

Costs Decision

Site visit made on 19 September 2016

by Caroline Mulloy BSc (Hons) DipTP MRTPI

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

Decision date: 17th October 2016

**Costs application in relation to Appeal Ref: APP/F2605/W/16/3152570
Land to the West of Richmond Road, Richmond Road, Saham Toney,
Thetford, Norfolk IP25 7EX**

- 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 Mr and Mrs Terry, Mark, Melissa and Merry Page, Thompson, Burgan and Halliday for a full award of costs against Breckland District Council.
 - The appeal was against the refusal of planning permission for outline planning permission (with all matters reserved) for one four bedroom detached dwelling with garage and gardens.
-

Decision

1. The application for an award of costs is refused.
 2. Paragraph 30 of Planning Practice Guidance 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 expense in the appeal process.
 3. Paragraph 049 of the Planning Practice Guidance (PPG) states a number of examples of unreasonable behaviour by local planning authorities. The appellants consider that the Council behaved unreasonably with respect to a number of substantive matters. The matters are: preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failure to produce evidence to substantiate each reason for refusal; vague, generalised or inaccurate assertions about a proposals impact, which were unsupported by any objective analysis; acting contrary to, or not following, well established case law; refusing to enter into discussions with the applicant, when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed, thus reducing the expense associated with the appeal.
 4. The applicants contend that the proposal should have been permitted as the benefits clearly outweigh the Council's perceived adverse impacts; that the Council failed to properly apply the balancing exercise required by bullet point 14 of the National Planning Policy Framework (the Framework); and that it only took the benefit to the housing land supply into account in the balancing act. However, the Council acknowledged the absence of a five year supply of housing in their report and that the application should be considered against the presumption in favour of sustainable development.
 5. The Council acknowledged the benefits of the proposal in terms of the contribution to the five year supply of housing, the accessibility of the site to services and facilities and the contribution which the proposal makes to the
-

economic and social dimensions of sustainable development. They were also aware of the benefits referred to in the Design and Access Statement accompanying the application. Whilst they did not specifically list all of the benefits in this final balancing act the social and economic benefits are clearly referred to in the preceding paragraph.

6. Moreover, the Council undertook the balancing act required by paragraph 14 of the Framework and reached the conclusion that the harm to the character and appearance of the area and the impact on the protected trees would demonstrably outweigh the benefits of the proposal. The weight to be attributed to factors in the balancing act is a matter of planning judgement for the decision maker.
7. The applicants contend that the Council were wrong to rely on Policy CP11 of the DPD as due to the absence of a five year land supply the Policy is out-of-date. The applicant quotes the recent Court of Appeal judgement¹ which made clear that policies for the supply of housing included plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed. However, paragraph 46 and 47 of the judgment explain that paragraphs 14 and 49 do not say that out-of-date policies should be given no weight, or minimal weight, or indeed any specific amount of weight as weight is a matter for the decision maker.
8. The Policy pre-dates the Framework and the wording of the 1st sentence of the Policy does not, therefore, reflect paragraph 17 of the Framework. The Council acknowledge that less weight is applied to the Policy due to the absence of a five year supply of housing land and indeed I conclude that limited weight should be afforded to the Policy. Nonetheless, as the applicants acknowledge, the Policy is consistent with paragraph 109 of the Framework and it is, therefore, reasonable to attach some weight to the Policy even if this is limited. In any event, the weight to be attached to a Policy is a matter of judgement for the decision maker. The Council has not acted unreasonably in this regard.
9. The applicants consider that the Council failed to substantiate any of the reasons for refusal, instead contriving protection where none exists and using out-of date and irrelevant policies to refuse the proposal, without actually demonstrating any significant impacts with evidence.
10. It is suggested that the Council 'contrived policy' in that the officer report refers to the site being within a landscape which is 'designated' in the Breckland Settlement Fringe Landscape Assessment (the Assessment) 2007. However, whilst this may an unfortunate use of terminology in the report itself there is no evidence before me to suggest that there has been a deliberate attempt to contrive policy. Furthermore, this wording is not reflected in reason for refusal 1.
11. The applicants consider that the Council failed to undertake any meaningful analysis of its policies particularly with regards to Policy CP11 and the Saham Toney/Watton Gap. The planning officer's report refers to the gap in the context of the Assessment. Whilst I accept that there may have been a misinterpretation as to whether the proposal is within the gap, the Council do not refer to the gap in the reason for refusal.

¹ Suffolk Coastal District Council and Hopkins Limited and Secretary of State for Communities and Local Government and Richborough Estates Partnership LLP, Cheshire East Borough Council and Secretary of State for Communities and Local Government. 2016 EWCA Civ 168

12. Notwithstanding the issue of the gap, Policy CP11 states that high protection will be given to the Brecks landscape, reflecting it's role as a regionally significant green infrastructure asset. Proposals within the Brecks Landscape Character Areas will not be permitted where these would result in harm to the key visual features of the landscape type. The Assessment identifies the area as having high sensitivity to further expansion. The reason for refusal clearly sets out the harm which the Council consider would occur as a result of the proposal. It states that the proposal would be inconsistent with the existing pattern of development, introduce a new road frontage dwelling where none currently exist detracting from the rural wooded character of the area which are legitimate concerns.
13. I, therefore, consider that the reason for refusal clearly articulates the harm which the Council considers would result as a consequence of the proposal. Whilst I have reached a different conclusion in my Decision, I consider that an element of judgement is required in making a planning decision where the character and appearance of the area is at issue and I consider that there was reasonable scope for alternative viewpoints to be held. Consequently, I consider that the Council has demonstrated a reasonable basis for its stance and clearly states the impact which the proposal will have. I am, therefore, satisfied that the Council has substantiated reason for refusal 1. The Council has not acted unreasonably in this regard.
14. Turning to reason for refusal 2, the applicants consider that the Council's claim that the proposal would harm the protected trees was unsupported by any objective analysis and ignored the results of the Arboricultural Implications Assessment (AIA). I note that the Council's view was informed by advice from their Tree and Countryside Consultant.
15. Key to the applicants' case is that the Council failed to look for solutions contrary to paragraph 187 of the Framework with specific regards to the location of the access in relation to protected trees T15 and T17. It is suggested that as the access was a reserved matter that its location could have been altered at the reserved matters stage.
16. I note that the Design and Access Statement (DA) refers to pre-application discussions with the Highways Officer who indicated that 43 metre visibility splays would be acceptable if the access point was situated to the northern end of the proposed development with a view to improving visibility for the neighbouring accesses as well. However, it goes on to state that there are also alternative options within the site for achieving 59 metre visibility splays if necessary. However, the officer report did not explore the possibility of an alternative access point in spite of the obvious reference to it in the DA. Furthermore, the Council have refused planning permission partly on the basis of the impact which the access and turning area would have on the protected tree without addressing or contradicting the applicants' statement that there were other feasible access options.
17. The officer report goes on to state that if the parking and turning areas would be located within the root protection area of the tree it is necessary to demonstrate that this can be achieved to a satisfactory level without causing harm to the tree and that no such evidence has been provided by the applicant. However, an AIA was submitted with the application which, together the design and access statement, refers to the use of piled foundations and a no dig access and driveway which as I have concluded would address the Council's concerns regarding the impact on the root protection area of T17.

18. Although I note that the Council were also concerned regarding the pruning of branches which would have been required to enable clearance for the access, these concerns would have been resolved by the relocation of the access. As the applicants point out there is sufficient room between T17 and T15 to locate the access without encroaching onto the root protection area of those trees. However, even though the application was in outline, the possibility of an alternative access was not explored by the Council.
19. Nevertheless, the Council were also concerned about the long term implications of the proposal on the trees subject to the TPO in terms of pressure for additional pruning arising from the development as a whole. Whilst I have reached a different conclusion, I consider that the impact of the proposal on the long-term health of the trees subject to the TPO is a legitimate concern and that consequently the Council were not unreasonable in taking this stance. The extent to which the issue can be addressed by a condition is a matter of judgment for the decision maker. I consider that the Council's concerns regarding the pressure for additional pruning works in the long term would have resulted in the application being refused in any event. Consequently, the matter of the access would not have changed the overall outcome.
20. It is also suggested that the Council failed to disclose pertinent information with regards to the response from the Tree and Countryside Consultant for the Council which the appellants contend they were not aware of and which differed from that published on the Council's website. However, there is insufficient evidence before me to demonstrate that this information was deliberately withheld.
21. The Council considered that there was insufficient evidence to demonstrate that the proposal would not have a harmful effect on the trees and that it was not acceptable to leave this matter to a condition. This is a legitimate concern and a matter of planning judgment for the decision maker. As the Council considered that the reason for refusal could not be easily overcome there would be little room for discussion or negotiation. I, therefore, consider that the Council has substantiated reason for refusal 2 and has not, therefore, acted unreasonably in this regard.
22. The applicant also raises a number of other points in relation to how the Council dealt with the application. However, I consider that these are not matters which were fundamental to the case and would not have resulted in a different outcome.
23. I turn, then to the matter of wasted expense. Notwithstanding some of the matters referred to above, I consider that the Council have, nevertheless, substantiated the reasons for refusal. The Council have stood by their decision and consequently, even had those matters been addressed it clearly would not have altered their decision. Whilst I have reached a different conclusion, I consider that overall the Council were not unreasonable to take the stance which they did. I have, therefore, concluded that the Council has not acted unreasonably. In these circumstances, it is not necessary to consider the question of any expense incurred. Since unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated, the application cannot succeed.

Caroline Mulloy

Inspector