
Costs Decision

Site visit made on 14 February 2017

by Colin Cresswell BSc (Hons) MA MBA MRTPI

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

Decision date: 16 March 2017

**Costs application in relation to Appeal Ref: APP/D0840/W/16/3158466
Pentewan Valley Nurseries, B3273 from Treveskern to junction south of
Tregiskey Farm, Pentewan, St Austell PL26 6DL**

- 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 & Mrs N and L Hoar for a full award of costs against Cornwall Council.
 - The appeal was against the refusal of outline planning permission for the erection of five dwellings.
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Decision

1. The application for an award of costs is refused.

Reasons

2. The National Planning Practice Guidance (PPG) advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
 3. There is some confusion within the evidence regarding the flood zone status of the site. In its consultation response, the Environment Agency says that the Flood Risk Assessment J-5024-CFM confirms the site lies within Flood Zone 3. Furthermore, paragraph 2.7 of the Council's Appeal Statement describes the site as being within Flood Zone 3b and even provides a map to illustrate this. However, this information is false. Subsequent correspondence obtained by the appellants clarifies that the site falls partially within Flood Zone 2 with the remainder being located in Flood Zone 1.
 4. Whilst I accept that the appellants sought to obtain clarification by contacting a Council officer, there is relatively little to suggest that any confusion over this matter directly influenced the appeal process. In the Committee Report the Council officer states in paragraph 42 that "the site falls partially within Flood Zone 2" and the site is clearly dealt with on that basis. Indeed, the reasons for refusal make direct reference to Flood Zone 2. Furthermore, the Council's Statement clarifies in paragraph 5.1 "there is no dispute the site lies within Flood Zone 2" and there are further references to the Flood Zone 2 location within the main body of the Council's submissions. It is also confirmed that the Environment Agency was referring to an earlier version of the Flood Risk Assessment in its original consultation response.
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5. Therefore, whilst the Council clearly made an error in paragraph 2.7 of its Appeal Statement, it was obvious enough from the other information provided that the site was considered to be within Flood Zone 2. Although the appellants pursued the Council on this matter, I consider that the erroneous references to Flood Zone 3 did not have a great deal of bearing on how either party approached the appeal.
6. It is argued that the Council introduced a new reason for refusal in its Statement by claiming that the proposal would not comply with Policy 3 of the Cornwall Local Plan. However, this was adopted during the appeal process and it is a statutory requirement for the proposal to be assessed against the current development plan for the area. It was therefore reasonable for both parties to cover Policy 3 within their evidence. The appellants also point out that if an affordable housing scheme on the appeal site would potentially comply with Policy 9 (as the Council suggest) then it must follow that the site should be treated as an edge of a settlement location for the purposes of Policy 3. Although I fully appreciate the appellants' point, this is nonetheless a matter of planning opinion which I may or may not have concurred with had the appeal turned on that particular matter.
7. It is suggested that the Council did not need to carry out a sequential test as part of the site is situated within Flood Zone 1 and the proposed dwellings could have been confined to that area. This was a matter of judgement for the Council. However, given that the red-line boundary of the site incorporates large areas within Flood Zone 2 and the indicative plans show dwellings situated within this area, the Council's approach was reasonable.
8. Whilst the appellants submitted information to show the extent to which the former nursery was being irrigated, this did not alter the conclusions of the Flood Risk Assessment that parts of the site are at risk of flooding in the event of the river defences failing. National guidance is clear that the sequential test needs to be applied to all land at risk of flooding, even if the proposed development offers wider sustainability benefits, or would pass the exceptions test. Having established that the site was at risk of flooding, the Council was correct to apply the sequential test, regardless of how other proposals might have been dealt with in the past. This includes the site at Polcoverack Lane¹ which was approved by a planning committee against professional advice.
9. The appellants point out that the Committee Report did not raise any problems with access and egress and it was not referred to in the Decision Notice. An example of a Decision Notice² for a site at Tregrehan Mills has been provided to show that the Council has previously made this matter a specific reason for refusal. It is argued that safe access and egress was unreasonably introduced as an objection during the course of the appeal.
10. However, the Committee Report took the approach that if the proposal failed the sequential test, there was no need to consider the exceptions test in any great detail. It was therefore reasonable to frame the reasons for refusal around the sequential test. Although the matter of access and egress was discussed in the Council's appeal statement, this was largely in response to the appellant's own evidence that the site could be made safe for its lifetime if the sequential test was passed. Had I found in favour of the appellants with

¹ Council Ref: PA15/10635

² Council Ref: PA14/03798

regard to the sequential test, it follows that the exception test would need to have been addressed in order to allow the appeal. The Council was entitled to comment on this.

11. In its consultation response, the Environment Agency indicates that a condition could be imposed to achieve safe access and egress. The appellants submitted a letter from a neighbouring landowner to show that this would be possible. It is argued that the Council should have recognised the strength of this letter and agreed to a condition being imposed. To illustrate this point, the appellants refer to an application at Tregrehan Mills³ where no letter was provided, only a drawing. However, whilst the Environment Agency is a statutory consultee, it is not the planning authority. It is up to the Council whether or not it chooses to follow any recommendations. In this case, the Council gave a reasonable explanation of why it considered that the letter was not a satisfactory way of achieving safe access and egress.
12. The appellants refer to many examples where the Council was adjudged to have acted inconsistently. One site referred to is Par Docks. I note that this was subject to a Level 2 Strategic Flood Risk Assessment and a sequential test was carried out, although the search area was adapted to take into account its strategic regeneration benefits. The Council makes a reasonable argument in pointing out that this is a larger site than the appeal proposal and is specifically identified as being of strategic importance within the Local Plan. The difference between Par Docks and the appeal proposal is therefore made evident. The Council also points out that many of the applications referred to by the appellants (including those in Tuckingmill and Wadebridge) pre-date the currently adopted Local Plan, which is a reasonable explanation considering that local housing targets had not been established at that point.
13. The appellants make particular reference to the Appeal Decision and associated Costs Decision at Devoran Boatyard⁴ where the Inspector determined that the Council had incorrectly applied the sequential test by relying on sites that already had planning permission. I appreciate the relevance of this case given that the Council also referred to sites with planning permission in the current appeal in order to demonstrate that the proposal failed the sequential test. Nevertheless, Appeal Decisions are only material considerations and it is a matter of judgement how much weight the Council wish to apply to such considerations when determining proposals. In the current appeal, the Council provided statistical evidence to justify its approach in the particular circumstances of this case. It was therefore not essential for the Council to legally challenge the Appeal Decision or disclose any correspondence with the Planning Inspectorate in order to explain its stance.
14. I therefore conclude that unreasonable behaviour resulting in unnecessary or wasted expense has not been demonstrated.

Colin Cresswell

INSPECTOR

³ Council Ref: PA16/01026

⁴ Appeal Decision: APP/D0840/W/16/3143424