



Costs Decision

Inquiry Held on 30 June to 2 July, 31 July and 3 August 2020

Site visit made on 3 July 2020

by Nick Palmer BA (Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 September 2020

Costs application in relation to Appeal Ref: APP/X3540/W/19/3242636 Land to the north and west of Garden Square and Gardenia Close, Rendlesham, Suffolk IP12 2GW

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Anthony Hardy of Capital Community Developments Ltd for a partial or full award of costs against East Suffolk Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for a phased development of 75 dwellings, car parking, public open space, hard and soft landscaping and associated infrastructure and access.
-

Decision

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

The submissions for Mr Anthony Hardy of Capital Community Developments Ltd

2. The basis for the application for a full award is that the reasons for refusal (RfR) are entirely without foundation. The concerns expressed by the Council are insubstantial and would not lead to unacceptable outcomes. The applicant was not given the opportunity to address the outstanding issues because the Council refused to allow an extension of the determination period.
3. In the alternative, the application for a partial award is made on the basis that several of the RfR should not have been imposed and were capable of resolution without the need for an appeal. The Council decided not to defend RfR 1, 4 and 7 in submitting its statement of case. It only defended part of RfR5. The applicant had to address those withdrawn reasons in its statement of case. Other reasons which were subsequently resolved required submission of further evidence.
4. RfR1 concerns conflict with Policy SSP12 of the Site Allocations and Area Specific Policies¹ in terms of the number of dwellings proposed and non-compliance with criteria of that policy. This reason was unnecessary as the concerns expressed are covered by other reasons. The objection contained in the reason in terms of the number of dwellings proposed was not justified.
5. RfR4 concerns odour impact from the adjacent Water Treatment Works (WTW). The Council had the necessary information before it made its decision to show

¹ Suffolk Coastal District Local Plan: Site Allocations and Area Specific Policies (2017)

- that odour was not an issue. Although an earlier layout plan was included within the odour assessment, the modelling demonstrated that there would be no unacceptable odour impact.
6. RfR5 which concerns living conditions was not defended by the Council in full. The part of the reason which was defended was capable of being dealt with by a condition.
 7. RfR7 concerns a requirement of Policy SSP12 for the development to accommodate existing sewers which cross the site. The documents submitted with the application made clear that the sewers would be accommodated.
 8. RfR6 concerns impact on designated European sites. The Council did not engage with either Natural England (NE) or the applicant on this issue prior to determination. The applicant had accepted the need for a Recreational Avoidance Mitigation Strategy (RAMS) contribution and provision of on-site mitigation measures but not the stated requirement to provide a 2.7km dog walking route. The latter requirement was not justified.
 9. The applicant's case is that it has been put to needless and wasted expense in pursuing the appeal and the individual reasons for refusal which have subsequently been withdrawn or addressed.

The response by East Suffolk Council

10. The applicant was given opportunities to amend the design following the previous refused application², by means of pre-application discussions with planning officers. It was the applicant's unremitting attempt to adhere to fixed design preferences which led to the design failures which are the reasons for refusal.
11. The RfR that were not defended were all refined or withdrawn promptly and before any evidence was prepared. The applicant did not incur unnecessary or wasted expense in the appeal process. The withdrawal of reasons at the statement of case stage had the effect of avoiding unnecessary expense.
12. RfR1 was not unjustified because Policy SSP12 allocates the site for 50, not 75 dwellings. This did not cause any unnecessary expense to the applicant. Neither did withdrawal of RfR4 cause any unnecessary expense.
13. RfR5 was retained but refined on the basis of further information and an internal review. This did not cause any wasted expense. The Council considered that this issue could not reasonably be addressed by a planning condition, and that such a condition would present challenges in terms of enforcement.
14. With regard to RfR7, the applicant did not provide a plan to the Council showing that the sewers would be accommodated until after the Council made its decision. This RfR did not cause any wasted expense.
15. The requirement for a dog walking route came from NE, which is the body that the competent authority must consult in undertaking appropriate assessment. The applicant secured its own advice from NE which was that such provision is necessary in addition to the RAMS contribution. A section 106 agreement has

² DC/18/2374/FUL

been entered into between the applicant and the Council which secures the requisite provision.

Reasons

16. The Planning Practice Guidance 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.
17. The applicant was given the opportunity to address the reasons for refusal of the previous application by means of pre-application engagement prior to submission of the application which was subject to the appeal. Some detailed design matters were resolved in this way. However, I have concluded in my decision on the appeal that the proposed fixed orientation of the dwellings causes significant design problems. Those problems were fundamental to both the Council's decision and my decision. On this basis I find no unreasonable behaviour on the part of the Council in not extending the determination period and in refusing permission.
18. In RfR1, the Council identified conflict with a number of the criteria of Policy SSP12, some of which have subsequently been resolved. I have found in my decision on the appeal that the development would remain in conflict with the criterion which requires that the design and layout is compatible with the housing objectives of the Rendlesham Neighbourhood Plan.
19. Although RfR1 refers to the number of proposed dwellings exceeding the number given in the policy, the basis for the Council's objection was the detailed policy criteria rather than the principle of the number of dwellings proposed. The Council decided not to defend this reason on the basis that the conflicts with policy criteria were covered by other reasons. On this basis and for the reasons given above, the inclusion of RfR1 in the decision was not unreasonable.
20. With regard to RfR4, the submitted odour assessment (2018) includes the results of modelling that demonstrate acceptably low levels of odour, but the housing layout provided in that assessment differs from the proposed development and relates to a previously proposed scheme. The Council took the view that the assessment did not demonstrate that the proposal would be acceptable in terms of odour impact. Its planning officers' report states that Anglian Water had drawn attention to the potential for nuisance from the WTW.
21. The applicant provided an updated odour impact assessment (2019) with its statement of case. This document was prepared to support the allocation of the site in the emerging local plan. Upon receipt of this information the Council decided not to pursue RfR4. The inclusion of the wrong plan in the 2018 assessment would have been misleading, and given that Anglian Water apparently had outstanding concern, the Council acted reasonably in including RfR4.
22. Surveys of the existing sewers were submitted with the application. The planning statement and flood risk assessment stated that the sewers would be accommodated and diverted as necessary. A sewer diversion request had been made to Anglian Water before the Council made its decision, but it appears that this information had not been provided to the Council. Upon receiving further

- information, including a plan showing the proposed diversions the Council decided not to defend RfR7.
23. Policy SSP12 does not require demonstration that sewers would be accommodated. The production of detailed plans would be a requirement under the sewer diversion procedure. In my view the documentation submitted with the planning application provided sufficient certainty that the sewers would be accommodated. It would have been a straightforward matter for the Council to have asked the applicant for more detail in this respect if necessary. For these reasons, I find that the inclusion of RfR7 was unreasonable. The wasted expense incurred by the applicant is limited to that incurred in production of the relevant part of its statement of case.
24. The matters covered by RfR5 include: limited depths of private amenity spaces, and associated boundary treatments resulting in insufficient useable amenity areas and limited outlooks from habitable rooms; loss of privacy between the proposed dwellings and their gardens, and overlooking of existing adjacent dwellings and their private amenity areas; and plot 15 being proposed to be entirely visible from public vantage points.
25. The scope of those matters was refined by the Council at statement of case stage. The matter that remained in dispute was the potential for overlooking between facing side windows in the development. The applicant's statement and Appendix 9 of that statement addressed the matters contained in the planning officer's report that were subsequently dropped by the Council, including the amount of amenity space, boundary treatments, the privacy of plot 15, overlooking of amenity spaces and of an adjacent dwelling at 5 Peace Palace Gardens.
26. I have found in my decision that the matter of potential overlooking between side windows is capable of being dealt with by a condition. However, the Council maintained its position that such a condition would not be reasonable or enforceable. This matter required the submission of evidence and suggested conditions and was a matter of judgement as to whether a condition would meet the tests in the National Planning Policy Framework. The Council's defence of this part of RfR5 was not unreasonable on this basis.
27. However, the inclusion of parts of RfR5 that were not defended amounts to unreasonable behaviour, which resulted in the applicant carrying out work and incurring unnecessary or wasted expense.
28. It appears that NE was not consulted by the Council before it made its decision. The Council did not carry out an appropriate assessment but concluded that on-site mitigation measures would be required in addition to the RAMS contribution. The Council's Ecology Officer referred to a need to provide a 2.7km dog walking route. This was also required by NE in correspondence after the Council's decision. The applicant has disputed the need for this provision but has nonetheless provided a section 106 agreement to secure it.
29. I have found in my decision on the appeal that the 2.7km route is justified, this being a matter of judgement having regard to the evidence submitted. I find that the mitigation requirements and RfR6 were justified and reasonable.
30. For the reasons given above, however, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning

Practice Guidance, has been demonstrated and that a partial award of costs is justified.

Costs Order

31. 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 East Suffolk Council shall pay to Mr Anthony Hardy of Capital Community Developments Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in producing the relevant parts of its statement of case in addressing reason for refusal 7 and the parts of reason 5 that were not defended by the Council; such costs to be assessed in the Senior Courts Costs Office if not agreed.
32. The applicant is now invited to submit to East Suffolk 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.

Nick Palmer

INSPECTOR