

Directorate for Planning and Environmental Appeals

Decision Notice: Claim for an Award of Expenses

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Decision by Richard Hickman, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA/240/228
- Site address: Land north of Northfield Road, Dunipace
- Proposed development : Residential development and associated engineering operations
- Claim made on behalf of appellant, Persimmon Homes East Scotland, against Falkirk Council

Date of decision: 19 January 2009

Decision

I find that the council has acted in an unreasonable manner, resulting in liability for expenses to the extent set out in paragraph 6 below. I therefore make an award of expenses, to the extent set out in that paragraph.

Accordingly, in exercise of the powers delegated to me and conferred by section 265(9) as read with section 266(2) of the Town and Country Planning (Scotland) Act 1997, I find the Council liable to the appellant in respect of the expense set out in paragraph 6 below. I remit the account of expenses to the Auditor of the Court of Session to tax on an agent/client basis. If requested, I shall make an order under section 265(9), read with section 266 of the Town and Country Planning (Scotland) Act 1997.

Reasoning

1. Awards of expenses do not follow the decision on the planning merits, and are made only where each of the following tests is met:

- The claim is made at the appropriate stage in the proceedings.
- The party against whom the claim is made has acted unreasonably.
- This unreasonable conduct has caused the party making the application unnecessary expense, either because it was unnecessary for the matter to come before the Scottish Ministers, or because of the way in which the party against whom the claim is made has conducted its side of the case.

2. The claim was made at the appropriate stage of the proceedings.



3. The basis of this claim is that Falkirk Council acted unreasonably in the determination of this application and the conduct of the resulting appeal in that :

- The Council did not have demonstrable and justifiable planning reasons for the refusal of planning permission.
- The Council did not seek to defend two of the reasons given for the refusal of planning permission (relating to traffic impact/road safety and architectural design matters).
- The Council had no proper basis to disagree with the Flood Risk Assessment, which had been found to be satisfactory by the experts advising the Council on this matter. Other sites put forward for development in the emerging local plan would also occupy flood plain land.
- The Council had no proper grounds to oppose the development on the basis that there would be a loss of open space, as it is allocated for residential development in the adopted local plan, and is not allocated as open space in the emerging replacement local plan.
- The Council's reasons for preferring other sites proposed in the emerging local plan do not justify refusal of permission at the appeal site.

4. The main points made by the Council in response to these submissions are:

- The appellant was informed at the earliest possible opportunity that the Council would not be defending two of the reasons for refusal.
- Traffic evidence was presented at the inquiry on behalf of the appellant to respond to the concerns of local residents regarding roads matters.
- The Council was entitled to oppose the development on flood policy grounds, on the basis that it would occupy part of a functioning floodplain. Land-raising may be an appropriate response, but the Council was entitled to take a different view from the appellant on this matter. Other much smaller floodplain sites put forward in the local plan would have to be considered on their individual merits. As with traffic, evidence was presented at the inquiry on behalf of the appellant to respond to the concerns of local residents regarding flooding matters.
- As with land-raising, the Council was entitled to disagree with the appellant as to whether a loss of open space would be involved.

5. Having considered these various aspects of the claim for expenses, I reach the following conclusions :

- I agree that it was unreasonable for the Council to base the refusal of permission on two reasons that were subsequently not defended by the Council.
- I also agree that, in the face of the considerable local concern expressed by local residents, it was necessary for traffic and road safety matters to be considered at the inquiry. Thus I find that the Council's unreasonable behaviour in relation to the traffic reason did not result in unnecessary additional expense for the appellant.
- In contrast, it was not necessary for design matters to be considered at the inquiry, and the evidence prepared by the design witness was not presented. The preparation of this evidence, to the extent that it may have added to material already prepared in support of the planning application, would constitute an additional and unnecessary expense for the appellant.
- With regard to flooding matters, I do not think that acceptance of the Flood Risk Assessment precludes the Council from opposing the development on flood policy grounds. I agree with the Council that it was not unreasonable for them to have concerns about land-raising, in a situation where they believed that using part of the floodplain for development was not necessary. In addition, the national flooding guidance makes it clear that risk assessments should be regarded as a best estimate, but cannot relied upon to be a precise forecast. The flooding that has already

occurred a short distance downstream, affecting local residents, provides sound justification for the Council to adopt a precautionary approach.

- Regarding the potential loss of open space, I have agreed that the appeal site does not constitute open space. However it is mainly greenfield open land, used to a small extent for recreation purposes, where the local community aspires to safeguard the green character of the area on a permanent basis. Again, while I may not have accepted the Council's arguments about the existing status of the site, I do not think it was unreasonable for the Council to seek to argue this point, and it was necessary for the inquiry to consider evidence on open space matters in the light of community concerns. Thus I find that there was neither unreasonable behaviour on the part of the Council, nor unnecessary additional expense on the part of the appellant, in relation to this matter.
- I accept that the emerging local plan contains draft provisions and omissions which run counter to the Council's position on flooding and open space in relation to this appeal. However there may well be site specific arguments at these other sites that justify the local plan proposals. I find that these are minor and peripheral considerations in relation to the present appeal, which do not undermine the reasonableness of the Council's position.

6. I conclude that the Council has acted unreasonably in not defending two of the reasons for refusal, but has not acted unreasonably in respect of the other criticisms made on behalf of the appellant. However I find that the only unnecessary expense to the appellant that may have resulted from this unreasonable behaviour is the preparation of the precognition relating to architectural design matters, in so far as that precognition contains significant additional material not already contained in submissions made in support of the planning application prior to its determination by the Council.

Richard Hickman

Richard Hickman
Reporter

Ryden

Position Statement

Planning Appeal

Site : Northfield, Dunipace
Client : Falkirk Council

Aims of Report

To identify the key issues relating to the above appeal, associated risks for the Council and to identify a strategy to protect the Council's position.

Background

Following the submission of an appeal by Barton Wilmore, on behalf of Persimmon Homes, the Scottish Government's Directorate for Planning & Environmental Appeals (DPEA) has determined that the appeal should be considered by an Inquiry. The decision to progress through Inquiry is based on:

1. The technical reasons for refusal
2. The level of public interest

Pre Inquiry Meeting

A pre-Inquiry meeting has been arranged for the evening of 20 August and is to be held in the local primary school.

The aim of this meeting is to sort out the arrangements for the Inquiry. Outline statements of case may be required and we await confirmation from DPEA on this matter.

Reasons for Refusal

Following a meeting with relevant Council officials, consideration has now been given to the most appropriate course of action. There are a number of reasons, primarily technical in nature, given for refusal of the application. These are detailed below, followed by an assessment of their robustness.

Reason 1

It is considered that the proposed residential development would be unacceptable as related traffic increases would be too great for the existing roads infrastructure and therefore would result in associated congestion and road safety concerns.

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- Observations

Transport Assessment (TA) was submitted as part of the application. The TA findings that the existing road infrastructure has sufficient capacity to accommodate the proposed development has been accepted by the Council's Transport Planning Unit. In view of this, limited scope to promote a robust defence. Although scope does exist for members of the public to put forward a subjective case, a unified body representing the residents views may be more effective than individual presentations.

- Recommendations

Encourage, where possible, residents to make representations. Council to concede.

Reason 2

It is considered that the proposed residential development would be unacceptable as there are inadequate drainage proposals to guarantee that flood water from the application site will not be dispersed to other areas.

- Observations

Flood Risk Assessment prepared and accepted by Council's Consultant. In view of this very difficult to defend.

- Recommendations

Concede

Reason 3

It is considered that the proposed residential development would be unacceptable as a result of the loss of open space.

- Observations

The Committee Paper states that the Draft Open Space strategy indicates that sufficient open space exists elsewhere. However, the strategy had not been subject to meaningful consultation or approved by Committee.

- Recommendation

Develop case further, focusing on Open Space strategy.

Reason 4

It is considered that the proposed residential development would be unacceptable as a result of the incorporation of proposed flats in southern part of the application site being out of keeping with the character of the local area.

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Observations

The inclusion of 3 storey flats within the development is of little or no significance within the context of the characteristics of the area.

Recommendation

Concede

Further Observations

When considering a development which is the subject of an appeal, the opportunity exists to open the debate to all matters relating to the application. Given that the reasons for refusal, provide only limited scope to prepare a robust, defensive case, it would be prudent to consider other aspects of the application. Having reviewed the relevant papers and policy documents I would suggest that we focus on :-

Denny & District Local Plan

The site in question is identified as Northfield, Dunipace with a capacity of 80 units and is included in Figure 3.2 "Brownfield Development Opportunities." From a site inspection and review of historical maps, it is clear that the site is not brownfield, but greenfield. Therefore, the allocation of the site under DEN 4 New Residential Development is flawed. Please note the supporting information for DEN 4 refers to the Northfield site as a Brownfield site.

It can be argued that the site was allocated within the adopted Local Plan on a false premise as it was not a brownfield site. In view of this, the adopted Local Plan reference to "open space is considered to be an appropriate alternative use" becomes more pertinent. The Local Plan also states that "environmental improvements could be pursued as a second phase to works described by Opportunity REC2". Policy REC2 Tygetshaugh (North) Dunipace promotes environmental improvements in the immediate vicinity of the site. Again, this adds some limited weight to the use of the land as open space.

It could also be argued that the Denny and District Local Plan adopted in June 1996 is significantly out of date and does not accord with the most recently approved Structure Plan.

Falkirk Council Local Plan Finalised Draft (Deposit Version) April 2007 (FCLP)

The FCLP is a material consideration. The FCLP does not allocate the site for housing and this de-allocation was based on concerns relating to flooding and also revised Structure Plan requirements. Although difficult to defend the reason relating to flooding, the Structure Plan argument is worth exploring further.

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Structure Plan Requirements

The Structure Plan requirement for Denny / Dunipace was very significantly reduced from 1,800 units to 1,000 units by an alteration to the Falkirk Structure Plan, agreed by Council in March 2005. The Finalised Draft LP required to be consistent with the Structure Plan and the deposit version of the Falkirk Local Plan allocates sufficient housing land to meet Structure Plan requirements to 2020.

An additional, relatively large scale residential development considered within the context of Dunipace, would be inconsistent with the Structure Plan.

It must be noted that development of the site is given support by SC2 "Windfall Housing Development within the Urban / Village Limit". Although it should be noted, the supporting text focuses to a great extent on brownfield development. Also Policy SC2 gives support to development of open urban space whose loss can be justified in terms of Policy SC12, which requires open space audit, or site specific local audit, demonstrating that the area is surplus to requirements. This point is considered in more detail below:-

Open Space Audit

The Open Space Audit against which the loss of this site was assessed was only in draft form, has no committee approval and has not been the subject of consultation. The status and robustness and therefore the relevance of the open space audit (draft) must be questioned.

There was no open space audit in accordance with the requirements of SPP11 Open Space and Physical Activity in place to support the loss of this land at the time of the application. Although it is understood the Council is now progressing with the audit.

Anticipated Costs

It is very difficult to anticipate the likely costs associated with the appeal. However, I would anticipate that the Council's costs could range from £10k to £30k. Furthermore, it is prudent to consider that the appellants are likely to apply for costs and these could be again in the region of £10k to £30k.

Ged Halney

22 July 2008

Ryden

Position Statement

Planning Appeal, Northfield, Dunipace.

Topic : Traffic Impact

Introduction

A Transport consultant has been engaged to review the submissions and consultation responses relating to traffic impact. A summary, based to a great on the text provided by the Transport Consultant, is provided below -

Summary of Findings

The only argument remaining is the one about the amount of dwellings served. However, the Council guidance, in discussing two wider points of access, doesn't specify that, for example, both points of access must be typically used by 50% of the traffic generated etc. - the only criteria is for a second point of access to be provided and the rural road provides this. It is an entirely subjective argument whether that provides ample access and there is nothing recorded in guidance to nail this down (particularly when you are trying to retrofit new guidance to apply to an existing area). If asked by the appellant 'Does the rural road parallel to the motorway provide a second point of access into the Barnago Road area? the reply would have to be 'yes'.

The number of dwellings served off an access is often a question of road maintenance and the ability to access larger areas of development (i.e. more than 200 houses) in the event one road is closed for, say, a water main repair. Clearly, the existing road system DOES permit this, as the rural road is closed at present and all traffic is being diverted via Barnago Road. If Barnago Road were to be closed at Stirling Street could all traffic be diverted round via the rural road? - yes it could - so again the two points of access argument favours the applicant.

In passing, I would note that the 300 dwelling threshold is commonly applied in urban Councils where there is a greater choice of transport mode available (so the car trip generation can reasonably be expected to be less) - there's nothing to pursue in upping the threshold as that moves the goalposts closer to the applicant in any case.

Lastly, on emergency vehicles, the present calming in the Barnago Road area is not always favourable to emergency vehicles and full width cushions that emergency vehicles would have to traverse exist in places on Northfield Road. It would be open to the applicants to say that they are willing to accept a condition relating to funding or provision of an improved calming scheme and changing what presently exists could IMPROVE access for emergency vehicles post development.

Recommendation

It is recommended that the Council concede on traffic impact matters but seek agreement over appropriate condition relating to traffic calming. Please note, the Transport Consultant confirmed that, given that there is no defensible case to be made, he would be unwilling to attend the public inquiry on behalf of the Council.

Ged Halney / 23 September 2008