
Costs Decision

Site visit made on 17 September 2019

by Jonathan Price BA(Hons) DMS DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 October 2019

Costs application in relation to Appeal Ref: APP/K2610/W/19/3221976 Land off Barn Piece Close, Norwich Road, Salhouse, Norwich NR13 6QF

- 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 Henry Greville Cator, Sara Elizabeth Cator and The Honourable Aubrey James Francis Buxton for a partial award of costs against Broadland District Council.
 - The appeal was against the refusal of planning permission for mixed dwelling residential development of 20 single storey properties.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

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.
3. The PPG cites that introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen might be one type of behaviour that may give rise to a procedural award against a local planning authority¹.
4. Following the appeal, it was reasonable for the Council to bring to my attention any material changes in circumstances relevant to the case. It was reasonable and necessary for the Council in its appeal statement to refer to the most recent estimates over housing land supply provided by the Interim Greater Norwich Area Housing Land Supply Assessment of 12 April 2019. This was significant new evidence required to inform any subsequent conclusion over the presumption in favour of sustainable development. This was particularly pertinent given the fact that development plan policy had in the intervening period become over five years old, which had triggered changes required under the National Planning Policy Framework (the Framework) over the basis of assessing housing supply relating to a local housing need.
5. Planning appeals are determined on the basis of current law which might have changed since the decision leading to a specific appeal was made. In this

¹ 047 Reference ID: 16-047-20140306

- regard it might be reasonable for the Council to draw my attention to the judgement² made by the Court of Justice of the European Union (CJEU) over the application of Article 6(3) of the Habitats Directive. This ruling has basically meant that mitigation measures intended to avoid or reduce effects on a European wildlife site should be assessed within the framework of an appropriate assessment and that it is not permissible to take account of these at the screening stage over deciding the likely significant effect of a proposal.
6. However, this CJEU ruling predated the decision leading to this appeal. In any case, there is little in the officer's delegated report to suggest there had been consideration over the proposed dwellings having a likely significant effect on the Broads European sites. Neither was there any indication that the green infrastructure/public open space shown in the planning application were mitigating measures over likely significant effects on the European sites, thus needing to be secured through a planning obligation.
 7. From the evidence there appears to have been a lengthy period of negotiation between the parties and several iterations over the content and wording of the Section 106 planning obligation. The Council were not satisfied with the final signed version which committed to providing the affordable housing element of the scheme but did not include the mechanism for delivering and maintaining the green infrastructure/public open space proposed in perpetuity. However, I was unable to find reference to the Habitats Regulations in the correspondence submitted.
 8. The Council was the competent authority for applying the Habitats Regulations at the application stage. It seems reasonable to me for this to have been an issue addressed in the delegated report and forming one of the reasons for refusal, had the proposal failed to mitigate for any likely significant effects on the Broads European Sites or to enable the Council to carry out an appropriate assessment.
 9. From my reading of the Council's statement, the CJEU ruling over the need for an appropriate assessment relates specifically to paragraph 177 of the Framework (amended in the revision to this made in February 2019), and the disengagement or otherwise of the so-called tilted balance in paragraph 11. Based on the cost's application rebuttal, the Council had subsequently undertaken an appropriate assessment and concluded that sufficient green infrastructure could be delivered with the development to satisfy the Habitats Regulations but that this needed to be secured through a Planning Obligation.
 10. I consider the Council had acted unreasonably in failing to explicitly address this issue of applying the Habitats Regulations in the delegated report and subsequent decision, only raising this at the appeal in the context of the CJEU ruling and paragraph 177 of the Framework. This then led to the unnecessary or wasted expense in the appellant addressing the Habitats Regulations in the later appeal submissions. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

² People Over Wind, Peter Sweetman v Coillte Teoranta (Case C-323/17) EU:C:2018:244

Costs Order

11. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Broadland District Council shall pay to Henry Greville Cator, Sara Elizabeth Cator and The Honourable Aubrey James Francis Buxton, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in preparing the final comments, insofar as these are addressed under the section titled *Appropriate Assessment*; such costs to be assessed in the Senior Courts Costs Office if not agreed.
12. The applicant is now invited to submit to Broadland District Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Jonathan Price

INSPECTOR