



Costs Decision

Hearing held on 17 September 2024

Site visit made on 17 September 2024

by E Dade BA (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 November 2024

Costs application in relation to Appeal Ref: APP/J1535/W/24/3342224 Land to the south & east of the former Chimes Garden Centre, Nazeing, Waltham Abbey EN10 6RJ

- 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).
 - An application was made by Mr Kevin Ellerbeck on behalf of Lifestyle Care & Community Ltd for a full award of costs against Epping Forest District Council.
 - The appeal was against the refusal of planning permission for redevelopment of the site to provide up to 52 later living apartments (Extra Care Housing) incorporating a convenience shop and café (use class E); 13 retirement cottages (Extra Care Housing); 10 self-build & custom build houses; 4 affordable houses, open space, bowling green, children's play area and improved local bus service; all matters reserved except access.
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Decision

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

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. Paragraphs 46-50 of the PPG provide examples of behaviours which may lead to a procedural or substantive award of costs against a local planning authority.
3. The applicant alleges the Council behaved unreasonably, for three reasons. First, it is suggested the officer report misled the planning committee members in material matters, including the affordable housing sum, past delivery of housing, regularisation of the access road, and decontamination of the site. Second, the Council did not disclose its counsel's advice. Third, whether the Council erred through the amount of weight attributed to policy compliant aspects of the development in the planning balance.

Officer report

4. The officer report clearly explains that, despite being of the view the proposal would not generate an additional surplus to support a contribution, the applicant proposed payment of an affordable housing sum.
5. The report explains that past delivery of the total number of homes was 30%, as measured by government's Housing Delivery Test (HDT). The Council considered the HDT measurement to have been superseded following recent adoption of the Local Plan. In subsequent correspondence from government, the Housing Delivery Test measurement was recalculated based on the Local

Plan housing requirement. The correspondence indicates the updated HDT measurement supersedes the previous measurement and does not indicate a shortfall in past delivery. Therefore, the Council did not err in treating the HDT measurement as superseded.

6. The officer report suggests the Council benefitted from the provisions of paragraph 76 of the National Planning Policy Framework (the Framework) by virtue of the Local Plan being less than five years old and is not subject to the requirement of paragraph 77 to provide an annual update of a supply of sites. The proposal pre-dates the publication of the Framework, and the transitional arrangements in footnote 79 of the Framework indicates the policy contained in paragraph 76 should not be taken into account as a material consideration. During the appeal, the Council maintained its view that Local Plan provides a suitable supply of deliverable sites. Therefore, the Council's judgement in respect of the proposal's contribution to housing supply would not change irrespective of whether the transitional arrangements were or were not applied.
7. The weight to be afforded to the decontamination of the site and regularisation of the access road are matters of judgement for the decision-maker. Notably, the report indicates the lawfulness of works at the Chimes Phase 1 and 2 were being investigated by the Council's Planning Enforcement Team, suggesting that mechanisms exist to address the matter beyond permitting the development proposal.
8. For the reasons set out above, I do not consider the officer report misled planning committee members.

Counsel advice

9. The appellant alleges the Council had received but failed to disclose counsel advice relating to affordable housing provision, the extent of previously developed land, and the classification of the proposed assisted living units.
10. The circumstances where a financial contribution may be accepted are set out in Policy H2 of the Epping Forest Local Plan 2023 (LP), and guidance for undertaking viability assessment is provided by the PPG. Therefore, the LP and national guidance together provide sufficient advice for calculating the affordable housing sum.
11. The officer report explains the former uses of the site and its consideration for inclusion within the Brownfield Land Register. Through the Statement of Common Ground, the parties agree that at least 16% of the site area is previously developed land.
12. Paragraph 14¹ of the PPG indicates that, when determining proposals for specialist housing for older people it is for the local planning authority to consider into which use class a particular development may fall. The PPG suggests such accommodation may fall within uses classes C2 or C3, depending on the level of care and scale of communal facilities provided. The officer report concludes the proposed units would fall within use class C3.
13. Therefore, even in the absence of published Counsel advice, I am satisfied the Council's assessment was robust and sufficient evidence was provided to substantiate each reason for refusal.

¹ Reference ID: 63-014-20190626

Weight afforded to policy-compliant matters

14. The applicant alleges the Council erred in concluding that aspects of the proposed development which do no more than ensure compliance with development plan policies cannot be benefits attracting positive weight. The appellant cites case law where this matter has been considered².
15. Paragraph 153 of the Framework requires substantial weight be given to any harm to the Green Belt, and at paragraph 152 states inappropriate development should not be approved except in very special circumstances. The Council's assessment of the proposal concluded the proposal would be inappropriate development within the Green Belt, resulting in harm to its openness and conflicting with its fundamental purposes.
16. In addition to Green Belt harm, in the absence of completed planning obligations the Council identified harms in respect of the proposal's failure to mitigate against adverse impact on local infrastructure and services, including provision of affordable housing, health capacity, sports & leisure, open space, Biodiversity Net Gain, the Epping Forest Special Area for Conservation, and local community facilities. The cumulative harms arising from the proposal identified by the Council in its decision were therefore of great magnitude.
17. Framework paragraph 153 indicates that very special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.
18. The weight to be applied to other considerations is generally a matter of planning judgement. For example, the Council had confidence in its five-year housing land supply and its supply of sites for older people's housing, leading to it affording only "very limited weight" to the proposal's delivery of units of extra care housing.
19. Therefore, even if the Council had afforded positive weight to considerations necessary to achieve compliance with development plan policies, it does not follow that the planning balance would be tipped in favour of the development.
20. As set out above, I do not consider the officer report to have misled planning committee members; the Council provided sufficient evidence to substantiate each reason for refusal, even without publication of counsel's advice; and, even if matters to achieve policy compliance were afforded positive weight, it is not likely the Council would have reached an alternative conclusion as to whether very special circumstances exist.
21. Therefore, unreasonable behaviour resulting in unnecessary or wasted expense has not occurred and an award of costs is not warranted.

E Dade

INSPECTOR

² *Vistry Homes v Secretary of State* [2024] EWHC 2088 (Admin)