



Costs Decision

Inquiry held on 24 to 27 July and 31 July to 1 August 2012

Site visit made on 1 August 2012

by K Sheffield BA(Hons) DipTP MRTPI

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

Decision date: 27 September 2012

Costs application in relation to Appeal Ref: APP/Z1510/A/12/2171723 Former Fleetshields Site, 66 East Street, Coggeshall, Essex, CO6 1SW

- 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 East of England Co-operative Society for a partial award of costs against Braintree District Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for the demolition of existing commercial workshop buildings and redevelopment for retail store, car parking and new access.
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Decision

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

The submissions for the East of England Co-Operative Society

2. The costs application was submitted in writing for a partial award and prior notice of the application was given to the Council. In addition to the written submission the appellant indicated verbally at the Inquiry that a retail impact assessment had not been required by the Council at the pre-application stage.
3. In respect of listed buildings the appellant stated that the Council's expert witness had accepted the reason for refusal did not make reference to listed buildings as an issue. The appellant contended that any concerns regarding the effect of the development on listed buildings should be made clear in the reason for refusal and the Council should not just rely on statutory duty.
4. With regard to noise the appellant contended that it was clear from the evidence that the Council's expert witness in the initial consultation response did not seek refusal of the application but conditions in respect of noise. It was also confirmed in the Council's committee report that planning officers were in agreement.

The response by Braintree District Council

5. Whilst the Council submitted a written response to the application, it revised its submission in respect of noise which was made orally. The Council stated that it was clear from the decision notice that noise and disturbance was a reason for refusal and it was a conclusion that Council members were entitled to reach. The issue in respect of costs was therefore principally whether the decision had been justified with evidence.
6. The Council considered that its position had been made clear in the initial response on the application from its expert witness which indicated that a noise

assessment was required and that there should be no deliveries outside normal hours. This was acknowledged in the report to committee.

7. The expert witness had considered the noise assessment when it was received in June 2012 and felt unable to agree with its contents. The Council contended that the evidence given to the Inquiry by the expert witness had supported the concerns of members, was totally professional and fair, drew attention to the consequences of averaging noise level readings, and demonstrated that when looking at maxima figures there was cause for concern.
8. No unreasonable behaviour on the part of the Council had been demonstrated. Appropriate noise evidence had been produced and the noise expert for the appellant had agreed that a planning condition could only control noise to a practical extent but could not necessarily make unacceptable noise acceptable.

Reasons

9. 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 caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
10. Although the written submission for an award of costs by the appellant was only presented to the Council a short time before the application was heard, it was confirmed that the Council had been notified of a possible claim in advance of the Inquiry. In addition the grounds on which the application was to be made had been confirmed verbally to the Council the day before the application was heard. It is therefore considered that the appellant made a timely application for an award of costs.
11. The Council and the Rule 6 Party (the Coggeshall Group) were both concerned that the size of the proposed retail unit and its location on an edge of centre site would have an effect on the vitality and viability of the retail centre of Coggeshall. Whilst a retail impact assessment is a tool which is used to assess the effect a development might have on existing retail centres, it is not an automatic requirement for all planning applications for retail development.
12. The National Planning Policy Framework (the Framework) indicates that when assessing applications for retail development outside of town centres, which are not in accordance with an up-to-date development plan, an impact assessment is required if the development is over a locally set floorspace threshold. Although the Council intends to impose a locally set threshold for the submission of a retail impact assessment in a Development Plan Document, no document or draft currently exists and there is therefore no locally set threshold. In these circumstances the Framework states that the default threshold of 2,500 sq m applies. The size of the proposed development is significantly below the default threshold and there is therefore no policy requirement for the submission of a retail impact assessment.
13. The need for a retail impact assessment was not identified by officers of the Council in assessing the planning application and whilst planning authorities are not bound to accept the recommendations of officers, if the advice given is not followed, authorities need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the

¹ Communities and Local Government Circular 03/2009 *Costs Awards in Appeals and Other Planning Proceedings*

decision in all respects. The Council failed to provide substantive evidence as part of the appeal to justify the alleged need for an impact assessment as required by paragraphs B16 and B20 of the Circular.

14. The Council suggested that the appellant could have relied on the retail information on which the Council had reached its decision. However, in order to respond fully to the refusal of the application on the grounds of vitality and viability, it was not unreasonable of the appellant to instruct a retail expert.
15. Although the Council's second reason for refusal does not make specific reference to listed buildings, it does identify concern regarding the form and context of the historic terraces to the north and west of the site, which include listed buildings. In addition cited Policies RLP90 and RLP95 of the Braintree District Local Plan Review, 2005 make reference to the need to preserve local features of historic importance.
16. The reason for refusal could have been more clearly drafted by making specific reference to listed buildings. However, planning legislation places a statutory duty on the need to have regard to listed buildings. Consideration of the effect of the development on the setting of the listed buildings as well as the conservation area was therefore warranted as part of the appeal. In its appeal submission the Council identified the heritage assets, assessed their significance and analysed the design of the building and its consequences for the conservation area and the setting of the listed buildings.
17. In assessing the planning application with regard to noise, officers of the Council considered it was a matter which could be addressed by conditions. However, the conditions considered necessary required the submission of a detailed noise assessment and attenuation measures and the restriction of deliveries to between 08.00 and 18.00 hours on Monday to Saturday and none on Sundays or Bank or Public Holidays. Therefore the Council's concerns regarding noise had not been fully resolved as part of the application and would have required the submission of further detailed information before the development could proceed if the Council had granted permission.
18. Whilst it is possible to control noise by condition there is sometimes a lack of certainty in the absence of a detailed noise assessment that the level of noise generated would be acceptable or could be controlled to an acceptable level. In view of the concerns of local residents regarding noise and the officer recommendation of the need for a condition requiring a detailed noise assessment and the restriction of deliveries to a shorter time period than proposed the caution expressed by the Council in refusing the application was not unreasonable.

Conclusion

19. Whilst the Council's conduct in most respects was neither unreasonable nor contrary to the advice in Circular 03/2009, the Council failed to satisfactorily justify the need for a retail impact assessment. I therefore find that unreasonable behaviour resulting in unnecessary expense has been demonstrated and a partial award of costs is justified.

Formal decision

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 Braintree District Council shall pay to East of England Co-Operative Society, the costs of the appeal proceedings described in the heading of this decision limited to the production of the retail impact assessment and the consequent submission of evidence in this respect.

21. The applicant is now invited to submit to Braintree 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. 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.

K. Sheffield

INSPECTOR