
Costs Decision

Inquiry (In-Person and Virtual) held on 12 – 14 July

Site visit made on 13 July 2022

by Andrew McGlone BSc MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 August 2022

Costs application in relation to Appeal Ref: APP/H2265/W/22/3294498 Rear of 78 High Street, Tonbridge TN9 1EE

- 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 McCarthy and Stone Retirement Lifestyles Ltd for a partial award of costs against Tonbridge and Malling Borough Council.
 - The appeal is against the refusal of planning permission for the redevelopment of the site to provide 36 retirement living apartments for older persons, with associated communal facilities, parking and landscaping.
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Decision

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

The submissions for the applicant

2. The application made in writing by the applicant is for a partial award of costs on the basis that the Council's substantive behaviour on appeal was unreasonable. The applicant contends this having regard to paragraph 049 of the Planning Practice Guidance (the Guidance) for several reasons. These are: preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failure to produce evidence to substantiate each reason for refusal on appeal; vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis; refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead; and not determining similar cases in a consistent manner.

The response by the Council

3. The Council confirmed that the planning application was determined based on a Flood Risk Assessment (FRA) that the applicant does not rely upon for the purposes of the appeal. The application was also without an accompanying Flood Warning Evacuation Plan (FWEP). Moreover, the EA strongly objected to the proposal and the Council has a duty to give 'great' or 'considerable' weight to the EA's advice. Given the strength of the EA's objection, the absence of a FWEP and problems with the first FRA, the Council cannot be said to have acted unreasonably. The Council continued to act in good faith on the EA's advice, who maintained a strong objection to the scheme on appeal. Bearing in mind the EA's relevant expertise in providing advice and guidance on flooding matters, and the Council's legal duty to give great weight to the views of a statutory consultee, this was not unreasonable.

4. The Council has co-operated with the appellant during the appeal on substantive flood matters, by agreeing substantive points or making suggestions. In respect of paragraph 167 of the National Planning Policy Framework (the Framework), the applicant's point simply fails to grapple with the fact that, as Mr Waring pointed out in examination in chief, a proper analysis of an FRA through the lens of paragraph 167 needs to inform the approach taken to paragraph 164(b). The plans were also not clear about where the plant room was to be located, so the Council was not unreasonable in not agreeing to a condition in this respect.
5. The appellant's witness was also required at the Inquiry to answer the Inspector's questions and in particular around the FWEF which went through several iterations between the appellant and the Council's emergency planners before the latter confirmed that they had no further comments on it.
6. The Council was also correct to take a precautionary approach having regard to the nature of the proposed users, bearing in mind the design of the scheme. To not have regard to the special characteristics of the end occupiers and assume that their vulnerability was identical to residential occupants would not have been an appropriate course of action. It is not unreasonable for the Council to have concerns about residents in an older age group where there would be heightened concerns in respect of mobility.
7. The EA may have acknowledged that it did not have the relevant expertise in retirement accommodation and flood evacuation management and procedure, but its advice was equally clear that it informs these issues and so it was reasonable for the Council to advance his views in substance in the defence of the reason for refusal.
8. The Council say that it has approached this appeal throughout in the spirit of cooperation. It sought in good faith to limit inquiry time and expenses by reaching an agreement on affordable housing and acted immediately in making clear that it was no longer pursuing its flooding reason for refusal as soon as Mr Waring's cross-examination was complete.
9. While that reason for refusal fell away, it was not unreasonable for the Council to have maintained such a reason bearing in mind the strong views of the statutory consultee, the fact there remained concerns about the mitigation measures proposed at the outset of the inquiry which the Inspector sought to have resolved, and the fact that the nature of the inquiry process is one in which evidence will have to be tested and ultimately then consideration given as to whether or not a development will be safe for its lifetime taking account the vulnerability of its users is a matter of judgement and assessment by a relevant witness.

The response by the applicant

10. The applicant oral response to this was as follows. To address the Council's inaccurate points on a topic-by-topic basis. In paragraph 6, the Council misses the point that the applicant has made on the basis that the FRA was subsequently submitted on the second application. In reference to CD2.6, there are two relevant parts in respect of this. The first arises from paragraphs 3.5.2 to 3.5.5. Those parts of the FRA submitted with the application made it clear and that "it will be necessary for the management to prepare a site flood management plan". The point is this, the FRA produced as part of the application made it clear that a FWEF was required. The second part of

paragraph 6 of the FRA also refers to the flood resistance and resilience measure that would be incorporated into the building's construction (paragraph 3.6). There is also a reference in the bullet point at the bottom of page 13 which sets out "All plant in the plant room to be above the flood levels in Table 3.1 or made waterproof." Those are exactly the same words that appear in the FRA that accompanied the duplicate application.

11. It is plainly wrong, therefore, to rely on that factor as justifying the Council's behaviour. The point is that it is now accepted there were matters of detail that can be secured by way of a condition with details to be approved by the Council subsequently and there is no reason as to why the Council could not have reached that conclusion on the evidence before it when determining the application. The Guidance makes it clear that persisting in a substantive objection which could be resolved through a condition is an example of unreasonable behaviour.
12. Paragraph 7 follows on from this as the FRA made it clear that a FWEP would be required. The condition now agreed between the parties requires detail to be agreed subsequently and we would ask you to look through the Council's response in respect of other schemes referred to during the Inquiry which are found in Mr Jenkin's and Mr Hann's evidence because in all those schemes the condition came first and the FWEP came subsequently. Failing to determine like cases alike is another example of unreasonable behaviour in paragraph 049 of the Guidance. As is the failure to cooperate and if the Council had asked the applicant to provide additional detail in respect of the FWEP's content prior to its determination of the proposal, all it needed to do was ask. But in any event, this information was provided prior to the exchange of proofs to the Council's emergency planners and nevertheless the Council persisted in its objection until Mr Waring was cross-examined.
13. With reference to paragraph 13 of the Statement of Common Ground (SoCG), the approach of the Council to the SoCG was unreasonable. That document (CD6.5.8) contains specific areas of disagreement and these words "The representatives of the TMDC and the Environment Agency (EA) have declined to agree the following points...5.0 Whether the Council's Emergency Planning Team are obliged to formally approve an FWEP." The Council and the EA expressly declined to agree matters, subsequently agreed through cross examination at the Inquiry. They were given every opportunity to do so, and it is not a reasonable approach having regard to the Guidance.
14. In respect of paragraph 14, the point made was that substantive issues relating to the location of the plant room in relation to Framework paragraph 167 a) and b) and the residual risk in Framework paragraph 167 d) were not part of the EA's objection to the planning application. They did not form part of the Council's officer report analysis. They didn't form part of the reason for refusal. They were introduced late in the day, which was unreasonable. We had to deal with this in evidence which led to significant abortive costs and to cap it all off, Mr Waring agreed in cross examination that there was no evidence basis for those points which had been raised late.
15. The final point is in relation to paragraphs 8 through to 12 of the Council's costs submission. The point raised here is sensibly the EA had a strong objection and then at paragraph 9 the Council had a duty in law. Regarding the matter of law point – the applicant agrees on this point, but that does not absolve the Council of critically analysing the response of a statutory consultee

to decide whether there are cogent and compelling reasons to justify a departure. That is its function as a local planning authority. The Council cannot abdicate its responsibility as it decided to call Mr Waring as its witness. This is not a case whereby Mr Waring appeared separately. Had the Council critically analysed the objection properly, it would have been obvious that the objection was not sustainable.

- 1) The EA had repeatedly advised the Council in numerous applications that evacuation matters were outside its remit and expertise.
 - 2) Officers can be expected to be aware of the ADEPT standing advice (link in the Guidance) and this makes clear that evacuation procedures are not within the EA's expertise and remit.
 - 3) Having regard to paragraph 058 of the Guidance, the appropriate people to ask about evacuation procedures were the Council's emergency planners and who, in the Council's own words in paragraph 17, the second iteration of the FWEP went back and forth between the applicant and the emergency planners. If the Council was to take advice in relation to this matter, it only had to ask its own emergency planners. By the time we reached the Inquiry it was plain that there was no objection from the emergency planners, but the Council still persisted in its objection. That is manifestly unreasonable.
16. Next, the Council also failed to take into account the Framework and the Guidance setting out that older people have diverse needs; failed to take into account the Planning Statement and Transport Statement in respect of the nature of the proposals here. Had it done so it would have been obvious that the EA's comments could not be taken at face value and proper consideration would not support them.
17. The final point is, in reality, that for most cases a local planning authority receives a consultation response from a statutory consultee setting out concerns in respect of proposed development. It is the job of an officer to properly consider whether those objections can be overcome by conditions or whether they amount to a substantive objection. Here the case officer had the FRA, setting out the appellant's proposed FWEP/management plan requiring evacuation and flood resistance and resilience measures and officers know it had in other cases secured these by way of condition. It is wholly unclear from any evidence given to this Inquiry how the Council ever reasonably came to the conclusion that it did. The reality is that the Council and the EA refused planning permission for a scheme based on vague and inaccurate assumptions about characteristics of the occupants who are older than 60 years old. That is a manifestly unreasonable position to take. With respect, the Council's costs response does not come close to addressing the applicant's points. For these reasons, we respectfully request that costs are awarded as per our application.

Reasons

18. Parties in the appeal process are normally expected to meet their own expenses. However, the 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. For an application to be successful, it needs to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense.
19. The Council refused planning permission based on the FRA before it at that

time and the EA's objection. The EA was a statutory consultee and therefore the Council does have a duty to give their comments 'great' or 'considerable' weight. However, this does not absolve the Council of interrogating the EA's response to determine whether it is robust, substantive and of merit in the first instance. The Council does not seem to have challenged the EA's comments with sufficient rigour in this case, especially throughout the course of the appeal. The reasons for this will become evident in due course.

20. Setting this aside for the time being, the Council's reason for refusal, Officer Report and the EA's objection did not specifically cite Framework paragraph 167. However, the reason for refusal did refer to paragraph 164 and specifically part b) of that paragraph. It was clear, before and during the Inquiry, that the Council's position in respect of paragraph 164 b) was informed by its analysis of the FRA against Framework paragraph 167. The substantive points that led to the Council's decision related to points a) to e) of paragraph 167. Hence, the applicant has not been put to unnecessary or wasted expense, in principle, by responding to these matters on appeal.
21. However, in dealing with points a) to e) several matters were accepted by the Council through cross examination. This led to the Council withdrawing its case in respect of the first reason for refusal. That said, the Council's behaviour prior to this is the key consideration in this case.
22. Following the refusal of planning permission and in the lead up to the Inquiry, a second planning application was submitted to the Council¹. This included an FRA that formed part of the evidence before the Inquiry. It pointed to the need for a FWEP and to incorporate flood resistance and resilience measures into the building's construction. There was also reference to all plant being located above the flood levels or made waterproof. Indeed, the wording in both FRA's was exactly the same in respect of these points.
23. However, the Council's flood risk Proofs of Evidence (PoE) recommended a planning condition to ensure the plant is located above the design floor level; a point accepted in cross-examination. There must have been a sound basis for reaching this judgement having regard to paragraph 167 a), so it is unclear why the Council did not agree to this point as part of the Flood Risk and Drainage Statement of Common Ground (FRDSocG)². It was unreasonable to do so, even if the plans were not precise about the location of the plant room as the question could have been posed and briefly answered as it was through evidence before me. Therefore, the applicant's witness presence at the Inquiry was not required to confirm this.
24. Although the Council suggested raising the finished floor levels to make the development flood resistant and resilient, it accepted that this would not be possible due to the need for level access. Further to this, the Council's witness accepted, as per the recommendation in his PoE, that a planning condition could secure flood resistance and resilience measures. The Council also accepted, despite the disagreement in the FRDSocG, that it would be appropriate for the least vulnerable parts of the development to be located on the ground floor, and that they were not integral to the scheme's functionality.
25. Also, in relation to point b), a draft FWEP was progressed by the applicant with the Council's emergency planners. The EA accepted that evacuation procedures

¹ Council Ref: TM/22/00638/FL

² Point 1.0, Specific Areas of Disagreement, Flood Risk and Drainage Statement of Common Ground

are not within its expertise and remit even though this issue was raised regarding its absence in the PoE. The FWEP has gone through several versions but following revision E on 9 June 2022, the emergency planners confirmed to the Council officer that they had no further comments on it. This was before the PoEs were submitted but after the submission of the FRDSocG. The Council accepted at the Inquiry that the precise details of the FWEP could be finalised through a planning condition and that this would overcome part of its case. It was also accepted by the Council's witness that a FWEP could ensure that mobility scooters were moved to apartments above practical flood risk and that future occupants' vehicles could be relocated to a safe location in the event of a significant flood event. Therefore, even if there was merit in the absence of a FWEP prior to 9 June 2022, the Council has, at least, acted unreasonably since then as its PoE did not reflect the up-to-date position on the FWEP. This position ought to have been clear to the Council as it was their own emergency planners who have commented on the FWEP.

26. It was an agreed matter that the appeal scheme complied with point c) of Framework paragraph 167. In terms of point d), the residual risk, in this case, relates to whether flood defences fail, or the design event is exceeded. However, in either scenario, the Council accepted that the accommodation on the first floor would be above the level of practical flood risk. Added to this, it was accepted that a scheme of evacuation could be secured through a FWEP which could be subject of a planning condition. Both matters would make the development safe for its lifetime in the design event, and demonstrated that any residual risk could be safely managed.
27. Lastly, in respect of point e), the Council accepted that, on a policy basis, there is no requirement in the Guidance for dry access. Indeed, this was the position accepted by the EA and the Council on a scheme at 1-4 River Walk³, near to the appeal site, and the hotel scheme⁴ on the appeal site itself. The correct approach in relation to dry access was also set out in the Clanage Road decision⁵. The EA was a party to that appeal. Despite this, the Council's case alleged conflict with point e) on the basis that no dry access could be achieved and that there was a requirement for there to be. This approach was accepted as being inconsistent with the above cases by the Council's witness and the Council accepted that a robust, fit-for-purpose and effective FWEP could be conditioned and that a safe refuge would exist above first floor containing both apartments and core community facilities.
28. I agree that it was not unreasonable for the Council to have concerns about the needs of future occupants of the proposal in relation to the effect of flooding. However, many of the Council's points were not supported by objective evidence and the Council later agreed that: the development's vulnerability in flood risk terms is the same as other residential accommodation; that the needs of older people are diverse as they are for the general population; and that it would be inappropriate to refuse planning permission as a matter of policy solely on the basis that the proposed occupants would be older people. Added to this, the Council's witness accepted that he did not consider the Transport Statement submitted with the planning application which evidenced the demand for mobility scooters and vehicles based on the type of housing proposed. This led to inaccurate and unevidenced assertions being made by the

³ Council Ref: 19/01108/FL

⁴ Council Ref: 20/01122/FL

⁵ Appeal Decision Ref: APP/Z0166/V/21/3270776, Appendix 1, Flood Risk and Drainage PoE, Paul Jenkin

Council which were later found not to be supported by objective evidence.

29. So, whilst the Council did engage with the applicant during the appeal in respect of flood risk, it should have done so to a greater extent and particularly reflected on its case, having regard to the advice of the EA. To have carried out such sensible ongoing case management would have avoided unreasonable behaviour. The applicant did seek to agree matters which the Council has now accepted could be subject of planning conditions. As a result, the Council has pursued a case in relation to flood risk that was made based on vague, generalised and inaccurate assertions and which has not been substantiated on appeal given that the issues raised were capable of being dealt with by planning conditions. Furthermore, it ought to have approached this case in a consistent manner given its approach to the 1-4 River Walk scheme.
30. Although I recognise the Council's efforts to save Inquiry time and expenses concerning affordable housing matters, this does not alter my conclusion that the Council acted unreasonably in refusing planning permission on a planning ground capable of being dealt with by conditions. This has led to the applicant incurring unnecessary and wasted expense in the appeal process due to the Council's unreasonable behaviour specifically in respect of flood risk matters. This has led to the applicant preparing a PoE, rebuttal proof, conferences, advisory costs and time at the Inquiry addressing these matters.

Conclusion

31. I conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated. As a result, a partial award of costs is warranted in this case.

Costs Order

32. 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 the Tonbridge and Malling Borough Council shall pay to McCarthy and Stone Retirement Lifestyles Ltd, the partial costs of the appeal proceedings limited to those incurred in relation to flood risk; such costs to be assessed in the Senior Courts Costs Office if not agreed.
33. The applicant is now invited to submit to Tonbridge and Malling Borough 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.

Andrew McGlone

INSPECTOR