

Grizedale Close Appeal Decision and Adverse Costs Award

1. The purpose of this report is to provide information to Members as to why the recent appeal at Grizedale Close was dismissed and to explain why costs were awarded against the Council.

Background

2. Planning application 10044/20 for “Demolition of bungalows and erection of 43no. dwellings comprising four storey block of 35no. flats and 8no. houses together with associated access, parking, landscaping and retaining wall along south western boundary” at land at Grizedale Close (applicant Watson Homes) was presented before Planning Committee on 11th November 2021, with an officer recommendation for approval.
3. Members resolved to refuse the application at the meeting and a decision notice was issued on 15th November 2021, with the following four reasons for refusal:
 1. *The proposed four storey apartment building, by reason of its siting, height, scale and appearance, would not be in keeping with the character and appearance of the area, and would appear incongruous from surrounding viewpoints and the public rights of way that adjoin the site, contrary to Policies CG3 and OA5 of Bolton's Core Strategy.*
 2. *The proposed development would result in the unacceptable loss of trees and hedgerows from the site and fails to sufficiently safeguard and enhance biodiversity, contrary to Policy CG1.2 of Bolton's Core Strategy.*
 3. *The proposed apartments would not provide adequate internal living space for future residents, with all the apartments failing to meet the minimum space standards set out within the DCLG Technical House Standards - Nationally Described Space Standards (March 2015), therefore unduly harming the amenity of future residents of the apartments, contrary to Policy CG4 of Bolton's Core Strategy.*
 4. *The proposed access into the development via residential streets of limited width is substandard and the limited on-site parking proposed within the development would lead to further on-street parking pressures on these streets, to the detriment of highway and pedestrian safety and contrary to Policies P5 and S1.2 of Bolton's Core Strategy.*
4. Prior to the start of the appeal, officers sought Counsel advice regarding the prospect of success in defending the reasons for refusal and whether the Council would be vulnerable to appeal costs. Counsel's opinion was received on 14th of March, On 25th of March Informal advice was issued to appellants. A briefing note was issued to the Chair of Planning Committee

and the Executive Member for Strategic Housing and Planning on 22nd of April 2022. Following this briefing, on 29th of April, approval was granted by the Director of Place in consultation with the Borough Solicitor not to defend reasons for refusal 3 and 4 and not to defend the biodiversity part of reason for refusal 2. Planning Committee members were informed of this decision after the close of the June 2022 Planning Committee meeting. This in accordance with the Council's Constitution and the Good Practice Guide.

Appeal case

5. The hearing was held on the 7 December 2022. To maximise the chance of success in defending the refusal reasons and to ensure the Committee's reasoning for them was presented to the Inspector in written submissions and at the hearing itself, it was appropriate for Councillor Hayes to represent the Council. Councillor Hayes is a ward member for the location of the site and moved refusal at the committee meeting.
6. With the assistance of an officer and external landscape architect a statement was submitted and Statement of Common Ground agreed on behalf of the LPA. The officer and landscape architect attended the hearing to support Councillor Hayes. Councillor Hayes also gave evidence as ward member in defence of the other reasons not being contested by the Council as Local Planning Authority. Members of the public attended and gave evidence in support of all reasons for refusal.

Appeal Decision

7. On 10 January 2023 the Inspector issued his decision letter dismissing the appeal (refusing planning permission). A copy of the appeal decision is contained at Appendix 1.
8. The main issues he considered were:
 1. effect on the character and appearance of the area with particular regard to the siting, height, scale and appearance of the 4-storey apartment block
 2. loss of trees and hedgerows from the site

Effect on the character and appearance of the area with particular regard to the siting, height, scale and appearance of the 4 storey apartment block

9. On this issue the Inspector concluded:

Para 11. There would be an adverse impact on the appearance of the site, which would occur as a result of the removal of the attractive existing dwelling and the loss of some trees from areas towards the centre and at the access to the site.

12. However, whilst the AB [apartment block] would be an unfamiliar building within the area with regards to its height and scale, its impact

on the appearance of the area would largely be contained and limited by reason of the siting and set down position of the building.

13. The retention, in the main, of the large grouping of TPO trees on the western side of the site would also serve to limit the impact of its appearance. The AB would also be set away from the passing PROW's. Whilst clearly arrived at largely out of function, the AB would not be unacceptable in terms of its appearance.

14. However, the AB, which would contain 28 one-bedroom flats along with 7 two-bedroom flats would be a notably dense form of development for this location, and its presence would contrast sharply with the character of the area.

15. Set against the tandem provision of the dwellings, the 35 flats within the AB would be likely to generate significant amounts of comings and goings as a result of the movement of residents and delivery and service vehicles, which are at the current time likely to be limited by reason of the restrained density of development.

16. The apartment block would be likely to introduce significant additional lighting into what would likely currently be a dark space during the winter along with significant additional noise during the summer when residents would likely wish to enjoy the extensively provisioned balconies and folding doors to the flats.

17. These would be development impacts that would contrast sharply with the existing character of the area and which despite the positioning and setting of the AB, would be notable from outside of the site.

18. Given these matters, the AB would result in substantial harm to the character of the area. It would subsequently conflict with policies CG3 and OA5 of the Bolton Core Strategy (2011) (CS) which amongst other things require that development has regard to the overall built character of an area and that the character of the existing physical environment should be conserved or enhanced within North Bolton.

Loss of trees and hedgerows from the site

10. The only mention of trees and hedgerows in his decision letter is in paragraph 13 (above) stating a large group of TPO trees will be retained, limiting the impact of the appearance of the development. He passes no judgement on the effect from loss of trees.

Appeal Decision – Summary

11. The Inspector accepts the height and appearance of the building is acceptable, but he finds the density of the apartments is not. He considers the effect of the apartment residents' activities and lighting from such a dense development close to a less dense existing area would harm the character of the area. He refers to substantial harm being caused.

12. The Inspector does not agree with the committee's reasons for refusal regarding the scale, height, materials and appearance of the building or loss of trees. He has found harm he considered himself from impacts of comings and goings, deliveries and lighting arising from the density (apart from a mention by the landscape architect about lights being visible in winter). In applying the planning balance, the Inspector says he could not give the affordable housing any weight because he did not agree the proposed condition would guarantee delivery.
13. The Inspector has considered the LPA's case but does not agree with it. Although he dismisses the appeal, it is not for the same reasons as those given by Committee.

Appellant's Grounds for Cost Claim Against the LPA

14. At the end of the hearing the appellant submitted a claim for partial costs against what it considered to be the Council's unreasonable behaviour during the appeal process which caused them unnecessary or wasted expense. This was in two parts: procedural and substantive:

Procedural

15. Despite the appellant engaging with the Council to agree the basis of the appeal on multiple occasions, the appellant was formally advised of the decision not to defend reasons for refusal 3 and 4, and part of 2 on 29 April, the day before the appeal statement was due to be submitted to the Planning Inspectorate (30 April 2022). The appellant had therefore already instructed a team of consultants and prepared a robust case to defend all four reasons for refusal.
16. The unreasonable conduct is the council's withdrawal of 2 and a half reasons for refusal which it withdrew on the basis of advice that it would be unable to defend them. The application should not have been refused for those reasons.
17. Whilst the council had indicated to the appellant the views of officers not to defend 2 and a half of the reasons for refusal by email on 25 March 2022, this was not agreed, in accordance with the requirements of the constitution and Good Practice Guide and with all involved in the process until 29 April 2022.
18. The unnecessary costs to the appellant relating to the appellant's detailed response to those withdrawn reasons for refusal would not have been incurred if the appellant was merely responding to third party representations on such matters.

Substantive

19. The appellant sought a partial award of costs in relation to defending the remaining element of reason for refusal² due to the failure of the Council to produce evidence to substantiate each reason for refusal on appeal as an example of unreasonable behaviour justifying an adverse award of costs.

Rebuttal

20. A rebuttal statement was submitted by the LPA against the costs claim. This stated in respect to the procedural claim, officers had kept the appellant fully aware of the intention to not contest certain parts of the reasons for refusal from the end of March. Formal notification could not take place until the decision had been approved by the Director of Place, in consultation with the Borough Solicitor which took until the end of April to secure.
21. Against the substantive claim, the rebuttal pointed out the evidence provided in the statement and given in person demonstrated how the development would harm the character and appearance of the area and loss of trees was contrary to policy.

Inspector's Costs Decision

22. Alongside the appeal decision, the Inspector also issued his decision on the costs claim. A copy of the costs decision is contained at Appendix 2. On the Procedural claim the Inspector found against the Council:

4.Inevitably, the appellant would have wanted to have their case prepared well before they were formally notified of the course the Council would take on 29 April 2022.

5. Even though it is suggested that Officers had set out their intentions to the appellant to withdraw concerns on these matters earlier, this may not have been the final position of the Council, and the claimant acted logically in mounting a defence of the reasons which were yet to be formally withdrawn from consideration.

6. Were the appellant to have been notified sooner and much nearer to the 25 March 2022 date, costs associated with making the case in relation to the 'withdrawn' reasons for refusal may not have been incurred.

23. On the substantive claim he criticises the Council for not defending reason for refusal no.2 relating to loss of trees and hedgerows:

10. The remaining element of refusal reason 2 related to concerns over loss of trees and hedgerows from the site. Concerns with regard to these matters have not been properly justified.

11. The Council offered little additional justification at the Hearing where it was discussed that the site did not currently contain hedgerows. The Council could have been more specific about the trees proposed for removal and how their removal would affect the character and appearance of the area. The evidence of the Council did not demonstrate a sufficient understanding/analysis of the arboricultural implications of the proposal.

Conclusion and next steps

24. All parties involved with an appeal are normally expected to cover their own expenses. But anyone involved in the appeal can ask the Secretary of State or appointed Inspector to order that one party pays some or all of another party's costs. National Government Guidance (PPG) advises that costs may be awarded where a party has behaved unreasonably, and where that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Both tests need to be satisfied to result in an award of costs.
25. The PPG is clear that an award of costs can be made irrespective of the outcome of the appeal.
26. No costs have been awarded against the Council for defending reason for refusal 1. Although the Inspector does not agree with the specific reasons why Committee thought the development would harm the character and appearance of the area, he nevertheless feels the case was reasonable.
27. Costs have been awarded against the Council for not informing the appellant's in a timely manner that certain reasons for refusal would not be contested.
28. Costs have been awarded against the council for not defending reason for refusal 2 (loss of trees). The Council's tree officer could not provide any input because that officer had not objected to the proposal at application stage so was unable to argue against it at appeal.
29. If they wish, the Appellant can now submit the sums involved in those costs for payment by the Council.

Next Steps

30. Officers will refresh the process for consideration of reasons for refusal once a decision has been made and prior to an appeal in order to minimise the time involved in making the decision to defend or not, solely based on legal advice and in accordance with the Council's established procedures.
31. Officers will liaise with Chair over the process of making Committee decisions particularly in respect of decisions against the recommendation contained in the report. This is relevant for approval or refusal and members must have all facts and legal opinion before them in order to make a decision. Members and Committee can be minded to make a decision on the basis of certain reasons, with the final decision brought back to a subsequent Committee with clear advice.

Appendix 1 – Grizedale Close Appeal Decision

Appendix 2 – Grizedale Close Costs Decision