



Appeal Decision

Hearing held on 30 October 2024

Site visits made on 30 May and 30 October 2024

by Jennifer Wallace BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 December 2024

Appeal Ref: APP/M1520/W/23/3330878

Walsingham House, Lionel Road, Canvey Island, SS8 9DE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by Mr Sean Tappenden of SJT Developments Ltd against the decision of Castle Point Borough Council.
 - The application Ref is 22/0037/FUL.
 - The development proposed is 'Proposed Phase 2 to application 21/0688/Ful to provide 13 NO Flats and 20 No Residential Houses'.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs has been made by Mr Sean Tappenden of SJT Developments Ltd against Castle Point Borough Council and by Castle Point Borough Council against Mr Sean Tappenden of SJT Developments Ltd. These applications are the subject of separate decisions.

Background and Main Issue

3. During the course of the appeal, it was confirmed that the Council had granted planning permission¹ for the same form of development as that before me. Consequently, the Council no longer seeks to defend its original three reasons for refusal. However, the parties remain in dispute as to the contributions sought for this development. The appeal submission was accompanied by an updated Financial Viability Assessment (FVA). This also accompanied the now approved application and the Council's response also formed part of the assessment of that application. Additional notifications in relation to the appeal were provided to interested parties reflecting the change of procedure and the change to the reasons for refusal. Having regard to the principles established by the Courts in Holborn Studios Ltd², I am satisfied there would not be prejudice to interested parties in my determining the appeal on this basis.
4. The appeal proposal is described as being Phase 2 of the development. Phase 1³ consisted of 9 dwellings which appeared to be at least substantially complete at the time of my first site visit and appeared occupied at the time of my second. The viability evidence of both parties assesses the scheme as a

¹ 24/0042/FUL granted 4 June 2024

² Holborn Studios Ltd v The Council of the London Borough of Hackney [2017] EWHC 2823 (Admin)

³ 21/0688/FUL

whole, so for 29 houses and 13 flats, and not the 20 houses and 13 flats proposed through this appeal.

5. The main issue is whether the proposed development would make appropriate contributions to meet the demands generated by development including for affordable housing.

Reasons

6. The Council's approach to seeking developer contributions is set out in the Developers Contributions Guidance Supplementary Planning Document (SPD) Cover Document adopted in March 2023. This sets out that the housing and economic strategies contained in the Castle Point Borough Council Local Plan adopted 17 November 1998 (LP) are no longer relevant, but that the LP sets development parameters which continue to enable development. Furthermore, the National Planning Policy Framework (the Framework) provides a general approach with respect to developer contributions, the need for affordable housing and for development to have proper regard to biodiversity and protected species.
7. The appellant has provided a final signed Unilateral Undertaking (UU) dated 27 February 2024 pursuant to Section 106 of the Town and Country Planning Act 1990 (as amended). This secures contributions towards mitigation for habitats sites, mitigation for protected species, biodiversity net gain, pedestrian access and a viability review which would establish whether or not a financial contribution to off-site affordable housing would be viable at a later date. At the hearing, the Council also conceded that the healthcare contribution should not be sought. I have no reason to disagree with this.
8. Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) (CIL Regulations) and paragraph 57 of the Framework set out three tests that planning obligations must meet. Each party provided me with a CIL compliance statement with respect to obligations contained within the UU. Notwithstanding that the statutory requirement for development to provide biodiversity net gain would not apply to this proposal, I am satisfied that each of the contributions sought meets the three tests set out in Regulation 122 and the Framework.
9. The contributions in the UU would therefore be reasonable and necessary to make the development acceptable. In terms of affordable housing, Policy H7 confirms that the Council will seek to negotiate a proportion of affordable housing.
10. However, the appellant's FVA sets out that the proposal could not provide any contributions. Indeed, it shows a residual land value substantially below the benchmark land value, such that it is unlikely that it would achieve the minimum return necessary for a reasonable landowner to sell. The FVA does not include the contributions towards biodiversity net gain that are proposed through the UU which would further reduce the residual land value.
11. This has been reviewed on behalf of the Council, which concluded that the development would be capable of providing all contributions sought, meet the benchmark land value, and have headroom to provide an affordable housing contribution. This allows for a 20% return to the developer which the Council did not dispute in its written evidence.

12. The parties provided a statement of common ground which identified the aspects of the Council's review of the appellant's FVA where they were in disagreement. At the hearing, it was further agreed that the ground rents payment should be excluded due to the Leasehold Reform (Ground Rent) Act coming into force and that the appellant's calculation with respect to interest was reasonable.
13. Both parties acknowledged the limitations of the BCIS data available at the time the viability work was carried out in establishing the build cost for the development. The appellant sought to rely on the acknowledged weaknesses of the dataset and the build quality of the finished product to justify their use of a higher build cost. However, there is no way for me to be sure that this would be the case, or that the lower quartile build costs reflects a more basic finish.
14. Furthermore, Phase 1 of the development has been completed, and was substantially complete at the time of my first site visit. Actual costs for that part of the development would have been available. The appellant's arguments at the hearing as to the difficulties in obtaining accurate development costs for individual sites were not compelling. Overall, I find the Council's arguments for the use of the lower quartile build prices to be more likely.
15. The Council relied on floorspace figures used in the appellant's own evidence. While it may be that an allowance for circulation space may be warranted, the Council cannot be criticised for relying on the appellant's own evidence.
16. It was agreed at the hearing that an allowance for fees in the abnormal costs would not be necessary. I find the Council's argument that abnormal costs would normally include a contingency to be the more likely. This is supported by the 2022 FVA that originally accompanied the application. Appendix 4 of that document provided a justification for abnormal costs. Where this set out a range for abnormal costs – such as the foul drainage pumping station and emergency storage in the range of £150k to £200k, and the surface water scheme at £80k to £100k – the higher cost was used.
17. While there were discrepancies in CIL and the necessary payments for mitigation at the SPAs, these amounts were minor. Overall, I find the Council's assessment of the viability of the proposal to be more compelling and conclude that the proposal could support a contribution towards affordable housing.
18. A viability review mechanism is proposed and secured through the UU to allow for changes during the time the development is carried out. The Planning Practice Guidance⁴ does allow for viability to be reviewed over the lifetime of a project. However, given the appellant's evidence as to why actual build costs for the development to date could not be provided, I am not convinced this would be a suitably robust mechanism to ensure that optimal public benefit could be delivered from the development.
19. Accordingly, I find that the proposed development would fail to make appropriate contributions to meet the demands generated by development for affordable housing. It would therefore be contrary to LP Policy H7 which seeks to deliver affordable housing, the Council's Developer Contributions SPD and

⁴ 'Viability' Paragraph: 009 Reference ID: 10-009-20190509 Revision date: 09 05 2019

the Framework insofar as they relate to affordable housing, protected species and biodiversity net gain.

Other Matters

20. It is not in dispute that planning permission has been granted for an identical proposal, and development commenced. While the appellant indicated that development would not proceed beyond a small number of plots, that permission is now extant and could be completed at any time were development to cease. It therefore represents a realistic fallback. Regardless, there would be benefits arising from the appeal proposal with respect to the delivery of housing, the associated economic benefits during the construction and occupation stages. The UU also secured a route through the site from the adjacent primary school to allow access to coaches for school trips. This is also a benefit of the scheme.
21. The parties are not in dispute that the proposal makes appropriate provision for protected species. I have no reason to disagree and note that the appellant's ecologist had made applications to Natural England for the necessary licences. The design of the proposed dwellings would be acceptable and there would not be an adverse effect on the living conditions of surrounding occupiers. The proposal would provide acceptable living conditions for future occupiers of the proposed development, which would include appropriate provision for parking. These matters are all to be expected of any well designed scheme and would be neutral in my assessment.
22. The appeal site is within the zone of influence of Benfleet and Southend Marshes Special Protection Area (SPA) and Ramsar site, and the Outer Thames SPA which are subject to pressures from recreational disturbance. It was confirmed at the hearing the appellant had paid a contribution towards mitigation. Had I been minded to allow the appeal, it would have been necessary to establish whether the proposal on its own or in combination with other projects would likely have significant environmental effects on the integrity of the habitats sites and if any mitigation had been appropriately secured. However, it has not been necessary for me to pursue this issue as a finding that the proposal would not have an adverse effect on the integrity of the habitats sites, with or without any mitigation, would be at best a neutral matter.

Planning Balance and Conclusion

23. It is not in dispute that the Council cannot demonstrate a five year supply of housing land. Paragraph 11d) of the Framework is therefore engaged. There are no policies in the Framework that would provide a clear reason for refusal therefore paragraph 11d) ii is engaged.
24. There would be undoubted benefits from the delivery of additional dwellings in an area where the requisite supply of housing land cannot be demonstrated. There would also be the additional economic benefits during the construction phase of the development and during occupation of the properties. Continued access for pupils of the primary school to Lionel Road for the use of coaches during school trips could be secured. The appellant has offered biodiversity net gain. However, there is an extant permission for the same number of dwellings on the site which secures all the benefits that would arise from this permission

and makes contributions towards the provision of affordable housing. I therefore attach limited weight to the benefits of the proposal.

25. The adverse effects of the proposal would arise from a lack of contribution towards affordable housing and I give this significant weight. The benefits of the proposal would therefore not significantly and demonstrably outweigh the harms. Consequently, the proposal does not benefit from the presumption in favour of sustainable development.
26. The appeal proposal would conflict with the development plan when read as a whole. There are no material considerations, including the Framework, of sufficient weight to indicate the decision should be taken otherwise. For the reasons given, I conclude that the appeal should be dismissed.

Jennifer Wallace

INSPECTOR

Richborough

APPEARANCES

FOR THE APPELLANT:

James Firth	Ceres Property
Laura Dudley-Smith	Ceres Property
Peter Riches	Morely Riches

FOR THE LOCAL PLANNING AUTHORITY:

Stephen Garner	Castle Point Borough Council
Keith Zammit	Castle Point Borough Council
Russell Porter	Porter Planning Economics

DOCUMENTS

Document 1 – Tree Planting Costs

Richborough



Costs Decision

Hearing held on 30 October 2024

Site visit made on 30 May and 30 October 2024

by Jennifer Wallace BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 December 2024

Costs application in relation to Appeal Ref: APP/M1520/W/23/3330878 Walsingham House, Lionel Road, Canvey Island SS8 9DE

- 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 Mr Sean Tappenden of SJT Developments Ltd for a full award of costs against Castle Point Borough Council.
- The appeal was against the refusal of planning permission for Proposed Phase 2 to application 21/0688/Ful to provide 13 NO Flats and 20 No Residential Houses'.

Decision

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

The Submissions of the Parties

2. The applicant's claim, the Council's response and the final comments of the application were all made in writing following the submission of the appeal. However given the changes in circumstances during the course of the appeal, it was necessary for further points to be made orally at the hearing.

Reasons

3. 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.
4. The applicant contends that an award of costs is justified on procedural and substantive grounds. Having regard to the advice in the PPG, I consider the applicant's grounds all relate to substantive grounds as it is not procedurally improper for the planning committee to reach a different view to their officers.
5. The applicant's case is essentially that the Council has prevented or delayed development which should clearly have been permitted, having regard to its accordance with the development plan, national policy and any other material considerations, that the Council failed to produce evidence to substantiate each reason for refusal on appeal, made vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis and did not have proper regard to a matter for which permission had already been gained.
6. The Council responds that a sustainable location is not defined within policy and that the planning committee were entitled to reach a different conclusion to officers. While these both may be true, it remains the case that reasons for refusal must be capable of being fully justified at appeal.

7. Concerns relating to the effect of the proposal on protected species were examined in the officer report and addressed. It was also set out that a protected species licence would also be required for the works. No explanation for the harm that would arise from the lack of parking from the flats was provided, despite the detailed explanation in the officer report which justified a lower provision of parking for the flats. There is no explanation as to how the density of the site would have an unacceptable impact on the living conditions of future occupiers or the character and appearance of the area against the clearly set out position of planning officers contained within the officer report. The officer report also clearly sets out that there was no policy basis upon which to seek open space. In this case, no substantive evidence was put forward at appeal to justify departing from the advice of planning officers.
8. The fact that planning permission had been granted for the access road would not lead me to find unreasonable behaviour on the part of the Council as that would not materially impact on any of the reasons for refusal.
9. I find that the Council has behaved unreasonably in delaying development which clearly should have been permitted having regard to the development plan, national policy and other material considerations. No evidence was produced to substantiate each reason for refusal and those reasons made vague, generalised and inaccurate assertions about a proposal's impact, which were unsupported by any objective analysis. This is borne out by the Council's subsequent approval of an identical proposal. The appellant has therefore been put to unnecessary expense.
10. However, as set out in the other costs decision in this case, the Council's unreasonable behaviour ended at the point when planning permission was granted for permission 24/0042/FUL granted 4 June 2024. As such, only a partial award of costs is justified.
11. The amount of the costs claim is not a matter for this decision. However, the applicant should be aware of the advice in the PPG¹ that awards cannot extend to compensation for indirect losses, such as those which may result from delay in obtaining planning permission.

Conclusion

12. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the actions of the Council until 4 June 2024 and a partial award of costs is therefore warranted.

Costs Order

13. 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 Castle Point Borough Council shall pay to Mr Sean Tappenden of SJT Developments Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in connection with the appeal until 4 June 2024; such costs to be assessed in the Senior Courts Costs Office if not agreed.

¹ 'Appeals' Paragraph: 032 Reference ID: 16-032-20140306 Revision date: 06 03 2014

14. The applicant is now invited to submit to Castle Point 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.

Jennifer Wallace

INSPECTOR

Richborough



Costs Decision

Hearing held on 30 October 2024

Site visit made on 30 May and 30 October 2024

by Jennifer Wallace BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 December 2024

Costs application in relation to Appeal Ref: APP/M1520/W/23/3330878 Walsingham House, Lionel Road, Canvey Island, SS8 9DE

- 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 Castle Point Borough Council for a partial award of costs against Mr Sean Tappenden of SJT Developments Ltd.
 - The appeal was against the refusal of planning permission for Proposed Phase 2 to application 21/0688/Ful to provide 13 No Flats and 20 No Residential Houses.
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Decision

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

The submissions for Castle Point Borough Council

2. While the Council made its costs application in writing prior to the opening of the hearing, this was not passed on to Mr Tappenden's agent. Consequently, the application was made orally.
3. The Council's case is that they worked proactively with the appellant following the refusal of planning permission to secure a resubmission of the application which was subsequently approved subject to a planning obligation on 4 June 2024. The Council considers that the appellant was unreasonable to continue the appeal on the basis that they had entered into a planning obligation, although the appellant now maintains this would make the development unviable.

The response on behalf of Mr Sean Tappenden of SJT Developments Ltd

4. The response was made orally at the hearing. It was set out that the viability of the development has been adversely affected by the delay in obtaining planning permission and that it was necessary to secure the permission in order to secure finance and to continue the employment of staff. It was set out that it was proper to continue the appeal as they were aware that an application to vary the planning obligation would not be supported.

Reasons

5. 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.
6. I have found in my other costs decision that the Council was unreasonable in its original decision to refuse planning permission for the development.

However, that was rectified on 4 June 2024 with the subsequent grant of planning permission 24/0042/FUL. The PPG¹ advises that costs cannot be claimed for the period during the determination of the planning application but that behaviour and actions at the time of the planning application can be taken into account in the consideration of whether or not costs should be awarded.

7. It is expected that parties in the planning system are making accurate submissions and acting in good faith. The appellant admits that they entered into a planning obligation they considered would render the development unviable. While it was in relation to a subsequent planning application, it nonetheless is of direct relevance to this appeal which was for the same proposal. I consider this constitutes unreasonable behaviour. I also consider the Council has been put to unnecessary or wasted expense in continuing to defend the appeal. However, the unreasonable behaviour on the part of the appellant only dates from the point at which the Council granted the subsequent planning permission.

Conclusion

8. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the actions of the developer after 4 June 2024 and a partial award of costs is therefore warranted.

Costs Order

9. 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 Sean Tappenden of SJT Developments Ltd shall pay to Castle Point Borough Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred after 4 June 2024; such costs to be assessed in the Senior Courts Costs Office if not agreed.
10. The applicant is now invited to submit to Mr Sean Tappenden of SJT Developments Ltd, 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.

Jennifer Wallace

INSPECTOR

¹ 'Appeals' Paragraph: 033 Reference ID: 16-033-20140306 Revision date: 06 03 2014