
Costs Decision

Site visit made on 23 July 2020

by Peter Mark Sturgess BSc (Hons), MBA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: Wednesday, 16 December 2020

Costs application in relation to Appeal Ref: APP/X1545/W/20/3251106 Land between Chandlers and Creeksea Lane, Maldon Road, Burnham on Crouch, Essex

- 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 David Wilson Homes Eastern Counties for a partial award of costs against Maldon District Council.
 - The appeal was against the refusal of an application for planning permission for erection of 36 dwellings, with associated off-street parking, public open space and landscaping.
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) expects the parties in planning appeals to normally meet their own expenses and that all parties behave in a reasonable way. Where a party has behaved unreasonably and has caused another party to incur unnecessary or wasted expenditure in the appeal process, they may be subject to an award of costs.
3. The circumstances of this cost claim arise at a late stage in the appeal process and relate to alleged unreasonable behaviour by the Council in requiring a draft agreement under section 106 of the Town and Country Planning Act 1990 (the s106 agreement) to be amended to incorporate compliance with the Nationally Described Space Standards (NDSS). The applicant argues that this is unreasonable behaviour for a number of reasons:
 - no reference has been made to the need for the development to comply with the NDSS at an earlier stage, including during the course of the processing of the planning application, in the notice of decision refusing planning permission and in the Council's statement of case, and therefore the Council has introduced fresh and substantive evidence at a late stage which has resulted in extra expense being incurred by the applicant;
 - that other recent planning permissions granted around the appeal site, which included affordable housing, were not required to provide houses which complied with the NDSS and therefore the Council has not been consistent in dealing with similar cases;

- that the Council has demonstrated a lack of cooperation with the appellant, by not engaging in a constructive dialogue in order to resolve this matter;
 - that the Council has behaved unreasonably by requiring the applicant to enter into a planning obligation which does not accord with the relevant law or relevant policy in the National Planning Policy Framework (the Framework).
4. The Council has argued that it became apparent through the negotiation of the s106 agreement that the appellant is not proposing affordable housing that would meet the Council's adopted standards and policies as they would not comply with the NDSS.
 5. The Policy H1 of the LDP refers to the need for proposals to conform with Maldon District Affordable Housing and Viability SPD (amended 2019) which refers to the NDSS as a '*starting point for discussion*' in relation to affordable housing. The Council has also stated that the Maldon District Design Guide also requires affordable housing to meet the NDSS. Whether or not a development of affordable housing is required to meet the NDSS is a policy issue which should, according to the PPG, be included in a local plan policy. Specific reference concerning the compliance with the NDSS is not included in the relevant policy of the development plan.
 6. The Council consider that this is not a new argument/reason for refusal as the notice of decision refusing the appeal application referred to '*inadequate provision to secure the delivery of affordable housing to meet the identified need in the locality*'. The Council state that as soon as they were aware of this issue, they raised it with the appellant and in an effort to take a pragmatic and positive approach that they have sought to agree a financial contribution to make up the shortfall in terms of bedroom space.
 7. The planning application which is the subject of this appeal is an application for full planning permission. Plans have been supplied by the applicant which show the details of the dimensions of the proposed dwellings and their room sizes. These plans were supplied at the time of the submission of the application and were available to the Council when it made its decision on the application. These would also have been the plans upon which the Council's Strategic Housing Officer would have commented. Therefore, the Council would have been aware of the overall size of the affordable housing units proposed by the applicant at an early stage in the planning application process.
 8. As a consequence, I cannot accept that the first time it became apparent to the Council that the appellant was not proposing housing that would meet the NDSS was when it entered into negotiations over the content of the s106 agreement during the course of this planning appeal. It would have had ample opportunity as part of the processing of the planning application to assess the sizes of the affordable housing against the requirements of the NDSS and bring any concerns it had to the applicant's attention at a much earlier stage.
 9. With regard to the comments around the wording of reason for refusal 3, I accept that this could be construed as meaning that the affordable housing proposed did not meet the needs present in the locality and that could have related to the size of the proposed dwellings.

10. However, this reason for refusal needs to be read in conjunction with the statement of case produced by the Council in support of this appeal. The statement of case refers to all the policies of the LDP the Council considers to be of relevance to this appeal and to the Maldon District Design Guide (MDDG). At no point in the statement of case, and specifically in relation to the discussion around reason for refusal 3, are the NDSS referred to. Moreover, there is no reference to the Council's Maldon District Affordable Housing and Viability SPD (amended 2019) and its requirement that the NDSS are a starting point for discussion in relation to affordable housing, in the statement of case.
11. It is apparent to me that the applicant would not have been aware of the Council's concern regarding the proposed affordable housing's lack of compliance with the NDSS until the discussions with the Council over the s106 agreement in July this year. Those discussions culminated in the Council's letter dated 4 September 2020 outlining its further objections to the appeal proposal on the grounds of lack of compliance with the NDSS.
12. The applicant has also referred to the Council not dealing with similar cases in a consistent manner. The larger application surrounding the appeal site was granted planning permission in August 2017. It appears that whilst this was subject to a s106 agreement requiring the provision of affordable housing, there was no requirement that that affordable housing complied with the NDSS. In the appropriate circumstances this could be explained by a change in planning policies between the determination of that application and the application which is the subject of this appeal. However, the LDP was adopted in July 2017 and therefore the same development plan policies would have applied to the 2017 application as to the appeal application. It appears therefore that the Council are not treating similar cases in a consistent manner.

Conclusion

13. The PPG requires that for an award of costs to be made, a party has to have behaved unreasonably and that unreasonable behaviour has directly caused another party to incur wasted or unnecessary expenditure in the appeal process.
14. The Council's requirement that the s106 agreement includes a reference to the compliance of the affordable housing with the NDSS and to reinforce this position with an explanatory letter amounts to unreasonable behaviour. This is because no specific reference to the appeal proposal needing to comply with the NDSS had been made either during the course of the processing of the planning application, in the notice of decision refusing planning permission or in the Council's statement of case. The Council's actions therefore are tantamount to introducing a new reason for refusal at a late stage in the appeal process.
15. Furthermore, the Council has permitted other similar developments without the need for them to comply with the NDSS. Therefore, it has behaved unreasonably by not acting consistently when dealing with similar applications.
16. The applicant has incurred unnecessary expenditure in having to respond to the Council's case around the application of the NDSS to the appeal proposal. Therefore, the circumstances for an award of costs to be made set out in the PPG are satisfied.

Costs Order

17. 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 Maldon District Council shall pay to David Wilson Homes Eastern Counties the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in contesting the Council's letter dated 4 September 2020 relating to the application of the Nationally Described Space Standards to the appeal proposal.
18. The applicant is now invited to submit to the 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. In the event the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Officer is enclosed.

Peter Mark Sturgess

INSPECTOR