common ground.
22. Given that housing land supply is not a precise science, and with matters such as establishing whether there has been a persistent under-delivery of deliverable housing land supply being debatable and lacking formal guidance, the absence of agreement on this is perhaps unsurprising; this was a matter for discussion and testing of evidence within the Inquiry. I have no reason to suppose that the applicant was not ready to proceed with the appeal once it had been submitted. No delay was occasioned in fixing a date for the Inquiry and no substantive adjournments were necessary as a result of an unready case, incomplete evidence or unprepared witnesses.
23. In respect of habitat mitigation, the applicant's case did not rely on the availability of Legion Field to provide this. The likelihood of this presently public open land remaining available appears from the evidence to remain a strong probability. Reference to this was not unreasonable particularly given the responses of the Council's ecological adviser.
24. Overall, I do not consider that the applicant behaved in an unreasonable manner in the lodging or pursuit of the appeal and this has not involved the Council in incurring or wasting expense unnecessarily. I therefore refuse the application for an award of costs.

P J Asquith

INSPECTOR