
Costs Decision

Hearing Held on 10 September 2019

Site visit made on 10 September 2019

by Jonathan Price BA(Hons) DMS DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 October 2019

Costs application in relation to Appeal Ref: APP/P1560/W/18/3215282 Plot adjacent to 24 Mill Lane, Walton-on-the-Naze, Essex CO14 8PE

- 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 Stephen Sibley (Martello Land Properties Limited) for a full award of costs against Tendring District Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for a new four bedroom dwelling.
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Decision

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

Reasons

2. 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. Unreasonable behaviour in this context may be procedural, relating to the appeal process, or substantive, relating to issues arising from the merits of the appeal. This application mainly cites substantive matters and the Council's behaviours in respect of the merits of the proposal.
3. The delegated report supporting the Council's decision had not referred to the fact that the site fell within a regeneration area, designated for Walton-on-the-Naze. However, I do not see this to be a basis for an award of appeal costs. The applicant had initially taken the view that the location of the site within a defined regeneration area obviated the need for applying the Sequential Test to a Flood Risk Assessment. It appears from the evidence that the Council had made it quite clear in advance of the refusal that, despite the site being within a regeneration area in both the adopted and emerging Local Plans, a Sequential Test was still required to be met.
4. A revised Flood Risk Assessment was prepared to accompany the appeal. There was correspondence between the parties in advance of this. As part of these negotiations I do not consider it entirely unreasonable for the Council to have at one point suggested the Sequential Test might be applied to the entire Tendring District. This had support through a quite recent Inspector's decision

- over a planning appeal relating to the Council's refusal for three houses on land at Holland-on-Sea¹, which was dismissed on 21 July 2017.
5. The Flood Risk Assessment submitted with the appeal had focused primarily on assessing alternative sites within the regeneration area, whilst also considering those within the wider urban parts of Frinton and Walton. The Council had considered the latter an appropriate area of search in a 2013 delegated report² over a proposal for three dwellings at 27 Hall Lane, Walton-on-the-Naze. That the Council's approach in 2013 for defining the area of the Sequential Test differs from an officer-level view given at one point in the course of negotiations over a revised Flood Risk Assessment appears scant grounds for an award of appeal costs in this case. This is particularly since the Council had subsequently not contested the appellant applying the Sequential Test to the Frinton and Walton urban area, only the appraisal of reasonable alternative sites.
 6. The scheme for three dwellings at No 27 had been refused and the subsequent appeal dismissed³, where the Inspector had not been able to conclude whether or not the Sequential Test would have been satisfied, referring only to the regeneration area in relation to a hypothetical Exception Test. Therefore, I do not consider the Council has acted inconsistently in relation to that previous appeal decision, as that had given no clear steer over the area for the Sequential Test. The more recent appeal, referred to in paragraph 4 (above), does however provide a clearer steer in this regard.
 7. I accept that the Council did later allow a single dwelling at No 27⁴ without first applying the Sequential Test. The Council did explain in the appeal statement that the Hall Lane site differed from this current case as the former contained an unsightly garage building. Whilst this might not have provided sufficient grounds to waive a requirement for the Sequential Test, the differing circumstances do not persuade me that this example provides sufficient basis for a costs award. This is principally because the approval of a single dwelling at No 27 in 2017 would not have altered my view over the current Mill Lane scheme needing to satisfy the Sequential Test.
 8. In respect of the Council's approach to determining the proposal for 16 dwellings in North Street⁵, I do agree that paragraph 36 of the PPG appears to have been wrongly applied. This paragraph refers to a site that is part of a regeneration strategy being very likely to provide the wider sustainability benefits to pass the first part of the Exception Test. It would appear the writer of this delegated report had misinterpreted this to mean the PPG did not require an initial Sequential Test for schemes within a regeneration area. The proposal for 16 dwellings was refused planning permission for a number of reasons and failure to satisfy flood risk policy might reasonably have provided an additional one. Regardless of the North Street scheme being very different from this case, I do not consider that a misinterpretation of PPG guidance on an unrelated scheme indicates the Council had misapplied either national

¹ APP/P1560/W/17/3172030

² 12/01039/FUL

³ APP/P150A/14/2216703

⁴ Council reference 16/00177/FUL

⁵ 18/01098/OUT

guidance or its own policies in the case of this appeal. This example adds little to a justifiable case for an award of costs.

9. The Council's statement refers to the appeal site being highlighted as an improved car park within the Walton-on-the-Naze Regeneration Framework, which formed the basis of adopted Local Plan Policy QL6 and emerging Local Plan Policy PP14, as opposed to an area considered acceptable for additional housing. I do not interpret this as the Council trying to subsequently claim the appeal site did not comprise a potential infill plot. The Council's decision was that the proposal failed the Sequential Test in that there were reasonably available plots in the surrounding area at lower flood risk. I do not construe the Council's position as seeking to safeguard the site for car parking but to show that, zoned originally as such, the regeneration of the wider Martello site had applied the Sequential Test and was predicated on the housing proposed being within the parts at lower flood risk.
10. I have considered this costs application on the basis of paragraph 49 of the PPG and the types of behaviour that may give rise to a substantive award against a local planning authority. The proposal was in a high risk flood zone and thus did need to meet the Sequential Test. Citing examples of reasonably available alternative sites in the decision, the Council's refusal of planning permission had not prevented or delayed a development which should clearly have been permitted, having regard to its accordance with the development plan, national policy and any other material considerations. From this decision notice, and the Council's appeal statement, there was not a failure to produce evidence to substantiate the reason for refusal on appeal, nor generalised or inaccurate assertions about the proposal's impact, that were unsupported by any objective analysis.
11. There are material differences between this appeal proposal and the cases at Hall Lane and North Street. There may have been some degree of misinterpretation or misapplication of PPG guidance in the manner these previous cases were dealt with. However, I do not consider this to have been the case with the current appeal and there is no material basis for a costs award over the Council not determining similar cases in a consistent manner.

Conclusion

12. On the basis of the foregoing, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. Consequently, I conclude that the application for an award of costs should be refused.

Jonathan Price

INSPECTOR