



Costs Decision

Hearing held on 7 November 2023

Site visits made on 6 and 8 November 2023

by Graham Chamberlain BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21st November 2023

Costs application in relation to Appeal Ref: APP/X2220/W/23/3324453 Land South of Whitefriars Meadow, Sandwich, CT13 9AS

- 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 Dover District Council for a full award of costs against Easton Builders Ltd.
 - The appeal was against the refusal of planning permission for a development described as the erection of three buildings to provide 10 apartments and commercial floorspace (Use Class E), together with associated landscaping and open space.
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Reasons

1. Irrespective of the outcome of the appeal, the Planning Practice Guidance (PPG)¹ states that an award of costs may only be made against a party who has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
2. The Council's application was made in writing and relates to the substance of the appellant's case. In summary, the Council submit that the appeal had no reasonable prospect of succeeding because, during the hearing, common ground was reached between the appellant and Council that there is at least one sequentially preferable site. The implication being that Paragraph 11d(ii) of the National Planning Policy Framework is not engaged. Indeed, the application of policies in the Framework provide a clear reason for refusal. The premise of the Council's case is supported by the PPG, which states that an appellant is at risk of an award of costs if the appeal had no reasonable prospect of succeeding.
3. It is fair to say the appeal had little prospect of success without passing the sequential test. Furthermore, the appellant erroneously approached the sequential test required by Paragraph 162 of the Framework, in part at least, with reference to the accessibility of services and facilities. Instead, the sequential test is concerned with sequentially considering sites with reference to three 'sub tests', these being; whether the alternative site(s) are in an area of lower flood risk; appropriate for the proposed development; and reasonably available.
4. Nevertheless, by way of mitigation, the Council's reason for refusal relating to flood risk was muddled in that it focussed on access and/or egress to the site. Such a consideration only becomes important if the sequential test is first passed. It also only alleged a conflict with Paragraphs 163-167 of the

¹ Paragraph: 030 Reference ID: 16-030-20140306

Framework, which relate to the exception test. The appellant's case, therefore, understandably focussed on responding to the perceived concerns with access and egress.

5. Moreover, the Council's delegated report does not identify any specific sites that are sequentially better, did not apply the tests listed above and seemed to factor in wider site constraints. It also confirmed that the level of search for alternative sites 'appears' limited but did not directly criticise the sequential test area or identify a different geographical location.
6. The appeal statement provides a bit more detail and does confirm that seven sites are proposed for allocation in the emerging local plan, and that some of these site score preferentially in terms of flood risk. However, there is little detail behind this statement. For example, the specific sites are not identified, and there is no analysis against the relevant 'sub tests'. Nor did the Statement of Common Ground identify which sites the Council considered to be sequentially preferable. Therefore, the limitations in the appellant's sequential test were not clearly set out by the Council. Thus, the Council's case lacked precision and therefore the appellant's response did too.
7. It is therefore unsurprising that this was a matter discussed in detail at the hearing. During that discussion the Council's case crystallised. At that point the appellant conceded the matter and agreed that at least one site was sequentially preferable in flood risk terms to the appeal site. Had the Council provided more detail in the delegated report, reason for refusal or appeal statement then the appellant may have conceded the point earlier.
8. Moreover, it is of note that parties are encouraged to keep their cases under constant review, even during events such as hearings. There is nothing inherently wrong with conceding a point as that assists the proceedings. Indeed, the appellant's team showed professional integrity in doing so.
9. The Council also evolved its case during the hearing with reference to whether the most important policies for assessing the proposal are out of date, whether the car free concept would harm the area, whether a district wide sequential test should be undertaken and the relevance of Policy DM25. Some of these revisions to the Council's case departed from the Statement of Common Ground. This serves to illustrate that cases can change upon testing at the event. The parties should react to this and not remain dogmatically wedded to a point that does not stand up to scrutiny. Given this, and when factoring in the lack of precision in the Council's case, I am of the view that unreasonable behaviour has not occurred, but only just.

Conclusion

10. In conclusion, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not occurred. The application for costs is therefore refused.

Graham Chamberlain
INSPECTOR