



Costs Decisions

Hearing Held on 13 October 2021

Site visit made on 14 October 2021

by D J Board BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31/01/2022

Appeal A

**Costs application in relation to Appeal Ref: APP/X1545/W/20/3259936
Woodacre, D'Arcy Road, Tolleshunt Knights, 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 Tern Developments for a full award of costs against Maldon District Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for 8 no new C3 dwellings (5 no 2 bed and 3 no 4 bed houses) together with access to existing paddocks, vehicular access, landscaping, sustainable urban drainage system and noise attenuation features.
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Appeal B

**Costs application in relation to Appeal Ref: APP/X1545/W/20/3262841
Woodacre, D'Arcy Road, Tolleshunt Knights, 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 Tern Developments for a full award of costs against Maldon District Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for demolition of existing buildings and erection of 2 no new C3 dwellings together with vehicular access.
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Decisions

1. The applications for awards of costs are refused.

The submissions for Tern Developments ¹

2. The submission was made in writing and expanded upon orally. Put simply the applicant submits a full costs application for both appeals on the basis of unreasonable behaviour on the part of the Council. The application is pursued regarding the addition of the sixth reason of refusal to Appeal A, the application of policy E1, application of policy H1, continued highways objection, application of the planning balance, addressing the requirement for a RAMS contribution and the hearing venue.

The response by Maldon District Council²

3. The Council does not accept that it has behaved unreasonably and has not prevented or delayed development which should have been permitted. It provided evidence to substantiate the reasons for refusal and suitable conditions would not have enabled the proposed development to go ahead.

¹ Costs application dated 21 October 2021

² ID2

The Council considers that it has determined similar cases in a consistent manner and that the applications were determined in accordance with the development plan.

Reasons

Discussion of the reasons for refusal

4. There have been a number of applications for the site and it is evident from the correspondence that there was some dialogue between the Council and the applicant. The parties reached agreement on internal layout and the RAMS contribution for Appeal A in advance of the hearing. The other reasons for refusal related to matters of judgement. Prior to the hearing the parties managed to narrow the differences on some points. Nonetheless, there remained matters in dispute. The Council provided evidence to support its position on these issues within its statement of case and in oral evidence at the hearing.
5. Given the remaining points of dispute were matters of judgement an extension of time suggested by the applicant would not have avoided the appeals. As such I do not consider that the Council has been unreasonable on this point.

Sixth reason for refusal – Appeal A

6. The Council omitted a reason on its decision notice for Appeal A. The initial decision notice (5 reasons) was viewed by the applicant via the Council's website, the agent being on furlough leave at the time. The Council state that the error was corrected at the point it was aware of it. I did not hear from the Council when this was or the procedure followed to do this. In addition the Courts have held that local planning authorities cannot withdraw and re-issue decision notices to correct errors. In this case the two decision notices within the appeal documents³ are dated with the same date. I understand the applicant's frustration and concern regarding this chain of events. However, in terms of the costs application whilst it is unreasonable to add a further reason for refusal in this way (whether or not it was an administrative oversight) the key consideration is whether additional costs /wasted expense arose because of the Council prolonging the proceedings on this matter by introducing a new reason for refusal.
7. The issue of affordable housing was raised as part of Appeal B. The issue is also covered within the officer report for Appeal A with reference to the relevant planning policies and the Council's application of them. It is also returned to in the planning balance section of the report. In addition to that it is clear from the planning statement that the matter of affordable housing had been raised as part of the 2019 submission on the overall site which is now considered for Appeal A. As such it was a known issue in the overall consideration of proposals for the site.
8. At the hearing the arguments put by the Council did not substantively deviate from those in the officer report on the scheme. Therefore, whilst I note that the applicant did not discover the Council's anomaly on the decision notice until the appeal was being prepared for, it seems to me that the affordable housing policies and the overall issue would not have been a total surprise or entirely

³ Appellants initial documents, LPA Decision Notice dated 16 June 2020 and Appendix 12 to appellants statement of case

new issue. Therefore, whilst regrettable, I do not consider that the Council's actions have necessarily prolonged the proceedings or led to excessive additional preparation time. In particular whilst it was not correct to introduce a new reason for Appeal A the matter was raised for Appeal B in any event. As such I would have needed to address this issue and ask questions on it at the hearing. Therefore, whilst there was unreasonable behaviour it has not led to additional cost on wasted expense.

Policy E1

9. The applicant has submitted evidence that there was agreement reached that policy E1 is not applicable to the schemes. The Officer report on Appeal A references this policy and also notes that it is not directly applicable but goes on to refer to the loss of the site for job provision having an adverse impact on the targets within E1.
10. Policy E1 is not listed in the Council's reasons for refusal and the Council did not dispute that at pre application stage the Officers gave advice that it would not be relevant. However, this is a matter of judgement and the Council's report and statement of case have set out clearly the context in which the policy is relevant for the Appeal. Moreover, the applicant's planning statement addresses the policy and its position regarding it in assessing the schemes. Therefore, overall, I do not consider the Council's reference to it as part of the appeal is unreasonable as it explained within the report and statement how it had considered and applied it to the appeals and the applicant was aware of this from an early stage in proceedings.

Affordable housing requirement

11. The documentation with the application and appeal submissions demonstrates that the applicant has consistently provided information to the Council to demonstrate that the policy requirements for affordable housing would not apply to either of the appeal schemes. The Council's own policies allow for demolition to be considered in floor area calculations for the application of the policy.
12. The Officer's report for Appeal A refers to the appropriate policy but make no reference to the SPD⁴. The report for Appeal B assesses the scheme against the SPD. The Council's statement refers to matters relating to scheme viability and gives an explanation regarding why it is considered that affordable housing is required in both schemes. It addresses the issue of demolition and the application of the SPD re vacant building credit. At the hearing the Council maintained its position that affordable housing should be provided in both cases. In this regard overall I consider that the Council has produced enough evidence to substantiate its position on affordable housing.

Highway safety

13. There is no dispute that the Local Highway Authority (LHA) did not object to the appeal schemes. The Council clearly stated that its concerns were regarding the internal layout of the scheme and that this would fall outside of the remit of the LHA. The lack of LHA response is acknowledged in paragraph 5.9.4 of the officer report for Appeal scheme A and at 5.9.5 the report goes on to explain the concerns regarding the internal estate road. The report goes on

⁴ Maldon District Affordable Housing and Viability Supplementary Planning Document 2019 (SPD)

to carefully consider the Transport Assessment at paragraph 5.9.6. It sets out why the Council remain concerned about the internal layout as applied for.

14. The Council has explained clearly its concerns regarding visibility and passing for larger vehicles along the internal access. The Council's appeal statement acknowledges that the subsequent planning application⁵ plans demonstrate that the concerns are capable of being addressed. In addition when revised plans were presented as part of the appeal it was clear that the Council agreed that the information shown on them would address reason for refusal 4.
15. Overall, I do not consider that the Council's approach to this, which is ultimately a matter for the decision maker, is inherently unreasonable.

Planning balance and housing land supply

16. The applicant refers to the change in the Council's five year housing land supply between the application being determined and the appeal being heard. More specifically the application of the planning balance for the Appeal schemes. At the hearing there was no dispute⁶ that the Council does not have a five year supply of deliverable housing and therefore the tilted balance in the Framework is engaged in Appeal A and for Appeal B the site is contained within the settlement boundary in any event.
17. Since the applications were determined there was a material change in circumstances in this area. This point is acknowledged in paragraph 2.5 of the Councils statement of case including the need to apply the tilted balance. However, it was the judgement of the Council that the harm arising from the schemes would not be outweighed by what it describes as limited benefits. The Council has clearly explained their position on this point and as such whilst the applicant may not agree I do not consider the Council has been unreasonable on this matter.

Essex RAMS

18. This issue relates to Appeal A⁷ and the applicant's concern that this reason for refusal could have been avoided if they had been directed to the Unilateral Undertaking (UU) template. The documents for Appeal B included a signed and dated UU.
19. This is not the only reason for refusal, with other issues being cited on both appeal schemes. In that scenario I do not consider that it is unreasonable for the Council to have determined the scheme without asking the applicant to provide a UU. This matter was resolved in advance of the hearing and the Council was clear that with the undertaking in place it would not defend the reason relating to RAMS in relation to Appeal A.
20. I found that the contributions would be necessary to make the development acceptable in planning terms and accord with Regulation 122 of the Community Infrastructure Levy Regulations. It would have been preferable for the Council to have communicated earlier with the applicant, including where to source the relevant template. Nonetheless, it would not have altered the need for an

⁵ LPA Ref 20/00825/FUL

⁶ Statement of common ground para 3.2

⁷ LPA Ref 20/00378/FUL

appeal given the other reasons for refusal. As such, I do not consider that unreasonable or wasted expense arose in this respect.

Hearing venue

21. The appeal was not adjourned and the Council was able to source a suitable room for the event. The Council has done all it could to facilitate the event in a timely and safe manner. There has not been unreasonable behaviour on this point.

Conclusion

22. I therefore find that unreasonable behaviour resulting in unnecessary expense as described in the PPG, has not been demonstrated. For the reasons given above I refuse the applications for an award of costs.

D J Board

INSPECTOR