
Costs Decisions

Hearing Held on 9 – 10 March 2021

Site visit made on 10 March 2021

by Graham Chamberlain BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21st April 2021

Costs Application A in relation to Appeal Ref: APP/V0510/W/18/3213834 Land south of Main Street, Main Street, Witchford, Cambridgeshire

CB6 2HQ

- 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 Abbey Properties Cambridgeshire Ltd, P. Seymour, M. Seymour, N. Holdsworth and J. Holdsworth against the decision of East Cambridgeshire District Council.
 - The appeal is in connection with an appeal against the refusal of planning permission for a proposal described as 'residential development of 31 dwellings, proposed access arrangement and associated works together with the setting aside of land for educational use by the Rackham Church of England Primary School'.
 - This decision supersedes that issued on 16 July 2020. That decision on the application was quashed by order of the High Court.
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Costs Application B in relation to Appeal Ref: APP/V0510/W/19/3227487 Land South and West of Nos 85 to 97 Main Street, Main Street, Witchford, Cambridgeshire CB6 2HQ

- 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 Abbey Properties Cambridgeshire Ltd, P. Seymour, M. Seymour, N. Holdsworth and J. Holdsworth against the decision of East Cambridgeshire District Council.
 - The appeal is in connection with an appeal against the refusal of planning permission for a proposal described as 'residential development involving the erection of 33 dwellings, proposed access arrangements and associated works'.
 - This decision supersedes that issued on 16 July 2020. That decision on the application was quashed by order of the High Court.
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Decisions

1. Application A - The application for a partial award of costs is allowed in the terms set out below.
2. Application B - The application for a partial award of costs is allowed in the terms set out below.

Reasons

3. Irrespective of the outcome of the appeal, the Planning Practice Guidance (PPG) states that an award of costs may only be made against a party who has

behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.

4. The Council's second reason for refusal in respect of application 18/01611/OUM was predicated on draft Policy LP29 of the Submitted Local Plan 2018 (SLP). This emerging policy sought to allocate land as Local Green Space (LGS) and set criteria for assessing applications on land covered by this designation. However, the SLP had not been adopted when the application was determined on the 12 February 2019 and therefore the Horsefield was not a LGS. The weight to be attached to Policy LP29 is informed by Paragraph 48 of the National Planning Policy Framework (previously Paragraph 216). When applying these tests, an Inspector had afforded the SLP only limited weight when determining an appeal¹ on the 18 November 2018. This was due to it not being at an advanced stage of preparation, it still being the subject of examination.
5. More significantly, the Inspector examining the SLP had proposed main modifications (in a letter dated the 19 December 2019) that included removing the LGS designation from the Horsefield. The Council would have been aware of this when determining application 18/01611/OUM only a couple of months later. The decision makers at the Council would probably also have been aware when making their decision on the application (12 February 2019) that a recommendation to withdraw the SLP was in the pipeline. The decision to do this was taken less than a fortnight later by full Council (on 21 February 2019). It would have been a prudent course of action for the Council to have delayed determining application 18/01611/OUM until after the meeting of full Council given the implications for the second reason for refusal.
6. In responding to an email from the applicants, Officers conceded on the 16 April 2019 that the SLP policies referred to in the reasons for refusal, including Policy LP29, carried no weight. But it was not made clear whether the Council would still pursue its concerns regarding LGS, even though the applicants had requested such confirmation in their letter of the 2 April 2019. The Council should have been much clearer from an earlier stage that the second reason for refusal in application 18/01611/OUM and the third in application 17/02217/OUM were unsustainable at that time given the course of events.
7. I therefore share the view of Inspector Phillips that the Council acted unreasonably in refusing application 18/01611/OUM on the LGS issue and then failing to promptly and clearly confirm that it would not defend both this reason for refusal and that attached to 17/02217/OUM. The appellants were put to the unnecessary expense of dealing with this matter. In coming to this view, I accept that The Horsefield is now a LGS following the Witchford Neighbourhood Plan (NP) being made on the 21 May 2020. This is a significant change in circumstances since 12 February 2019, but it does not alter the fact that the Council had already acted unreasonably.
8. A fair reading of the Council's submissions demonstrates that it erroneously took the view that footnote 6 of the Framework excludes LGS from the 'tilted balance'. In effect, the LGS designation in itself provides a 'clear reason' for refusing development in the context of Paragraph 11 of the Framework. However, this is not the case because Paragraph 11 d) i) of the Framework states that it is the application of policies relating to the designation, not the designation itself, that can provide a clear reason for refusal.

¹ APP/V0510/W/18/3200980

9. That said, the Council clarified the correct approach at the hearing. Moreover, the applicants would have needed to explain the interaction between Paragraph 11 d) i), Footnote 6 and the LGS designation in any event given the potential implications to my assessment. On balance, the Council's actions in this respect did not result in unnecessary expense.
10. Similarly, the Council in its written submissions appeared to only partially apply Policy GI2 of the NP, seemingly taking the view that very special circumstances (VSC) must be demonstrated in all instances. The Council did not overtly consider first whether the proposal would enhance the LGS without compromising its primary function as a LGS. The applicants were put to the expense of dealing with this. However, again the Council corrected its approach at the hearing and it ultimately transpired that VSC needed to be demonstrated by the applicants. Thus, no unreasonable expense was incurred.
11. In April 2020 the Council submitted its Five-Year Housing Land Supply Report 1 April 2019 to 31 March 2024 (FYHLSR). This was after the first hearing on the 15 January 2020 had closed. The document is reasonably self-explanatory and therefore would not have required much more additional commentary. The FYHLSR is used by the Council to inform its Annual Monitoring Report and was not prepared as discrete evidence to inform the appeals. The publication of this document was an important material consideration and a change in circumstances that the Council correctly and reasonably brought to the previous Inspector's attention. Similarly, the NP being 'made' was a significant change in circumstances that necessitated additional evidence being adduced.
12. The Council were entitled to change its position in respect of housing land supply on the back of the FYHLSR being completed and published as this was its most up to date evidence. The fact that the FYHLSR had not been subject to formal testing or consultation was not in itself a significant flaw given the fact that the applicants were afforded a chance to review it. Furthermore, there is no requirement in national policy or guidance for such a document to be formally tested and consulted upon unless the Council is seeking to confirm the supply through an Annual Position Statement.
13. This situation occurred again when the Council published its Five-Year Housing Land Supply Report 1 April 2020 to 31 March 2025 in December 2020. Again, it was reasonable of the Council to submit this document as it details the most up to date evidence as it sees it. The applicants were afforded ample time to review this document before the hearing opened. Given the history involved in these appeals it would have been helpful if the Council had made the applicants aware of its intention to publish the new FYHLSR, but I accept there is no requirement to do so and it may not be practical to inform every interested party. Accordingly, the Council did not unreasonably withhold information.
14. In preparation for the first hearing on the 15 January 2020 the Council entered into a Statement of Common Ground (SOCG), which agreed several matters including those policies that are most important to determining the appeals and whether they were out of date. The Council's position on this has change but such alterations flowed from changes in circumstance, such as a different five-year housing land supply position or the findings of an Inspector in a subsequent appeal decision².

² APP/V0510/W/20/3245551

15. The applicants have led on the preparation of the SOCG in the run up to the first hearing and subsequently before the second. It is evident that this was a difficult process which, perhaps, the Council could have been more engaged in. However, it is not unusual for an appellant to lead on the preparation of a SOCG. Moreover, there is nothing of substance before me demonstrating the Council deliberately dragged its heels to intentionally frustrate the appeal proceedings. It appears that discussions simply broke down before the second hearing because agreement could not be reached in the time available.
16. The Council submitted its questionnaire in respect of Appeal B (APP/V0510/W/19/3227487) outside of the prescribed timetable, but there is nothing of substance before me to demonstrate this resulted in unnecessary expense in the appeal process.
17. In response to the Inspectorate's letter of the 5 November 2020, the Council re issued its Statement of Case in December 2020. The Council were not invited to do this but nor was it informed that it could not. The new Statement of Case raised additional concerns relating to biodiversity net gain and re-visited heritage and landscape matters. The statement set out the Council's concerns in adequate detail and referred to the relevant development plan policies.
18. The Council were correct in raising the matter of net gain given the introduction of a new Supplementary Planning Document. It was subsequently agreed by the Council and appellant that this is a matter that could be addressed through a planning condition and therefore it was a substantive point that needed to be aired and resolved by the parties.
19. The quashed appeal decisions are material considerations that were before me and evidently not before Inspector Phillips. I accepted the Council's new Statement of Case because it addressed this material consideration. In the interests of natural justice, the Council (and the applicants as it transpired) were entitled to re-visit their submissions seek to address any perceived flaws. The Council had not previously involved a landscape expert but chose to do so given the findings of Inspector Phillips. Given that the appeals were to be redetermined I see no problem with this, especially as the applicants were afforded a chance to respond to the evidence from Ms Farmer and did so.
20. In February 2021 the Council changed its position regarding the impact on heritage from that set out in its December 2020 Statement of Case. The Council confirmed that it shared the view of Inspector Phillips and did not wish to revisit heritage matters as originally inferred. Although this was somewhat belated and only occurred following requests for clarification from the applicants, it was ultimately helpful in narrowing down the matters in dispute. Such dialogue is not unusual during the course of an appeal and therefore, on balance, the Council did not act unreasonably.
21. The weight to be afforded to the proposed education benefits is a matter of planning judgment and therefore the Council has not acted unreasonably in not sharing the applicants view on this point. Furthermore, for the reasons I go into in my formal decision, there are legitimate reasons to question the extent to which the gift of land would be a benefit.

Conclusion

22. In conclusion, the Council acted unreasonably in pursuing a LGS refusal initially predicated on emerging Policy LP29 and then failing to clearly clarify its position once the SLP was withdrawn. This unreasonable behaviour resulted in the applicants incurring unnecessary costs in rebutting the points made. Thus, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has occurred and a partial award of costs is justified.

Costs Order

23. 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 Cambridgeshire District Council shall pay to Abby Properties Cambridgeshire Ltd, P. Seymour, M. Seymour, N. Holdsworth and J. Holdsworth the costs of the appeal proceedings described in the heading of this decision in so far as they relate to addressing the matters summarised in Paragraph 22 of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
24. The applicants are now invited to submit to East Cambridgeshire District Council, to which a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Graham Chamberlain,
INSPECTOR