The Planning Inspectorate

Costs Decision

Hearing held on 8 and 9 February 2012
Site visit made on 9 February 2012

by M T O'Rourke BA (Hons) DipTP MRTPI

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

Decision date: 20 March 2012

Costs application in relation to Appeal Ref: APP/X2410/A/11/2161715 Land at Brookfield Farm, Hallfields Lane, Rothley LE7 7NF

- 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 Rothley Temple Estates Ltd and Charles Church North Midlands for a partial award of costs against Charnwood Borough Council.
- The hearing was in connection with an appeal against the refusal of planning permission for residential development of land with associated access, landscaping and open space.

Decision

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

The submissions for Rothley Temple Estates Ltd and Charles Church North Midlands

2. The costs application was submitted in writing (Documents 9 and 10). A partial award is sought for the expense in engaging the services of an education expert to prepare evidence and appear at the hearing to refute the Borough Council's (BC) second reason for refusal. This was unnecessary because there is a legal obligation to accommodate children in local schools and the children in question can be accommodated by the payment of a contribution towards the extension of schools that can reasonably be expected to serve the development. Having originally sought a contribution, this offer was then withdrawn by the County Council (CC) but subsequently a developers' contribution has been agreed and is provided for in the Unilateral Undertaking.

3. Additional points were made orally to the effect that the BC's behaviour in imposing the reason for refusal and then in persisting with it to the hearing was unreasonable. The BC had chosen to rely on the CC's second consultation reply of February 2011 but that did not recommend that permission be refused. From email exchanges in January this year, it became clear that the BC was seeking to rely on the CC to support its reason for refusal when in fact the CC was content to accept that if a contribution were made it would be able to address the need, whether at Rothley or any other school.

4. The reason for refusal is vague, incomplete and imprecise. It says residents would need to travel over 2 miles to access essential primary school education but does not say where to and the BC has provided nothing subsequently. It could have asked questions of the CC. Despite it now being known that it is likely the money would be spent at Cossington the BC has continued to maintain its objection. It has produced no evidence to show that the schools at

Mountsorrel or Cossington, both within 2 miles of the site, are unacceptable to serve the development in travel or sustainability terms other than to ask the Inspector to make the journey.

5. The reason for refusal does not mention walking distances and PPG13 and they are not mentioned in the Council's statement. The first mention of PPG13 was in a BC email to PINS on 30 January and in the response to the costs application. It is not a criticism of the scheme, rather of the CC and BC that they are unable to come up with a sensible programme to spend the S106 money that does not increase the travel distance to school. Conditions and S106 contributions have to be justified. That can only be if the money is used for the purpose asked for.

6. Substantive evidence has been produced by the appellants to show that the BC's stance is untenable both in respect of the LEA's admissions policy and the scope for extension at Rothley. Unreasonable behaviour has been demonstrated in terms of B16, B17 and B18 of the Circular. As the reason for refusal was substandard, all the costs of the education witness are sought.

The response by Charnwood Borough Council

7. This was also made in writing (Document 11) and the following oral observations were made. It was not unreasonable for the BC to rely on the CC's second consultation response. That response said Rothley primary school could not be extended and there was not sufficient capacity at either Mountsorrel or Cossington. No contribution was sought and it was a reasonable inference that was because it could not be spent. It was the first time the CC had responded to the BC in such terms and the BC had reasonably interpreted it as an objection.

8. The BC properly took into account the CC's advice and applied it to the principles of national policy and sustainability. The reason for refusal did not say where the children would go to school precisely because it was not known other than it could not be Rothley and unlikely to be Cossington or Mountsorrel. The CC provided greater detail to the appellant in its statement of 26 January 2012. Its view is still that Rothley school cannot be extended. The appellants disagree. The CC is best placed to know whether or not a school can take additional pupils. The CC has agreed an education contribution because otherwise if permission was given on appeal it would have nothing.

9. The second reason for refusal is linked to sustainability. When the CC changed its stance, it was reconsidered but still found to be valid. The situation is still that the local school does not have capacity and cannot be extended such that all but 5 children would have to be schooled elsewhere and travel more than 2 miles. The CC's submission and the PPG13 advice on sustainable walking distances provide a respectable basis for the BC's stance (B16). PPG13 is referred to in the SOCG. Circular paragraph B18 is irrelevant. The application of costs largely relies on the difference of opinion between Mr Clyne and the CC as to whether Rothley school can be extended. In accepting the CC's position, the BC has not acted unreasonably. If costs are awarded it should be limited to those incurred after 26 January 2012 when the CC provided further detailed submissions.

Reasons

10. 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.

11. Paragraph B23 advises that planning authorities are expected to give thorough consideration to advice they received from statutory consultees; that it is the primary responsibility of the planning authority to either accept or reject that advice; that they should clearly understand the basis for doing so; and should provide, where necessary, a clear and rational explanation of the position taken. Paragraph B24 refers to early discussion with the consultee and that what matters in any subsequent costs application is whether the authority can show good reason for accepting, or rejecting, the consultee's advice.

12. The BC took the February 2011 consultation response from the CC, which said that Rothley, Mountsorrel and Cossington schools did not have capacity, at face value. It did not ask questions as to what that meant in terms of the CC's responsibilities as education authority and whether it really meant that it would be the primary age children from the new development at Rothley who would be displaced and have to travel out of the village to school. Nor does it seem that the subsequent application that was made to extend the school, and then withdrawn, prompt any reconsideration of the second reason for refusal.

13. The reason for refusal is incomplete and lacks precision. It refers in the third sentence to families having to rely heavily on private transport to attend primary education and then in the last sentence to the potential impact on future residents who would need to travel over two miles to access essential primary school education. However it does not give any specific explanation as to why that would be the case nor does it refer to any national or local policy dealing with infrastructure, travel distances, etc.

14. It is clear from the BC's statement (paragraph 5.4(ii)) that the BC were seeking to rely almost exclusively on the CC to provide the evidence to justify its second reason for refusal which, when the CC agreed S106 terms, left it unsupported. The BC referred at the hearing to the PPG13 reference to walking distances of under 2 kilometres. That advice is in the context of offering the greatest potential to replace short car trips. Yet PPG13 is not referred to in the reason for refusal or in the BC's hearing statement and appeared to be an after thought.

15. At the hearing the BC failed to provide a clear and rational explanation of the position it was taking. In the event Mr Clyne's detailed evidence to the hearing on the statutory responsibilities of the education authority, on current admissions policy, catchment areas and numbers of out of catchment pupils at Rothley school, demonstrated that the outcome identified in the reason for refusal, that children from the development would have to go to primary schools some distance away, was unlikely to happen. The BC would have also known all that if it had sought earlier to clearly understand the CC's position.

16. When the CC's agreement to a developer's contribution became known late in January 2012, the BC had the opportunity to reconsider the second reason for refusal and determined to continue to defend it. To avoid a risk of costs, evidence should be produced at appeal stage to substantiate each reason for

refusal with reference to the development plan and all other material considerations. I do not consider that the evidence produced by the BC, both in its statement and at the hearing, went anywhere need providing a respectable basis for its stance on this matter.

17. Accordingly I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has been demonstrated and that a partial award of costs is justified. I am not limiting the costs to those of Mr Clyne's appearance at the hearing as the BC's behaviour before was unreasonable in terms of its failure to critically examine the CC's consultation advice (B23) and in its vague drafting of the reason for refusal (B16).

Costs Order

18. 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 Charnwood Borough Council shall pay to Rothley Temple Estates and Charles Church North Midlands, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in producing the education evidence.

19. The applicant is now invited to submit to Charnwood 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.

Mary O'Rourke

Inspector