Costs Decision

Inquiry held on 9-11 December 2008
Site visit made on 12 December 2008

by K Nield **BSc(Econ) DipTP CDipAF MRTPI**

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

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Decision date:
21 January 2009

Costs application in relation to Appeal Ref: App/Q1445/A/08/2081266
Land east of 55 Highcroft Villas, Brighton, East Sussex, BN1 5PT

- 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 Kingsbury Estate Ltd for a full award of costs against Brighton & Hove City Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for the erection of an apartment building containing 24 flats together with parking and access.

Summary of Decision: The application is allowed in the terms set out below in the Formal Decision and Costs Order.

The Submissions for the Appellant

1. The application refers to paragraphs 7, 8 and 11 of Annex 3 of Circular 8/93 and is for a full award of costs.

2. Of the 3 reasons for refusal of the application the Council must have known that Reasons 2 and 3 (in respect of nature conservation interest and the Council's requirement that all new residential development should be built to a Lifetime Homes standard and for an agreed proportion of all new dwellings to be built to wheelchair accessible standards) could have (and have) been dealt with by a condition attached to a planning permission or by Planning Obligation under Section 106 of the Town and Country Planning Act 1990 (as amended).

3. The Council's position in respect of the appeal scheme was unreasonable given the long planning history set out by the appellant's agent. That background and the way the Council dealt with the previous (outline) application[1] indicate that, notwithstanding the 2000 appeal decision to allow residential development on the site, the Council was not willing to allow the proposed residential development to proceed.

4. The appellant draws attention to the way the application was dealt with by the Council indicating that matters were raised that were ill founded and sprung on the appellant at a late stage. The whole of the background to the scheme should have been taken into account by the Council.

5. In respect of the first reason for refusal (regarding open space) no assessment had ever been undertaken by the Council identifying the site as open space that should be protected as such by policy QD20 of the adopted Brighton and Hove Local Plan (LP). In two previous Officer's reports in respect of planning

[1] Application BH2007/03333

applications on the appeal site (both post-adoption of the LP) conflict with LP policy QD20 had not been identified as a reason for refusal.

6. Reason 1 of the Council's Decision Notice required the appellant to have provided a city-wide assessment of open space, compliant to Planning Policy Guidance Note 17: *Planning for Open Space, Sport and Recreation* (PPG17), a task which the Council agreed would be onerous. That requirement of the appellant was unreasonable. It was compounded by the failure of the Council to provide any reasoned evidence as to the value of the site as open space. Mrs Thomas accepted that she had not made such an assessment and only relied on the audit produced within the appellant's evidence. That was the only evidence to the Inquiry that the site was of value.

7. However, that evidence is inadequate in that it contains several inaccuracies and it cannot constitute cogent evidence. Mr Pickup's evidence as to the low value of the open space was unchallenged. The reasons given as to the lack of assessment of the site's value by the Council was that they treat all identified open space the same, irrespective of value and that triggers an exclusion on the use of such land for alternative purposes because of what the Council claims is a shortfall of open space across the city.

8. The Council has taken a wholly unreasonable approach based on a flimsy and superficial assessment of the site and on a consultant's report[2] which does not adopt or reflect any site specific assessments in the audit of open space.

9. The Council had received a clear warning in the recent appeal decision for the Springfield Road site[3] that in the absence of a valid assessment that was compliant with PPG17, redevelopment of an open space for alternative uses was not precluded.

10. The Council has placed obstacles in the path of the application which should have been permitted and has failed to take all material considerations into account. A key consideration should have been to weigh the benefits of the proposal as a sustainable location for housing (including affordable housing for which the Council acknowledged there was a compelling need). No evidence was presented by the Council on those matters and the housing case for the appellant was not challenged.

11. In respect of housing supply the Council placed reliance on an out of date Strategic Housing Land Availability Assessment (SHLAA) as the only basis for indicating there is no need for new housing. That is unacceptable as a measure of need and the Council's reference to a current 4 year supply of housing is recognition of failure. It conflicts with paragraph 8 of Annex 3 (of Circular 8/93) that relevant national planning policy and guidance has been taken into account. It is clear in this case that the Council is unable to demonstrate a 5 year housing supply and therefore the presumption in favour of housing development[4] should apply. The Council has relied on a history of delivery of windfall housing sites but there is no robust evidence to the Inquiry of local

[2] Space, Sport and Recreation Study- Brighton and Hove City Council – A draft report by PMP
[3] Ref: APP/Q1445/A/07/2047264, dated 20 March 2008
[4] Planning Policy Statement 3: *Housing* – Paragraph 71

circumstances that would prevent specific housing sites being identified to comply with PPS3[5].

12. In conclusion the appellant indicates that the appeal was unnecessary and, consequently, the costs associated with it were unnecessary.

The Response by the Council

13. The Council disagrees with the appellant's case for an award of costs.

14. In respect of the matters dealt with in Reasons 2 and 3 of the Council's Decision Notice the Council considers that the appellant's agent had adequate time to overcome the Council's objections but did not.

15. The appellant's agent had access to the Council's housing policies and the previous appeal decision but did not identify a site for translocation of the slow-worms. Although the first reason for refusal is still outstanding agreement with the appellant has now been reached in respect of Reasons 2 and 3.

16. In addition the content of the section 106 Obligation is not agreed by the Council and the appellant has refused to fulfil the Council's requirements in respect of the provision of affordable housing. The outstanding matters in that regard could have been confirmed by the appellant before or during the Inquiry.

17. The Council is required to produce substantial evidence to substantiate its refusal of planning permission and its case (in respect of Reason 1) is based upon the scheme not complying with LP policy QD20 and the requirements of PPG17.

18. The appellant acknowledged that the Council has produced evidence but the outstanding issue to the Council is a consideration as to whether the site is open space. The Council indicates that it was reasonable to refuse the application as it was unacceptable in principle assessed against PPG17.

19. The Council has produced evidence as to why the development could not be permitted and in that regard it is clear that it conflicts with LP policy QD20 and PPG17. Mrs Thomas, cross-examined by Mr Clay, indicated that the site is open space and has value to the community. The Council's evidence and that of local residents has proved its value. The Council considers the views of residents and these have provided a firm basis for the reason for refusal supported by substantial evidence. The application was determined on its planning merits.

20. The appellant indicates that no survey of open space was carried out, however, PPG17 states that applicants may wish to carry out their own assessment and may want to consult with local communities. In this case the appellant did not carry out an assessment or show evidence of consultation.

21. This application was made after previous applications so the appellant cannot claim ignorance of LP policy QD20 or PPG17 and could have raised the issue of need for the open space with Council officers.

[5] Planning Policy Statement 3: *Housing* – Paragraph 59

22. The appellant relies heavily on the previous appeal decision but it should be recognised by the appellant's agent that that planning permission from that decision had lapsed by the time the appeal application was submitted and the policy situation had changed so that the scheme should now be assessed against current development plan policy.

23. The appellant stated that the Council's evidence was based on flimsy reasons and assessments without a specific assessment of sites. However Mrs Thomas' evidence shows a shortfall of open space in Brighton. The PMP study[6] was reliable but had not been adopted by the Council. The audit carried out by the Council did include the appeal site as open space.

24. The appellant indicated that the Council had not been prepared to let the application succeed. The Council contends that its determination of the application was based on sound planning grounds and was not dictated by ulterior motives and was not irrational.

25. The Council had a duty to examine all aspects of a scheme before determination of an application and that is what Council members did in this case. The appellant failed to prove the case for the planning merits of the site.

26. The appellant claims that the Council did not consider housing need. It is clear that the Council did not refuse the application on the basis that it conflicted with housing policy but it provided evidence[7] in the form of the SHLAA and monitoring report which revealed that the Council was meeting its housing targets. Although the appellant claims the SHLAA is out of date the Council contends it is up to date and shows how much housing is needed for Brighton and would shortly be reviewed. Council members are aware that this development would only provide 10 units of affordable housing. Housing need is for the Council to decide and where the Council decision is based on relevant planning policies there should not be grounds for an award of costs. Housing can be provided on other sites but once the open space is lost it cannot be replaced.

27. The appellant's agent did not offer an explanation of why he had not taken account of relevant policies and confirmed that he acted in the best interests of his client. The Council contends that even though the officer had not raised the issue of open space with the appellant the application could reasonably have been refused.

28. The question of operational land is not dealt with fully in the appellant's proof of evidence and there is no evidence regarding Network Rail retaining an interest in the use of the land for operational purposes. The present use of the land may be unlawful and result in litigation.

29. The Council believes it has not acted unreasonably and has provided substantial evidence in respect of the reasons for refusal. All reports requested by the appellant have been produced.

[6] *Open Space, Sport and Recreation Study* undertaken by PMP
[7] Mrs Thomas: Evidence

Conclusions

30. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

31. Annex 3 indicates (at paragraph 8) that the authority will be expected to produce evidence to substantiate each reason for refusal, by reference to the development plan and all other material considerations.

32. In respect of Reasons 2 and 3 of the Council's Decision Notice the issues could have been resolved through appropriate planning conditions if all other matters were found to be acceptable. In the event, in respect of the nature conservation interest (Reason 2) the proposed translocation of slow-worms is dealt with in the Unilateral Undertaking. In the previous appeal decision this matter had been dealt with by a condition and it should have been clear to the Council that a similar approach would be appropriate. It is unreasonable of the Council to suggest that the appellant had not suggested a suitable site for translocation when the Council is itself providing such a site. Appropriate information was before the Council to deal with this issue at the application stage.

33. In respect of Reason 1 the Council relied upon the effect of LP policy QD20 and PPG17 leading to a different consideration of housing development than had existed at the time of the 2000 appeal. To that extent I accept there had been a material change in planning policy since the previous appeal. Both LP policy QD20 and PPG17 depend to a large extent on the identification and assessment of land as open space and an understanding of its role and value to the community.

34. The Council applies a strict application of LP policy QD20 to any land it considers as open space in effect providing a complete restriction to its use for an alternative purpose whatever the merits of that might be. At the time the application was determined the Council had commenced an audit of open land but its contents and any conclusions were not in the public domain and it did not form part of any adopted or approved document of the Council. No consultation had been undertaken by the Council on the findings of the audit.

35. Nevertheless that audit is the only basis upon which the Council has determined that the land is open space and should fall for consideration within LP policy QD20. As I note in my decision there are a number of factual errors in the audit entry for the appeal site which significantly reduces the audit entry's value and the reliance that can be placed upon it. Without a PPG17 compliant audit of open space the effectiveness of LP policy QD20 is reduced. This had been clearly pointed out to the Council in the Springfield Road appeal decision[8] produced in the evidence

36. The Council did not produce the audit as evidence, nevertheless it relied upon it when produced by the appellant. The Council contended that the appellant's agent should have raised the lack of a PPG17 compliant assessment of open

[8] Appeal Ref; APP/Q1445/A/07/2047264 dated 20 March 2008 (M Pickup – Appendix 9)

space with the Council officer that he was in dialogue with and should have undertaken a city-wide survey to ascertain whether the land was surplus to requirements. The Council agreed at the Inquiry that the assessment would be a major undertaking. The Council's site assessment is dated 18 July 2007 but the existence of the audit was not made known to the appellant until after the application had been determined. Its existence was not referred to in the Officer's report to the Planning Committee in January 2008 which described the site as a private allotment site, a use ancillary to the former railway use and which had ceased over ten years previously. The site had been described by the previous Inspector in 2000 as, for the most part, former operational land but the Council has considered it as if it were a greenfield site.

37. Against the context of the site's previous planning permission for housing, the previous Inspector's conclusion that the use of the site to meet a need for allotments would not be realised and bearing in mind the private and inaccessible nature of the site to the public I consider that the Council's approach to the proposed development was both impractical and unreasonable.

38. The Council did not attach weight to the contribution the appeal scheme would make towards meeting housing supply and affordable housing in Brighton. Although the Council contended that it had adequate housing sites this depended on a continuation of windfall sites coming forward as it had in the past. No cogent evidence of an up to date five year supply of deliverable sites was provided by the Council and no robust evidence to the Inquiry of local circumstances that would prevent specific housing sites being identified to comply with PPS3. The evidence presented to the Inquiry by the Council was not up to date and the Council's assumptions regarding windfall sites have not been tested at an Examination in Public. In those circumstances I consider there was a clear need for the Council to weigh in the balance of considerations the contribution the site could make towards housing supply and the mix of dwellings. The Council's failure to consider those factors was unreasonable behaviour.

39. The Council also did not consider the contribution the scheme would make to the provision of affordable housing in the context of an accepted significant demand. Although the provision of ten affordable units would not be large against the accepted need it would make a significant local contribution. I consider that it was unreasonable for the Council not to take this factor into account in the balance of considerations.

40. In the light of the foregoing I conclude that the Council, when determining the application, failed to properly consider whether, notwithstanding any identified conflict with the development plan, material considerations nonetheless indicated a determination other than in accordance with the plan. I consider that the Council failed to produce evidence to substantiate its reasons for refusal; and that consequently the appellant was put to the expense of pursuing an appeal which should not have been necessary. I conclude that this amounted to unreasonable behaviour on the part of the Council.

Formal Decision and Costs Order

41. 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, and all other

powers enabling me in that behalf, I HEREBY ORDER that Brighton and Hove City Council shall pay to Kingsbury Estate Ltd the full costs of the appeal proceedings, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under section 78 of the Town and Country Planning Act 1990 against the refusal of planning permission for the erection of an apartment building containing 24 flats together with parking and access at land east of 55 Highcroft Villas, Brighton, East Sussex, BN1 5PT.

42. The applicant is now invited to submit to Kingsbury Estate Ltd, to whose agent 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 Court Costs Office is enclosed.

Kevin Nield

INSPECTOR