



Costs Decision

Hearing held on 7 and 8 November 2023

Site visit made on 7 November 2023

by Joanna Gilbert MA (Hons) MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 November 2023

Costs application in relation to Appeal Ref: APP/U2235/W/23/3325102 Little Gaynes, Faversham Road, Lenham, Kent ME17 2PU.

- 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 Maidstone Borough Council for a partial award of costs against Mr J Bond.
 - The appeal was against the refusal of planning permission for 4 Social Rent Affordable Homes and 16 Open Market Homes, 1 car port, passing points, a re-aligned access, the retention and enhancement of PROW KH438 and the implementation of a 0.51 Hectare public access Natural Landscape Buffer dedicated as a Local Nature Reserve. The scheme includes a Nutrient Offsetting arrangement with Forestry England to counter the issues relating to the Great Stour catchment area.
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Decision

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

Reasons

2. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) 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. Unreasonable behaviour in the context of an application for an award of costs may be either procedural or substantive. The applicant considers that the appellant has behaved unreasonably both procedurally and substantively and that a partial award of costs is warranted. Lenham Parish Council, while not making their own application for costs, supports the applicant's claim. I shall address procedural matters first, before turning to substantive matters.
3. The applicant submits that the appellant has behaved unreasonably on a procedural basis with regard to nutrient neutrality and housing land supply.
4. The appellant's Nutrient Assessment 3135/P03 dated 29 September 2022 referred to a water usage rate of 94 litres per person per day (lpppd). Prior to the applicant reaching their decision on 23 February 2023, the appellant produced a further Nutrient Assessment 3135/P05 dated 21 February 2023. This second Nutrient Assessment considers a water usage rate of 120lpppd. This would comprise a standard water usage rate of 110lpppd with an additional 10lpppd contingency. It was accompanied by an email from the appellant to the applicant on the same day which did not seek a lower water usage rate. However, the appellant's statement of case continued to argue for a lower water usage rate of 94lpppd. Furthermore, at the point that the main

parties submitted their Statement of Common Ground on nutrient neutrality on 30 October 2023, the main parties were still expressing differences in relation to water usage rates, even though the appellant acknowledged at the hearing that the nutrient budget calculator had factored in 120lpppd.

5. The appellant acknowledges that a typographic error was made in relation to whether the phosphorus load was increased or decreased. While the appellant referred to securing additional phosphorus and nitrogen credits, these did not materialise. Instead, the appellant's arguments at the hearing centred on lowering water usage rates below the lowest rate applied via Building Regulations and on management of phosphorus through sustainable drainage in addition to committing to some phosphorus and nitrogen credits via a legal agreement.
6. It is unfortunate that the applicant suggested that a legal agreement was the most appropriate way to confirm the water usage rate only at the hearing. Since the hearing, the appellant has provided a completed unilateral undertaking which confirms that the development would be constructed to adhere to the water usage rate of 120lpppd in the second Nutrient Assessment.
7. However, given that the appellant's technical evidence within the second Nutrient Assessment was at the time of the appeal based on the 120lpppd, it was unreasonable of the appellant to continue to make the lower water usage argument prior to and during the hearing. This resulted in wasted expense for the applicant in respect of undertaking further work on lower water usage in producing their statement of case, the Statement of Common Ground on nutrient neutrality, and preparing for and participating in the hearing in relation to this element of nutrient neutrality.
8. Turning to housing land supply, the appellant provided detailed submissions within their statement of case on the applicant's five year housing land supply, though the appellant did not clearly evidence that adopted policies within the Maidstone Borough Local Plan 2017 did not carry full weight. These detailed submissions were followed by further work on housing land supply at my request as part of a Statement of Common Ground on this topic. It was disappointing that I had to request a further Statement of Common Ground at a relatively late stage in the appeal process, but this occurred as the main parties had failed to work together effectively to set out the specific, remaining areas of dispute in respect of housing land supply.
9. Following the submission of the Statement of Common Ground on housing land supply, the applicant published an updated five year housing land supply position¹ on 1 November 2023. Having received the applicant's update, the appellant provided their own latest position on housing land supply on 3 November 2023. It was at this point where the appellant confirmed their wish not to spend a great deal of time on housing land supply at the hearing.
10. Although the Firwood appeal² is recent, involved cross-examination, and was not legally challenged, it was not unreasonable for the appellant to disagree with that decision as set out in their statement of case. The applicant may disagree with the appellant's contentions in this regard, but disagreement does not render the appellant's viewpoint automatically unreasonable.

¹ Annual Housing Delivery Update 2023 and 5-year supply table.

² APP/U2235/W/22/3305441, decision issued 10 March 2023.

11. I consider the Council presently has a five year housing land supply. However, this view is based on the evidence provided by both main parties in early November 2023. It is clear from the numerous different housing land supply figures within the evidence that circumstances have evolved. This is not unusual. It was frustrating, but not unreasonable for the appellant to mention on 3 November 2023 that the matter of housing land supply was no longer as significant as it originally appeared to be. Accordingly, the time expended by the applicant on housing land supply was neither unnecessary nor wasted.
12. With regard to the applicant's substantive grounds for costs, these pertain to the appellant's affordable housing position and that the applicant considers that the proposed development had no reasonable chance of succeeding, as the proposed development is clearly not in accordance with the Development Plan, and no other material considerations such as national planning policy are advanced that indicate the decision should have been made otherwise.
13. The applicant considers that the proposed development is contrary to Maidstone Borough Local Plan 2017 (MBLP) Policy SP 17 and to national and local policies which aim to protect rural character and appearance and require conservation and enhancement of the Kent Downs Area of Outstanding Natural Beauty in which the site lies. Further to this, the applicant considers that the appellant placed unreasonable reliance and weight on pre-application advice which was not wholly positive. Notwithstanding my appeal decision which finds that the proposed development conflicts with relevant local and national planning policies and that there are no material considerations which indicate planning permission should be granted, it was not unreasonable for the appellant to submit an appeal as their interpretation of the situation was plainly different on matters which are to some extent subjective.
14. With regard to affordable housing, the applicant contends that the appellant has failed to apply national planning policy and has also inaccurately applied local policy. Despite the applicant's officer report and decision notice referring to concerns about the policy requirements of MBLP Policy SP 20, the number of affordable homes offered and the tenure mix of those homes, including national policy on First Homes, the appellant did not address these matters in their statement of case or in the main Statement of Common Ground. It was not reasonable to remain largely silent on these issues. Indeed, it was not until the submission of the Statement of Common Ground on affordable housing on 30 October 2023 that it became clear that the appellant was willing to offer eight affordable homes rather than the four affordable homes within the description of development, with scope for First Homes within that offer.
15. The appellant did interact with Maidstone Borough Council's Housing Delivery Team, but it appears that the appellant did not communicate with the appropriate part of the Council. The National Planning Policy Framework has contained expectations of at least 10% of homes being for affordable home ownership since 2018. Furthermore, not only was the PPG altered following the publication of the First Homes Written Ministerial Statement on 24 May 2021 to include considerable information on First Homes, but it was also made clear in the officer report in February 2023 that no information on First Homes had been submitted as part of the application and that insufficient information had been submitted to the applicant to allow for viability review processes to be carried out on affordable housing numbers and tenure mix.

16. It is set out in MBLP Policy SP 20 that where it can be demonstrated that the affordable housing targets cannot be achieved due to economic viability, the tenure and mix of affordable housing should be examined prior to any variation in the proportion of affordable housing. The Affordable and Local Needs Housing Supplementary Planning Document (July 2020) (ALNHSPD) contains further detail on how MBLP Policy SP 20 should be implemented. Chapter 15 of the ALNHSPD provides detail on how viability issues will be addressed.
17. In failing to address the local and national policy context in place, the appellant was negligent. This represents unreasonable behaviour and has given rise to wasted time and expense in the appeal process as the applicant had to continue to address points of local and national policy on affordable housing which were extant and applicable, but which the appellant appeared unwilling to engage with.
18. While the appellant's starting point for discussion with the Housing Delivery Team appears to have been policy compliant in terms of the number of affordable housing units only, the culmination of those discussions placed only one offer on the table. That offer was for four affordable housing units, all of which would be for social rent. In moving the goalposts at a very late stage in appeal proceedings to introduce an alternative of eight affordable housing units and to discuss tenure alternatives on the second day of the hearing, the appellant fundamentally altered their case. This was unreasonable and led to wasted time and expense for the applicant in preparing the Statement of Common Ground on affordable housing, and in preparing for and participating in the hearing with regard to affordable housing.
19. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of lower water usage and affordable housing and a partial award of costs is therefore warranted in respect of lower water usage in producing the Statement of Common Ground on nutrient neutrality, preparing for and participating in the hearing in relation to this element of nutrient neutrality, and with regard to the work undertaken by the applicant on affordable housing as part of the appeal process.

Costs Order

20. 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 Mr J Bond shall pay to Maidstone Borough Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of lower water usage and affordable housing as set out above; such costs to be assessed in the Senior Courts Costs Office if not agreed.
21. The applicant is now invited to submit to Mr J Bond, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Joanna Gilbert

INSPECTOR