



Costs Decision

Inquiry opened on 11 September 2012

Site visit made on 18 September 2012

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: 29 October 2012

Costs application in relation to Appeal Ref: APP/Y2736/A/12/2174677 Malton Livestock Market, Horsemarket Road, Malton, North Yorkshire, YO17 7LZ

- 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 Fitzwilliam (Malton) Estates for a full award of costs against Ryedale District Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for the demolition of the existing livestock market including associated buildings and redevelopment of the site for retail with 3-storey car-parking and public square.
 - The inquiry sat for 5 days on 11-14 & 19 September 2012.
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Decision

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

The submissions for Fitzwilliam (Malton) Estates

2. A "Notice of an Intention to make an Application for an Award of Costs" was submitted in writing. This formed the basis of the costs application made at the inquiry, with the following additional points being made orally.
3. No substantial evidence has been put forward by the Council and the Council has failed to address the guidance set out in the National Planning Policy Framework ("the Framework"). It is untenable to seek to avoid the discipline set out by the Costs Circular by saying that Members have not acted unreasonably if they have acted on the advice of Council Officers. The Council can have no complaints about the application for costs regarding the misapplication of the sequential test because it was fully informed of all the relevant points in a letter from the appellant's retail advisers, dated 13 February 2012.
4. The Council did not produce any evidence relating to the appropriateness of making the proposed development conditional upon the relocation of the livestock market (LM). It is not unreasonable for people to disagree on design and layout matters relating to detailed applications, but this proposal was submitted in outline. The issue is one of process, with the contention from the Council being that insufficient information was submitted. But by the day before the Planning Committee the Design and Conservation Officer (DCO) said that all the information had been submitted, it just needed "tweaking". Comments by the appellant's witness about the coherence of the design process did not relate to the design process itself, but to the way it was interpreted by the Council. If the Council had granted a conditional approval, which the appellant subsequently challenged, it would have involved a different sort of appeal process.

The response by Ryedale District Council

5. This was also made in writing. Additional points were made orally, to the effect that the response should be read alongside the points made in the Council's closing submissions; and that although the appellant may take a different view regarding the quality of the Council's evidence, this is not sufficient reason to say the Council acted unreasonably on design grounds.

Conclusions

6. 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.
7. The Council made a number of concessions during the course of the inquiry, including the very significant admission that it misapplied the sequential test. As a result, information provided to Members of the Planning Committee was incorrect as they were wrongly advised that the Wentworth Street Car Park (WSCP) site was sequentially preferable to the LM site in PPS4¹ terms. As the methodology for undertaking a sequential assessment is set out in the still extant PPS4 Practice Guidance there can be no excuse for its incorrect interpretation and application.
8. Other aspects of the Council's first reason for refusal flow from this misapplication of the sequential test and compound the errors made. These include the fact that tests of availability, suitability and viability were applied to the LM site and the appeal proposal when they should, instead, have been used to check whether any other site was sequentially preferable to the appeal site. Far from producing substantial evidence to support this first reason for refusal, the Council conceded that much of its content was unsupportable. The Council's actions relating to its pursuit of this reason for refusal therefore have to be seen as unreasonable.
9. In addition, it seems to me that the misapplication of the sequential test led directly to the Council's fourth reason for refusal. This reason did not form one of the Officers' recommendations in the LM Committee report, but was subsequently imposed by the Council's Solicitor, under delegated powers, after the Planning Committee had resolved to grant outline planning permission for the WSCP proposal. The decision to approve the WSCP scheme was taken at the same Planning Committee which refused planning permission for the appeal proposal.
10. This matter was, however, further compounded by the unsubstantiated assertion in this fourth reason for refusal that the cumulative impact of both developments proceeding would be likely to have a significant adverse impact on town centre vitality and viability. No attempt was made in the LM Committee Report to quantify or otherwise rigorously assess this potential cumulative impact, nor did the Council produce any specific evidence to support this reason for refusal at the inquiry. Again, these actions have to be viewed as unreasonable, in the context of the Costs Circular, and have clearly resulted in unnecessary or wasted expense as the appellant has had to address the consequences of these errors through the appeal process.
11. It seems to me, however, that the matters underlying the second reason for refusal fall into a somewhat different category. Some aspects of the Council's behaviour

¹ Planning Policy Statement 4 (PPS4) "Planning for Sustainable Economic Growth", the extant national guidance on such matters at the time the Committee Report was written

certainly have to be regarded as unreasonable, such as its conclusion, formed in the LM Committee Report, that the LM site should not be considered as currently available for the proposed development. This was clearly at odds with its earlier acceptance, at the time of the withdrawn 2007 planning application, that the site was available, under the normally understood definition of that word in retail planning proposals. No material change in circumstances was identified.

12. This conclusion also seems to be at odds with Officers' own assessment of the situation, set out in the LM Committee Report, which acknowledges the fact that the site owner is likely to exercise its contractual right to terminate the lease, such that the site would become vacant and available for redevelopment in October 2013. The Report also acknowledges that there are no policies within the existing development plan which allocate the LM site for continued use for this purpose. Nevertheless, it is the case that at the time the Council refused planning permission no notice to terminate the lease had been issued, and the Council could not know for certain that any such notice would be issued.
13. There is clearly a strong element of local support to retain a LM within Ryedale, with some weight of opinion expressing a preference for the LM to remain in Malton and on its current site, at least until an alternative location can be found. These are matters which the Council is actively pursuing through its emerging Local Plan Strategy (LPS), by means of policies SP7 and SP9. I have formed the view, in my appeal decision, that only limited weight can be accorded to these policies as they and/or their supporting text are subject to objection on the specific point of making development of the LM site contingent upon the relocation of the LM.
14. However, as the examination into the soundness of the LPS is still in progress, it is not possible to say what the final form of these policies will be. But the fact that such policies are being pursued provides clear substance to the Council's case in this regard, and in my opinion it is not unreasonable for the Council to seek to have some assurance that the future of a Ryedale LM, at whatever location, should be safeguarded. The Council's contention that the retention of the LM is a material consideration, relevant to this appeal, does carry some weight and there can be no real dispute that the termination of the lease arises directly from the appellant's desire to make better use of this prime edge-of-centre site.
15. Whilst I have decided that the weight to be attached to this matter in the overall planning balance is insufficient to cause me to dismiss this appeal, I consider that the Council's actions with regard to this issue should not be seen as unreasonable. Moreover, in view of the strong objections to the appeal proposal from users and operators of the LM, I consider it highly likely that any such matters would have needed to have been addressed through the appeal process, even in the absence of any opposition on the Council's part. In these circumstances, and notwithstanding the absence of any substantial evidence from the interested persons opposing the proposal on this point, I am not persuaded that the inclusion of this reason for refusal has resulted in unnecessary expense for the appellant.
16. With regard to the third reason for refusal, relating to design and layout matters and the effect of the proposed development on the surrounding area and on heritage assets, I have indicated in my decision that I do not agree with the Council's view that insufficient information was submitted. But notwithstanding this matter, and the fact that the proposal was submitted in outline, a key point of difference between the parties came down to a subjective view as to whether the form and layout of the proposal, especially with regard to the scale and massing of the two larger buildings, would be acceptable.

17. The appellant's comment that the DCO's advice on the day prior to the Committee Meeting was that the proposal was acceptable, subject to "tweaking", does not accurately reflect this Officer's view. What the DCO actually said, as recorded in the email of 28 March 2012, was that overall he felt that the scheme could provide a good starting point but that it would benefit from further "tweaking". Earlier in this email the Officer comments that there are some outstanding issues that he would like to address, clarify and develop. Whilst he states that these include the multi-storey car park elevation on Newgate, and the issue of design, it is not possible to conclude that this was the sum total of his concerns.
18. Indeed I note that in the appellant's email of 16 March 2012, responding to Council comments on the Heritage Statement Addendum, matters of scale and massing were still a topic of discussion between the parties. There is nothing in the DCO's email of 28 March to suggest that these matters had been fully resolved. The DCO's suggestion that the car park elevation on Newgate "should, for example, be broken up and should reflect the changes in topography", has been responded to by the appellant commenting that this could be addressed by changes to the roof-line. Whilst I have indicated that I consider this proposed action to be adequate, it may well be that the DCO was seeking some other response.
19. Such matters are, of course, speculation, but the fact remains that the Council argued at the inquiry that the scale and massing of the two larger buildings would not be acceptable. I do not consider that the Council acted unreasonably in taking this stance, and am satisfied that there was sufficient substance to its evidence and its case for this matter to stand as a credible objection to the proposal. The fact that I have formed a different view overall, and have favoured the appellant's evidence, does not mean that the Council was unjustified in holding its position.
20. I do not consider that the Council acted unreasonably in declining to grant a conditional approval, in view of its strong opposition to the proposal on several grounds as detailed above and in my appeal decision.
21. However, my overall conclusion is that unreasonable behaviour resulting in unnecessary expense has occurred, but only in respect of the first and fourth reasons for refusal. I therefore conclude that a partial award of costs is warranted in this respect.

Formal Decision and Costs Order

22. 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 Ryedale District Council shall pay to Fitzwilliam (Malton) Estates, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in pursuing reasons for refusal 1 and 4.
23. The applicant is now invited to submit to Ryedale 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.

David Wildsmith

INSPECTOR