



Costs Decision

Site visit made on 14 September 2021

by M Cryan BA(Hons) DipTP MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 December 2021

Costs application in relation to Appeal Ref: APP/Y0435/W/21/3267500 Land off Caldecote Street, Newport Pagnell, Milton Keynes MK16 0BX

- 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 Manor Farm Developments Ltd for a full award of costs against Milton Keynes Council.
 - The appeal was against the refusal of the Council to grant planning permission for the erection of a building comprising two B1 office units with associated parking and landscaping.
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Decision

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

Reasons

2. The Planning Practice Guidance ("the PPG") advises that, irrespective of the outcome of the appeal, 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.
3. Examples of unreasonable behaviour are set out in Paragraph 047 of the PPG¹ in respect of procedural awards, and in Paragraph 049 of the PPG² in respect of substantive awards. There are two principal parts to the applicant's claim for costs in this case, which I shall consider in turn.

Part 1 – Before and during determination of the planning application

4. The first element of the claim relates to the Council's behaviour before the planning application was submitted, and subsequently while it was being determined. Before the planning application was submitted, the applicant sought advice from the Council that a proposed use of the site falling into the "less vulnerable" category (with reference to Table 2 in the PPG³) would be "appropriate in flood risk terms and that an application for office accommodation would not therefore need to be accompanied by a Sequential Test". The planning application was submitted in July 2020, and in September 2020 the case officer advised that they would be recommending approval. However, by October 2020 the Council had changed their view, and planning

¹ Reference ID: 16-047-20140306

² Reference ID: 16-049-20140306

³ Paragraph: 066 Reference ID 7-066-20140306

permission was refused. The applicant contends that the Council's actions were unreasonable, and have led to costs in submitting the appeal.

5. The applicant has submitted various e-mails as part of their evidence for the appeal and the costs claim. On 14 May 2020, following up earlier e-mails with which I have not been provided, the applicant e-mailed the case officer asking:

"I would also be grateful if you could confirm that if our client were to consider an alternative use for the site that falls within the 'less vulnerable' categorisation of development set out in the technical guidance to the NPPF, that as this would then be an appropriate use within Flood Zone 3a, that this would be acceptable in principle?"

6. On 26 May (following a gentle reminder from the applicant on 19 May) the case officer responded:

"In respect of the scope of the sequential test required, the consideration of the use of the development as sui generis, alongside the characteristics associated with this form of the development was assessed within the officer's delegated report. It is considered that the scope of the sequential test should cover all Town Centres areas as designated within the Plan:MK proposals maps and in locations within a buffer zone that would provide appropriate access to a Town Centre via sustainable travel, most likely on foot from a reasonable distance. It would need to be demonstrated that there are no sites or buildings available for this type of use within sustainable town centre areas, or within close proximity to these areas which would provide occupants of the units to the benefits associated with a sustainable town centre use.

"In respect of a proposed 'less vulnerable use' on the site, while this is more likely to be acceptable in principle, I would recommend submitting a pre-application to propose a development on the site for the LPA to assess, or to explore possible development options for the site."

7. The applicant responded on the same day, seeking clarification:

"As I am sure you can appreciate, determining an appropriate buffer area around the Town Centres will be fundamental to whether any future sequential test is considered acceptable to the Council. If we were to take a buffer zone around each Town Centre equivalent to the distance between the application site and the centre of Newport Pagnell, would this be an appropriate and reasonable approach?"

"In addition, I note your comment in relation to 'less vulnerable' uses, however when you say this is more likely to be acceptable in principle, could I ask why it would not automatically be acceptable in principle, in terms of flood risk only? I understand that you would need to fully assess any such application, however, in terms of flood risk, any surety in this respect, that you could provide would be very much appreciated."

8. On 11 June (again following a reminder from the applicant on 4 June) the case officer responded:

"Having discussed with colleagues, it would be considered that the sequential test should include sites up to a 3 mile buffer around the Town Centres designated in Plan:MK. It is considered that this distance would include sites

that are reasonably accessible from the Town Centres by foot or sustainable transport, such as cycling.

"In respect of uses falling into the 'less vulnerable' category, given the location of the site within Flood Zone 3, these uses would be acceptable in respect of flood risk only."

9. I include those lengthy extracts because, in submitting the costs claim the applicant has particularly drawn my attention to the second paragraph of each of the Council's responses. However, it is clear from the exchanges provided that the parties were still discussing the need for, and scope of, a Sequential Test.
10. For reasons which I have dealt with in more detail in my main appeal decision, the issues of whether a Sequential Test is necessary, and whether or not a proposed use is appropriate or not for an area at risk of flooding (and if an Exception Test is necessary) are separate matters which need to be addressed in turn. At no point in these exchanges did the applicant ask if the planning application for offices could, or should, be submitted without a Sequential Test, and more importantly there is certainly no substantive evidence to indicate that the Council gave such an assurance.
11. In the light of the above exchanges, and the subsequent submission of the planning application without a Sequential Test, it strikes me as slightly odd that the case officer should have e-mailed the applicant on 17 September 2020 indicating that they were "happy to recommend approval". I note from the applicant's appeal statement that the Council e-mailed on 5 October to advise that "the development could not be supported as there was a requirement for a Sequential Test to be conducted", and also the comment that the Council did not "allow the appellant sufficient time to consider their options" before planning permission was refused on 19 October.
12. I have not been provided with any further correspondence between the parties, so it is not clear what happened between 17 September and 5 October which caused the Council to change course, nor how the applicant responded. The Council has not indicated that any meetings or conversations took place, nor that any new information came to light. Given the content of the e-mail from the Council on 17 September, I am not at all surprised that the applicant would be disappointed, to say the least, to be notified relatively late in the day that planning permission was going to be refused. However, while it is unfortunate that this does not appear to have been clearly and unequivocally communicated between the submission of the application in July 2020 and the e-mail of 5 October, the evidence before me does not demonstrate that this amounts to unreasonable behaviour in the terms set out in the PPG.
13. In any case, even if I had found the Council's behaviour to be unreasonable, in order to make an award of costs I would need to be satisfied that this had resulted in unnecessary or wasted expense. For the reasons set out in my main decision, I consider that the absence of a Sequential Test was a fundamental and fatal flaw in the planning application, and the Council was correct to refuse planning permission for the reason it did. In the applicant's appeal statement, they "maintain the view that the proposed development does not require the application of the Sequential Test". It is therefore not at all clear to me that events would have followed a different course had the need for a Sequential Test been communicated earlier or more clearly, and it seems likely that the

appeal would have been pursued in any event. On the basis of the evidence before me I cannot conclude that the Council's behaviour led to unnecessary or wasted expense for the applicant.

Part 2 – During the appeal

14. The second element of the applicant's claim is that, in responding to the appeal, the Council's has tried "to assert that the Case Officer emails do not confirm that a Sequential Test would not be required". The applicant considers that this is an "attempt to misinterpret what was clear and unequivocal written advice" which amounts to further unreasonable behaviour and which has led to additional time and expense "to rebut these erroneous comments".
15. It should be clear from the previous section, and paragraph 10 in particular, that the pre-application e-mails provided do not demonstrate that the Council confirmed that a Sequential Test would not be required. I therefore do not find that the Council's behaviour in addressing the applicant's points during the appeal amounts to unreasonable behaviour.

Conclusion

16. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Planning Practice Guidance, has not been demonstrated.

M Cryan

Inspector