

Costs Decisions

Hearing held on 5 April 2016

Site visit made on 5 April 2016

by M C J Nunn BA BPL LLB LLM BCL MRTPI

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

Decision date: 13 April 2017

Costs application in relation to Appeal A Ref: APP/L3245/W/15/3139973 Land off Bicton Lane, Bicton, Shrewsbury, Shropshire

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Galliers Homes Ltd for a full award of costs against Shropshire Council.
 - The application Ref: 14/02239/OUT, dated 16 May 2014, was refused by notice dated 21 September 2015
 - The appeal was made against the refusal of outline planning permission for a residential development comprising 15 dwellings, estate roads and public open space.
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Costs application in relation to Appeal B Ref: APP/L3245/W/16/3141878 Land off Bicton Lane, Bicton, Shrewsbury, Shropshire

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Galliers Homes Ltd for a full award of costs against Shropshire Council.
 - The application Ref: 15/04035/FUL, dated 16 September 2015, was refused by notice dated 17 December 2015
 - The appeal was made against the refusal of planning permission for the erection of 15 dwellings, new access road, link footpath and landscaped public open space.
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Decisions

1. The application for an award of costs is allowed partially in respect of Appeal A in the terms set out below, but refused in respect of Appeal B.

Reasons

2. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of an 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. Accordingly, it is possible for costs to be awarded against the 'winning' party to an appeal. For an application for costs to succeed, an applicant will need to demonstrate clearly how any alleged unreasonable behaviour has also resulted in unnecessary or wasted expense.
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3. Although costs cannot be claimed for the period during the determination of the planning application, the PPG is clear that all parties are expected to behave reasonably throughout the planning process. Although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviour and actions at the time of the planning application can be taken into account in considering whether or not costs should be awarded.¹ Cost applications may relate to events before the appeal was brought, but costs that are unrelated to the appeal are ineligible².

Appeal A

4. The Council resolved to grant outline planning permission on 9 April 2015 at a meeting of the Planning Committee, subject to the completion of a legal agreement to secure affordable housing. The terms of the legal agreement were subsequently agreed and it was signed by the appellant on 28 July 2015, and returned to the Council on 6 August 2015 for sealing and completion. However, the Council did not complete the legal agreement, but instead put the planning application back to the Planning Committee for further consideration on 10 September 2015. At that meeting, the Planning Committee, contrary to officers' recommendation, refused permission. A refusal notice was subsequently issued on 21 September 2015.
5. The Council's reason for referring the application back to Committee was based on the view that the weight to be given to some policies in the Shropshire Site Allocations and Management of Development Plan ('the SamDev') had changed since the initial resolution to grant permission in April, and specifically that greater weight could be given to certain policies, following the publication of the Main Modifications to the SamDev. However, this notwithstanding, the officer recommendation to grant permission remained unchanged in the later September 2015 Committee Report.
6. The timeline of events is important here. The SamDev was submitted to the Planning Inspectorate for examination on 1 August 2014. Examination Hearings were held between 11 November and 18 December 2014. Publication of the Main Modifications took place for 6 weeks from 1 June 2015. The Inspector's Report was published on 30 October 2015, and the SamDev was finally adopted on 17 December 2015.
7. Hence it is clear that the only material change in circumstances between the date of the original resolution to grant permission in April 2015 and the date the application was referred back to the Planning Committee in September 2015 was that the Main Modifications had been published and consulted on. Importantly, however, the Inspector's report, including her recommendations on the Main Modifications, had not been published at that point. In the absence of the Inspector's report, the final form of the SamDev and its policies was still uncertain and unresolved at that stage.
8. The relevant legislation³ requires that applications or appeals be determined in accordance with the statutory development plan unless material considerations indicate otherwise. This is reiterated in the National Planning Policy Framework

¹ Paragraph: 033 Reference ID: 16-033-20140306

² Paragraph: 032 Reference ID: 16-032-20140306

³ Section 38(6) of the Planning and Compulsory Purchase Act 2004

- (‘the Framework’)⁴. At the time the application was first considered in April, the SamDev did not form part of the statutory development plan because it had not been adopted. That situation had not altered in September 2015, notwithstanding the publication of the Main Modifications.
9. The Framework⁵ states that decision-takers may give weight to relevant policies in emerging plans according to the stage of preparation, and that the more advanced the stage of preparation, the greater the weight that may be given. The Framework also says that when assessing the weight to be given to emerging plans, the extent to which there are unresolved objections may be considered: the less significant the unresolved objections, the greater the weight that may be given.
10. The Council notes that Policy S16.2(vi) of the SamDev was not subject to modification, although extensive modifications were proposed to Policy MD3. On this basis, it argues it was entitled to give more weight to the former policy and less to the latter. The problem with this approach is that Policy S16.2 cross refers to Policy MD3, with a clear requirement that both policies must be read and applied in conjunction with another. In these circumstances, I consider differential weighting of these policies to be inappropriate and unsatisfactory since it would result in an unbalanced and uneven approach to decision making.
11. Moreover, the April 2015 Committee Report clearly concluded that the scheme accorded with adopted Core Strategy Policy CS4⁶. The status of this Core Strategy policy did not change in the interim period to September, when the application was reconsidered. In addition, the April 2015 Report concluded that the scheme was ‘in line with emerging development plan policy’⁷. However, rather confusingly and contrary to the earlier April Report, the September 2015 Report concluded that ‘development of the proposed site would be contrary to the development plan policies for the location of housing in both adopted and emerging policy’⁸. Nonetheless, notwithstanding this latter comment, the Report still recommended permission be granted on the basis that ‘the benefits of the proposal tip the balance in favour of supporting this application’⁹. I find the Council’s approach in the two Committee Reports displays inconsistency.
12. Indeed, it is hard to see how circumstances, including the interpretation and application of policies, had altered so radically between April and September so as to justify a different outcome on the planning application. Given the overall recommendation of officers remained to grant permission for the scheme in September, it is difficult to understand why it was deemed necessary to refer the matter back to the Planning Committee at all. Although I accept that modifications had been published for consultation, I do not consider the overall status of the SamDev had changed so significantly or dramatically as to warrant, firstly, the application being referred back to the Planning Committee, nor secondly, a different decision being taken.

⁴ Paragraph 196

⁵ Paragraph 216

⁶ Paragraph 7.1

⁷ Paragraph 7.1

⁸ Paragraph 4.1

⁹ Paragraph 4.1

13. As the PPG notes, applicants are entitled to a degree of consistency in decision making¹⁰. In this case, there was a clear resolution to grant permission made in April 2015 subject to the completion of a legal agreement. The appellant had a legitimate expectation that planning permission would follow. It was incumbent on the Council to seal and complete the accompanying legal agreement as expeditiously as possible following that resolution. Referring the matter back to Planning Committee some months later and then taking a contrary decision, runs counter to the requirement to deal with cases in a consistent manner.
14. My decision was to dismiss this appeal. Thus, I have come to the same ultimate decision as the Council's Committee. However, it is important to note that my decision was made in different planning policy context, as compared to circumstances at the time of the Council's deliberations and decision. At the time of my decision, the SamDev been adopted, its policies finalised, and its full statutory status had been confirmed. This was not the case in September 2015.
15. To sum up on Appeal A, I do not find the manner in which the Council processed the application to accord with good practice, nor the reasons for referral back to Committee or the reasons for its change in position to be convincing. Notwithstanding my decision to dismiss Appeal A, I find the Council's conduct to be inconsistent and unreasonable. This has resulted in unnecessary expense for the appellant. An award of costs is therefore justified in respect of Appeal A.

Appeal B

16. The appellant's case is that Appeal B would not have been necessary if the Council had behaved reasonably in relation to Appeal A, and granted the outline application as per the Planning Committee's resolution in April 2015. Whilst this may be so, the circumstances in respect of Appeal B are significantly different.
17. The full planning application, subject of Appeal B, was submitted on 17 September 2015¹¹. However, this was *after* the Planning Committee's decision on 10 September to refuse the outline scheme¹². As a consequence, it could not have come as a surprise to the appellant that the Council would refuse this later application. Indeed, to have permitted it would have been inconsistent with its earlier decision on the outline application. As the Council notes, the appellant could have awaited the outcome of an appeal against the refusal in the first outline application before proceeding with the second full application and the additional subsequent appeal. Given my decision to dismiss Appeal B, I consider the Council's decision to refuse the second application to be justified. Furthermore, by that time, the development plan context had changed: the date of the refusal notice coincided with the adoption of the SamDev¹³.

¹⁰ Paragraph: 049 Reference ID: 16-049-20140306

¹¹ Appellant's Statement of Case, Paragraph 1.1. The planning application form is dated 16th September 2015

¹² The decision notice was not issued until 21 September 2015

¹³ 15/04035/FUL was refused on 17 December 2015, the same date as the SamDev's adoption

18. Crucially, in respect of the second application, there was no 'change in position' by the Council or inconsistency in how it dealt with the planning application. Therefore, contrary to the situation in respect of Appeal A, I find in relation to Appeal B that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has not been demonstrated and that no award of costs is justified.

Conclusion and Costs Order

19. The question that arises is whether a full or partial award of costs is justified in respect of Appeal A. The PPG is clear that some cases do not justify a full award of costs where, for example, the appeal is considered jointly with another appeal, and there is evidence in common¹⁴. In this instance, both Appeals A and B have evidence in common. Consequently, given my conclusion in respect of the Appeal B costs application, and the commonality of evidence, I do not consider a full award of costs is justified in respect of Appeal A. Nonetheless, I am satisfied that a partial award of costs is justified for the work that was required in relation to Appeal A, which was not common to Appeal B.
20. 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 Shropshire Council shall pay to Galliers Homes Ltd the costs of the appeal proceedings for work relating to Appeal A, which was not common to Appeal B.
21. The applicant is now invited to submit to Shropshire 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 Office is enclosed.

Matthew C J Nunn

INSPECTOR

¹⁴ Paragraph: 041 Reference ID: 16-041-20140306