



Costs Decision

Inquiry Held on 26-29 November, 3-5, 10, 11 December 2019 and 8 January 2020
Site visit made on 26 November 2019

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 March 2020

Costs application in relation to Appeals Refs: APP/A0665/C/18/3206873, APP/A0665/C/19/3232583, APP/A0665/X/19/3227520; APP/A0665/W/18/3206746
Land at Thornton Science Park, Pool Lane, Ince, Chester CH2 4NU

- The application is made under the Town and Country Planning Act 1990, sections 174, 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Cheshire West & Chester Council for a full, or in the alternative, a partial award of costs against The University of Chester.
 - The inquiry was in connection with:
 - An appeal against an enforcement notice alleging without planning permission a change of use of the Land to a university faculty within Use Class D1 of the Town and Country Planning (Use Classes) Order, 1987 (as amended). (The EN1 appeal)
 - An enforcement notice alleging without planning permission a material change of use to a mixed use comprising a University science and engineering faculty providing undergraduate and postgraduate education, together with research and development (in connection with automotive/petrochemical/ aviation/ environmental and energy industries), laboratories, office use and industrial use (engineering workshops and blending plant). (The EN2 appeal)
 - An appeal against the part refusal of a certificate of lawful use or development for a sui generis mixed use, including elements of research and development, laboratory, teaching, workplace training, and including ancillary facilities such as offices and restaurant. (The LDC appeal)
 - An appeal against the refusal of planning permission for a change of use of buildings 38, 40, 58, 62, 304 and 305 to accommodate the University of Chester Faculty of Science and Engineering for the purposes of teaching, training and research as an integral part of the Science Park. (The section 78 appeal).
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DECISION

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

THE COSTS APPLICATION

The submissions for Cheshire West & Chester Council

2. The costs application was submitted in writing. The following additional points were made orally.
 - The Council's planning witness accepted the planning balance was difficult, not finely balanced as stated in the appellant's closing submissions.

- If the appellant had not behaved unreasonably in full or in part, the matters would not have proceeded to an inquiry and the Council would not have incurred unnecessary expense. Causation of expense has been demonstrated.

The response by The University of Chester

3. The response was made in writing. In short, the University considered that the full closing submissions demonstrated the merits and reasonableness of the appellant's case in all aspects of the appeals.

Reasons

4. The Planning Practice Guidance advises that costs may 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. The word "unreasonable" is used in its ordinary meaning.
5. The Council's application is on the basis that the unreasonable behaviour is within the substantive category, relating to the issues arising from the merits of the appeals, and not procedural. An appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding. I note no specific reference is made in the costs application to the withdrawal of grounds (b) and (f) in the EN1 appeal or the withdrawal of grounds (b), (d) and (f) in the EN2 appeal.

Legal grounds

6. In the LDC appeal and the ground (c) appeals the onus of proof is on the appellant. Essentially the same evidential matter was at issue in the three appeals.
7. The appellant's case (excluding that on building 58) evolved considerably over the period leading up to and during the inquiry, where it was confirmed finally in the closing submissions and supported by legal argument. Additional documents came forward during the appeal process, a number related to the use and development of the site when owned by Shell.
8. It may well be that a review of the additional evidence contributed to the appellant's acceptance that the introduction of the Faculty of Science and Engineering (FSE) onto the site amounted to a change of use but that the change was not material in planning terms. This narrowed the focus of matters that had to be examined at the inquiry.
9. As set out in the decision on the legal grounds, there is no statutory definition of a material change of use. It is a matter of fact and degree and judgement is involved. A case was presented by the appellant that was supported by documentary and individual testimony and legal argument. Whilst the case was ultimately not successful, its pursuit did not amount to unreasonable behaviour. Having said that, two elements merit further consideration.
10. In closing the appellant confirmed the relevance of the matter of the Council's position at the time the use by the FSE was being proposed. On examination of the evidence there was little prospect of that line of argument succeeding. In my view the catalogue of events and meetings essentially was background

information to help explain why the current position has been reached. Once it was confirmed that no case was to be presented on legitimate expectation or estoppel the matter was of no assistance to the legal grounds. Its continued detailed pursuit at the inquiry was unreasonable. The Council incurred unnecessary expense because the inquiry proceedings were prolonged unnecessarily and the matter had to be addressed at some length in its closing submissions.

11. The case on Building 58 was primarily based on legal submissions with reference to case law. The planning witnesses contributed evidence related to the planning application and documentation. Despite the detailed argument, I consider the appellant's case had no prospect of succeeding not least because the proposal for Building 58 did not clearly involve a change of use. The Council incurred unnecessary expense in responding to this part of the case.

Ground (a) appeals and section 78 appeal

12. The Council's costs application focuses on the public safety issue.
13. The Council relied primarily on the Health and Safety Executive (HSE) to substantiate its consultation advice on public safety. The appellant's technical evidence fell a very considerable way short of what would reasonably be expected of expert evidence. Consequently, the appellant was not able to substantiate a key element of its case that Thornton Science Park (TSP) should be considered to fall within the Outer Consultation Zone. In addition, the appellant's challenge to Sensitivity Levels was not adequately substantiated. In short, the appellant's position on public safety issues was unreasonable.
14. The appellant also challenged the Council's conclusion that the development led to a significant increase in the number of people being subjected to threshold levels of risk. Evidence on the matter was presented primarily by the appellant's planning witness, initially based on the technical evidence placing TSP in the Outer Zone. At the inquiry the case was reviewed but in so doing there was conflict and inconsistency with the appellant's viability argument. The 'fallback' position was not substantiated.
15. In conclusion, unreasonable behaviour has been demonstrated on the public safety issue. The Council incurred wasted expense as a result of the inquiry time spent on this issue.
16. The public safety issue on its own could not be not determinative because a planning balance was necessary, to include consideration of the educational, social and economic benefits of the development. The Council presented a full case on the remaining main planning issues and in so doing disputed the planning merits of the appellant's case. In its costs application the Council has not demonstrated unreasonable behaviour by the appellant in respect of this part of its case. Therefore it does not follow that a finding of unreasonable behaviour on the public safety element results in a costs award related to all the proceedings on the section 78 appeal and ground (a)/deemed planning application in the EN2 appeal.

Ground (g) appeal

17. The length of the compliance period has to be reasonable. In this case the action the University would have to take to remedy the breach of planning

control has to be balanced against the public interest in allowing the unauthorised development to continue in light of the public safety concern. Judgement has to be exercised.

18. The Council confirmed at the end of the inquiry that it would not oppose an extension of the compliance period to a year. This concession alone indicates the University did not act unreasonably to appeal on ground (g).

Conclusions

19. Unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated but only in respect of certain parts of the University's case. In view of the implications and consequences for the appellant, matters probably would have proceeded to an inquiry even if the areas where unreasonable behaviour occurred were not pursued. A partial award of costs is justified, not a full award.
20. The partial award should be based on:
- the time spent at the inquiry examining the Council's early position on the proposed FSE and addressing the matter in the closing submissions;
 - preparation and presentation of the Council's case and examination of the appellant's case on Building 58;
 - attendance at and participation in the inquiry throughout the examination of the public safety issue, including the cost of the venue;
 - the expense incurred in making the costs application.

COSTS ORDER

21. 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 University of Chester shall pay to Cheshire West and Chester Council the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred (i) in responding to the legal grounds of appeal in respect of the appellant's case on the Council's early position and the case on Building 58, (ii) attendance at and participation in the inquiry throughout the examination of the public safety issue, including the cost of the venue, and (iii) the making of the costs application; such costs to be assessed in the Senior Courts Costs Office if not agreed.
22. The applicant is now invited to submit to University of Chester, 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.

Diane Lewis

Inspector