
Costs Decisions

Hearing held on 28 March 2017

Site visit made on 28 March 2017

by S M Holden BSc MSc CEng MICE TPP FCIHT MRTPI

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

Decision date: 11th April 2017

Costs application in relation to Appeal A Ref: APP/X1545/W/16/3154913 The Old Dairy, Broad Street Green road, Great Totham, Essex CM9 8NX

- 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 A Lawson for a partial award of costs against Maldon District Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for a proposal to replace existing B1 industrial building with proposed children's day nursery and one dwelling.
-

Costs application in relation to Appeal B Ref: APP/X1545/W/16/3162966 Land to the west of The Old Dairy, Broad Street Green road, Great Totham CM9 8NX

- 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 A Lawson for a partial award of costs against Maldon District Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for a proposal described as "one dwelling".
-

Decision

1. The application for costs in relation to both proposals is refused.

Preliminary Matters

2. The two proposals that were the subject of the hearing were on sites immediately adjacent to one another and in the ownership of the same appellant. I was appointed to determine the two appeals and held a hearing into both proposals on the same day in order to avoid unnecessary repetition. I have therefore determined the applications for costs from both parties on the basis that they were related to the two proposals considered together.

The submissions for Mr A Lawson

3. The appellant sought partial costs in relation to three matters. Firstly, the Council had provided no evidence to substantiate its reason for refusing the first application (Appeal A) in relation to contamination. Secondly, in refusing the first application the Council had referred to saved Policy CC7. However, this policy did not apply to the site as it lies outside the Special Landscape Area (SLA). It took until the hearing to agree this, causing the appellant to have to rebut issues relating to the effects on the SLA that were not relevant to this
-

case. The Council should have been more thorough and corrected this error sooner. Thirdly, the appellant was of the view that it was only necessary for one of the four criteria set out in saved Policy E6 to be met to permit the loss of an employment site. It was therefore unreasonable to refuse the application due to the lack of a marketing exercise.

The response by the Council

4. The Council's response in relation to contamination is that its technical guidance sets out a clear process, which required a first stage risk assessment. This was particularly relevant given the uses proposed on the site. It would not have been reasonable to impose conditions without first having some idea of the contamination risks.
5. The Council acknowledged its error in including reference to saved Policy CC7. However, other policies were also relevant to an assessment of the proposal on the character and appearance of the area, so the decision would have been no different. In respect of the loss of employment land, the decision maker should look at the provision of the whole policy (in this case E6) and consider the proposal against all the criteria before reaching a decision. It was therefore not unreasonable to require evidence of marketing to justify a change of use.

Reasons

6. The Planning Practice Guidance (PPG) 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.
7. I consider that the Council's reason for refusing the scheme due to the potential risk of contamination was reasonable given its own published guidance on the matter. Legislation makes it clear that it is for the developer to satisfy the local planning authority to demonstrate that there would be no unacceptable harm. The appellant did not undertake a Phase 1 risk assessment as part of the information submitted with the original application; neither did he prepare such a report to support his appeal. In rebutting the reason for refusal he stated that the risks of contamination were extremely remote, but this was based on only limited information about the previous use of the site and no technical assessment.
8. Nevertheless, on the basis of these statements I was prepared to accept that in the event that the appeal had been successful, the issue of contamination could have been addressed through the imposition of appropriate, albeit stringent conditions. I only accepted this having confirmed at the hearing that the appellant was prepared to accept such conditions. He therefore did not incur any additional or unnecessary expense in persuading me that this approach was acceptable in this case.
9. The issue of the position of the boundary of the SLA was discussed at the hearing. It was not particularly clear due to the small scale of the Local Plan Proposals Map. Initially it appeared that part of the site of Appeal B was within the SLA, although it was finally agreed that the boundaries coincided on the western side of the site. Whilst this meant that reference to Policy CC7 in relation to Appeal A was incorrect, it did not alter the Council's assessment of the scheme when considering the effect of the proposal on the surrounding

area, including countryside that was close to the SLA. The Council referred to a number of other relevant policies and I concurred with its conclusion that the proposed development would be harmful to the character and appearance of the area. In my view reference to an additional policy that was not relevant was a minor error, but cannot be considered to be unreasonable behaviour. It has not resulted in the appellant incurring significant additional costs in preparing his case.

10. For reasons set out in the appeal decisions, I agreed with the Council that the decision maker should have considered Policy E6 as a whole when considering the potential loss of an employment site. This is the case even though only one of the criteria has to be met for a particular scheme to be found acceptable. Whilst a change of use that delivered a greater public benefit could have led to a conclusion that the scheme was acceptable, in this case that benefit was not demonstrated. The remaining criteria were therefore relevant and, in the absence of a robust marketing exercise, provided a sound reason for the Council to reject the proposal. The Council's behaviour was not unreasonable. In continuing to contend for the public benefits of the scheme but not pursuing any marketing of the site, the appellant did not incur any additional or unnecessary expense in presenting his case.

Conclusion

11. I therefore conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated and an award of costs is not justified.

Sheila Holden

INSPECTOR