The Planning Inspectorate

Costs Decision

Inquiry held on 27-30 June, 4th and 6 July 2023
Site visits made on 26 June and 4 July 2023

by Graham Chamberlain BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd August 2023

Costs application in relation to Appeal Ref: APP/G2245/W/23/3316398
Berkeley House, 7 Oakhill Road, Sevenoaks, Kent TN13 1NQ

- 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 Berkeley Homes (Eastern Counties) Ltd for a partial award of costs against Sevenoaks District Council.
- The appeal was against the refusal of planning permission for a development described as 'Demolition of existing building and ancillary structures and the erection of a residential apartment building (69 units) together with associated parking, basement, refuse and recycling facilities, hard and soft landscaping, and associated earthworks'.

Decision

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

Reasons

2. Irrespective of the outcome of the appeal, the Planning Practice Guidance (PPG) states that an award of costs may only be made against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.

3. In this case the allegation of unreasonable behaviour relates to procedural matters and concerns: 1) the Council's witnesses pursuing points outside the reasons for refusal and its full statement of case; and 2) the Council being obstructive in agreeing the Statement of Common Ground.

4. The PPG states that a Council is at risk of an award of costs if it does not agree a statement of common ground in a timely manner, does not agree factual matters common to witnesses of both principal parties, introduces fresh and substantial evidence at a late stage and prolongs the proceedings by introducing a new reason for refusal.

5. Article 35(1) of the Town and Country Planning Act (Development Management Procedure) (England) Order 2015 requires local planning authorities to set out the full reason for refusal on its decision notice. The purpose behind this is clear, as it allows applicants the opportunity to understand the concerns and then decide whether to abandon the project, reapply or appeal.

6. The 2000 Inquiry Rules[1] require a local planning authority to provide their full statement of case before proofs of evidence are prepared. It does not set out

[1] The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules

detailed requirements as to what a proof of evidence can include, but it is logical that proofs should flow from the statement of case, which is to contain full particulars and copies of any documents to be referred to.

7. The Procedural Guide: Planning Appeals provides further advice and explains that a statement of case must set out the planning arguments which the local planning authority is relying on. The purpose behind this is to promote discipline and fairness in the appeal process by discouraging new substantive matters being introduced through proofs.

8. In this instance, the second reason for refusal refers to significant and demonstrable tree loss. There is no direct reference to post development pressure, which is unsurprising when looking behind the reason for refusal. In this respect there is no mention of post development pressure on trees in the committee report or the minutes of the committee meeting. It is therefore reasonable to conclude that in this instance the reason for refusal was not referring to post development pressure on trees.

9. Indeed, this was not even a point raised by the Council's Arboriculturalist or during the lengthy pre application discussions. This is despite the guidance in BS 5837:2012. It was also a matter that Mr Cashman was directly instructed to address and only after his site visit. The fact that the Council did this suggests it was not a point that naturally flowed from the reason for refusal. This would probably explain why the Council's Statement of Case makes no reference to this matter and it was not raised at the case management conference either[2].

10. The concerns of the Council's witnesses in respect of post development pressure on trees was first mooted at a joint site visit with the applicant's consultants on the 11 May 2023. I have not been presented with any record of what was discussed. In response, the applicant wrote to the Council on the 24 May 2023 explaining their concerns in respect of this point and warning that they may make an application for an award of costs if it were pursued[3]. The Council wrote back on the 26 May 2023 explaining that it was going to pursue the matter, although no detail was provided as to the substance of the concern, such as the trees in question or how they might be affected. The Council also failed to acknowledge that this was a new issue.

11. If the Council were intent on pursuing the point, then it should have proactively raised this earlier, as was done with the other additional concern raised by the Council relating to the lack of a financial contribution to education infrastructure. In so doing, the Council should have provided an outline of the concerns (perhaps an addendum to the statement of case) soon after the 11 May 2023. This would have allowed the applicant's arboricultural witness time to respond in their proof and thus negate the need for a rebuttal.

12. The applicant's Statement of Case was very long and therefore I have some sympathy with the Council because in five weeks it had to digest this submission, procure experts, and provide a statement of case. This may explain why the Council's expert witnesses were unable to contribute, but it does not justify raising a new issue through its proofs of evidence. The appeal timeframes are set nationally and therefore the Council should have been

[2] Held on the 27 April 2023
[3] A point reiterated in the applicant's opening at the Inquiry

geared up to meet them. Moreover, the Council had its own in-house expertise[4] that could have assisted with drafting the Statement of Case.

13. It is therefore fair to say that post development pressure on trees, including a reference to a breach of BS5837 (which was not referenced in the Statement of Case either) was a new matter raised by the Council late on in proceedings. The Council did this through its proofs and in contravention of what the procedures, rules and guidance seek to achieve. This amounts to unreasonable behaviour. The applicant was put to the expense of addressing this matter within a rebuttal proof. There were no unreasonable costs at the inquiry itself because there was no adjournment and the applicant had time to prepare to address the point on post development pressure on trees in oral evidence, which was a matter not without merit.

14. On the other point relating to trees, the Council's reason for refusal can reasonably be interpreted as referring to all trees within the site that would be lost, including Category C trees. This is because the reference to Category A and B trees was prefaced with the term 'including'.

15. Mr Reynold's evidence went beyond the Council's case as he raised concerns about the ability to deliver a sustainable drainage system, biodiversity net gain, play space and affordable housing. He also questioned the adequacy of cycle parking, the sunlight daylight assessment, whether the frontage planting would be a benefit and the extent to which Policy EN1 would be breached.

16. However, these were not his areas of expertise, and he was clear in many respects that he did not have a detailed knowledge of the technical documents relating to them. Consequently, questions in relation to these matters would have been better directed to the Council's other witnesses, which indeed they were, and the points quickly and concisely clarified. As a result, the applicant was not put to any unreasonable expense in addressing the generally tangential points raised by Mr Reynolds that fell outside the Council's case.

17. On the other points raised by the applicant, it was perfectly acceptable for Mr Reynolds to offer his view on whether the Landscape and Townscape Assessment (LTVA) was 'best practice' as he is an expert in the field. His evidence elsewhere on the LTVA was clear, that he broadly agreed with the methodology and many of the findings. The same point applies to his comments on the design process, which is clearly a component of the Council's first reason for refusal. In this respect, the rebuttals from Mr Pullen and Mr Smith were probably unnecessary as they simply sought to address Mr Reynold's evidence, which could otherwise have been left to oral evidence.

18. Similarly, he was entitled to reach a view that the woodland walk was an urbanising feature. Indeed, that was not a new point because several interested parties had raised it in their written submissions. The incursion of the scheme into the open space was not a concern of the Council but I take no issue with Mr Reynolds raising this point because the Council were incorrect in its approach on this matter and his first duty is to the Inquiry.

19. A Statement of Common Ground (SOCG) is not legally binding but is nevertheless a very useful tool when preparing for an appeal. This is because it allows parties to identify and clarify matters that they agree and therefore by

[4] Neither the Council's in house Arboricultural Officer nor Urban Design Officer seemed to support the scheme.

extension those likely to be in dispute. This can provide focus, especially when writing proofs. The Council agreed a SOCG in a timely manner and in accordance with the timetable.

20. However, during the Case Management Conference, the applicant explained that through the process of drafting the SOCG the Council had failed to indicate whether it agreed or not with certain factual matters. The applicant had written to the Council to seek its view, as this would have focussed the content of later submissions. The points the applicant sought clarification on were relevant to the witness's preparation and many had been addressed in the committee report, so it is unclear why the Council found this taxing.

21. The belated agreement of these points in an amended SOCG, after the proofs had been submitted, could have amounted to unreasonable behaviour. However, the applicant's witnesses seem to have written their proofs on the assumption that their understanding of the matters was correct, a point that was clarified with the revised Statement of Common Ground. As a result, and on balance, the Council's actions did not result in wasted expense. In respect of Policy EN5, Mr Sperryn is entitled to change his mind on its relevance following questioning. In this respect, witnesses are encouraged to reflect on what they hear and are entitled to change their views.

22. In conclusion, the Council's pursuit of what amounted to a new 'reason for refusal' in respect of post development pressure on trees was unreasonable. This has resulted in some wasted expense, albeit narrow in scope and relating to part of a rebuttal proof prepared by Mr Forbes -Laird. Thus, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has occurred. The application for costs is therefore partially allowed.

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 Sevenoaks Council shall pay to Berkeley Homes (Eastern Counties) Ltd the costs of the appeal proceedings relating to that part of the rebuttal proof by Mr Forbes -Laird that addressed post development pressure on trees; such costs to be assessed in the Senior Courts Costs Office if not agreed.

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

Graham Chamberlain,
INSPECTOR