



Costs Decision

Hearing held on 26 February 2013

Site visit made on 26 February 2013

by David Wildsmith BSc(Hons) MSc CEng MICE FCIHT MRTPI

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

Decision date: 26 March 2013

Costs application in relation to Appeal Ref: APP/R0335/A/12/2181506 Beneficial House, Easthampstead Road, Bracknell, RG12 1NS

- 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 T A Fisher Developments Ltd and House of Fisher Ltd for a partial award of costs against Bracknell Forest Borough Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for the change of use of B1 (office) building, with ground floor extension and addition of third floor, to provide a 36 suite apart-hotel on first, second and third floors with reception and 2 no A1 (non-food, bulky goods) retail units at ground floor level with remodelled parking and service arrangements.
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Decision

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

The submissions for T A Fisher Developments Ltd and House of Fisher Ltd

2. The application was made in writing. It is for a partial award of costs, on the basis of unreasonable behaviour by the Council in relation to the retail reason for refusal. At the Hearing an additional, written summary of the appellants' case was submitted and the case was also elaborated on, orally. This elaboration did not materially add to the written case, but it did highlight that as the Council's concerns regarding matters of need and impact have been withdrawn late in the day, the appellants have incurred unnecessary expense in preparing to argue their case on these matters.

The response by Bracknell Forest Borough Council

3. This was also made in writing and elaborated on orally at the Hearing. In its oral comments the Council repeated its view that the Sequential Assessment had been inadequate in failing to specify why the proposed unit sizes were required and why the vacant units in the town centre would not be suitable, especially as the Framework makes no distinction between "bulky goods" operators and retailers that can operate successfully from town centres. The Council reiterated its view that different interpretations of information and guidance do not amount to unreasonable behaviour.

Reasons

4. Circular 03/2009¹ advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby

¹ Circular 03/09: Costs Awards in Appeals and other Planning Proceedings

caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

5. A Statement of Common Ground (SoCG) was agreed between the Council and the appellants very close to the start of the Hearing, with a signed version submitted at the Hearing itself. This document indicates that there is agreement between the parties regarding 4 of the 5 criteria set out in policy CS22 from the Council's Core Strategy Development Plan Document (CSDPD), dealing with out of town centre retail development. These are criteria which a proposal for development needs to comply with, for planning permission to be granted.
6. Importantly, 2 of these criteria, with which the Council now accepts there would be no conflict, directly address matters covered in its first reason for refusal. The first criterion requires that the development in question should be justified to meet an identified need, whilst the third criterion requires it to be demonstrated that the development will not have an unacceptable adverse impact on the viability and vitality of any other town centre.
7. For the first of these criteria the SoCG highlights the fact that the National Planning Policy Framework ("the Framework") does not require an Applicant to prove that there is a need in qualitative or quantitative terms for the development being proposed. It is therefore agreed that criterion (i) is not in accordance with the guidance within the Framework. Furthermore, for the third criterion of policy CS22 it is agreed that impact is not relevant in the determination of the appeal scheme as the retail element of the proposal is significantly less than the 2,500sqm figure set out in paragraph 26 of the Framework. There is no locally set threshold.
8. The Framework had been published before the planning application was submitted and should therefore have been regarded as a material consideration by the Council in the determination of the application. To some extent the Council does appear to have taken the Framework on board, as the Officers' delegated report refers to the 2,500sqm threshold and concludes that in the context of the apart-hotel an impact assessment is not required. This is stated to be because a hotel use does not fall within the definition of leisure uses detailed in the Framework.
9. However, the Council's first reason for refusal still expressed a concern that the proposed A1 retail use could have an unacceptable impact on the viability and vitality of Bracknell town centre. I share the appellants' view that as the size of the proposed units would fall well below this 2,500sqm threshold it was unreasonable of the Council to include this element within its reason for refusal, as it did not accord with the more recent guidance in the Framework.
10. Similarly, I consider that the somewhat ambiguous concern expressed in the reason for refusal regarding the need for the development, admittedly qualified by reference to the size of the units and viability justification, is also at odds with the guidance on retail assessments contained in the Framework. As the Council subsequently agreed, in the SoCG, that neither need nor impact are matters of concern in this case, I conclude that the Council acted unreasonably in including both of these matters in its reason for refusal.
11. However, in light of the lack of clarity regarding specific end-users and the absence of any formal definition of bulky goods I consider that that the Council did not act unreasonably in taking the view that a sequential approach to site selection had not been satisfactorily demonstrated. The Council's stance in this regard is supported by the fact that the 2 largest, vacant town centre sites considered in the appellants'

Sequential Assessment would have been able to satisfy the floorspace requirements of several of the operators referred to by the appellants.

12. I acknowledge that the PPS4 Practice Guidance² indicates that in many cases, developments for the sale of bulky durable goods are regarded as complementary to the role of town centre retailing and do not generate sufficient sales productivity to trade in prime town centre locations. But although this matter lends some support to the appellants' case it does not categorically indicate that bulky goods cannot be sold from town centre sites. Indeed it appears that Brighthouse, an operator dealing in bulky goods (at least in part), has subsequently occupied one of the town centre units considered unsuitable by the appellants. This lends weight to the Council's view that such units could accommodate bulky goods retailers and its concern over the adequacy of the Sequential Assessment.

Summary and conclusion

13. I have balanced the various matters in this case differently to the Council and have concluded that planning permission should be granted. But for the reasons already given I am satisfied that the Council did not behave unreasonably in taking the position it did on the adequacy of the Sequential Assessment. However, the Council's acknowledgement that the scheme is not required to demonstrate a need, and that an assessment of its likely impact on the viability and vitality of the town centre is not necessary leads me to conclude that it did act unreasonably by including these points in its reason for refusal.
14. Insofar as the appellants have therefore had to pursue these matters of need and impact at appeal, at least up to the signing of the SoCG, I consider it highly likely that wasted or unnecessary expense has been incurred. I therefore conclude that a partial award of costs is warranted in these respects.

Costs Order

15. 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 the Bracknell Forest Borough Council shall pay to T A Fisher Developments Ltd and House of Fisher Ltd the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in relation to matters relating to any assessment of the need for the retail development and its likely impact on the viability and vitality of Bracknell town centre.
16. The applicant is now invited to submit to the Bracknell Forest 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.

David Wildsmith

INSPECTOR

² The Practice Guidance to Planning Policy Statement 4 (PPS4) "Planning for Sustainable Economic Growth"