



Costs Decision

Inquiry held on 7 December 2011

Site visit made on 7 December 2011

by David Morgan BA MA MRTPI IHBC

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

Decision date: 1 February 2012

Costs application in relation to Appeal Ref: APP/Y3940/A/11/2156351 Land at slag Lane and Hawkeridge Road, Westbury (Vivash Park)

- 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 David Wilson Homes for a full award of costs against Wiltshire Council.
 - The inquiry was in connection with an appeal against the refusal of Council to grant planning permission for the erection of 117 dwellinghouses, public open space and associated landscaping, highways and drainable infrastructure.
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Decision

1. I allow the application for costs in the terms set out below.

The submissions for David Wilson Homes

2. The costs application was made in writing.

The response by Wiltshire Council

3. The response was made in writing.

Reasons

4. 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.
5. The Council is correct in stating that members, in taking a view of the development contrary to that of their officers, formed a different opinion on the amount of weight to be accorded the material planning considerations presented by the appellant in support of a departure from development plan policy. This is reflected in the wording of reason for refusal 3 of the decision notice. However, paragraph B20 of the Circular makes clear that where planning authorities determine not to accept the recommendations of officers, and their professional and technical advice is not followed, they will need to show reasonable planning grounds for taking such a contrary decision, and produce relevant evidence on appeal to support the decision in all respects.
6. Moreover, as paragraph B16 also makes clear, authorities will be expected to produce evidence to show why the development cannot be permitted, and that they are expected to produce evidence at appeal stage to substantiate each

reason for refusal with reference to the development plan and all other material considerations.

7. The appellant broadly accepts that the development is contrary to policies H1 and to a lesser degree C41 of the development plan, and does not fundamentally challenge this fact in evidence, instead cogently arguing that there are indeed substantive material considerations that outweigh dogmatic adherence to those policies which justify the grant of planning permission.
8. The Council do set out their case in section 5 of their Rule 6 Statement; here contravention of development plan policy is identified as key to the case. However, the substantive material considerations presented by the appellant, specifically industrial land supply, five year housing supply and national policy developments post-dating the policies of the development plan, are not meaningfully addressed. In short, the Council has failed to substantiate reason for refusal 3 of the decision notice and has presented no evidence, as anticipated by paragraph B16, necessary to provide a respectable basis for the authority's stance. On the same basis, they have not fulfilled the expectations set out in paragraph B20. Accordingly, there is strong basis for concluding that the Council has behaved unreasonably in this respect.
9. The circumstances determining the Council's withdrawal of their objection to the scheme, and their decision not to present evidence in support of the decision, are set out in the Council's proof. It is made clear that the conclusions of the Draft Wiltshire Workspace and Employment Land Review Report prepared by Roger Tym and Partners, published in November, comprehensively compromise the policy-based justification for refusal and effectively concur with and endorse the evidence of the appellant and the professional judgement of officers on the lack of justification for defending the site's industrial land designation.
10. Officers of the Council are to be commended for acting as promptly as they reasonably could in seeking a review of the case in the light of this evidence and in advising members of the changed circumstances. Indeed, it is these actions, and the prompt and affirmative response of members that are cited, in accordance with paragraph A28 of the Circular (specifically bullet point 5) as the Council's principle defence against charges of unreasonable behaviour (and so wasted expense on behalf of the appellant). Indeed, it is the case that the Council's actions have curtailed their own expenses at the Inquiry, restricting proceedings to one day and, it may also be said, those of the appellant in this respect also.
11. However, bullet point 5 of A28 is clear that mitigation of risk of costs may succeed where 'for example, an appeal or reason for refusal of planning permission is withdrawn at an early stage'. This text also refers to paragraph B4 (in this case bullet point 7) of the Circular which states that one example of unreasonable behaviour could be considered through the 'withdrawal of any reason for refusal...resulting in wasted preparatory work and/or attendance of a witness...who proves not to be required'. Although officers acted as quickly as they reasonably could, the withdrawal of the Council's reasons for refusal came four days before the end of the already extended deadline for proofs of evidence. By this stage the appellant, unclear as to the outcome of the Council's review of the case, had no choice but to progress with their preparation of evidence, already well advanced, for the Inquiry.

12. Although progressed with all haste, the actions of the Council cannot be held to have been undertaken 'at an early stage' in the process, and in any event had not been able to forestall the bulk of the work by the appellant in preparing for the Inquiry. On these clear counts therefore, the Council can be held to have acted unreasonably, resulting in unnecessary and wasted expense, as described in Circular 03/2009, on behalf of the appellant in respect of preparing for and appearing at the Inquiry. On this basis, and in light of the points set out above, a full award of costs is justified.

Costs Order

13. In exercise of my 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 powers enabling me in that behalf, I HEREBY ORDER that Wiltshire Council shall pay to David Wilson Homes the costs of the appeal proceedings, such costs to be assessed in the supreme Courts Costs Office if not agreed. The proceedings concerned an appeal more particularly described in the heading of this decision.

14. The applicant is now invited to submit to Wiltshire 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 Supreme Courts Costs Office is enclosed.

David Morgan

Inspector

