

Case Name: *Swale Borough Council v Secretary of State for Housing Communities and Local Government & Anor* [2020] EWHC 3482 (Admin) (17 December 2020)

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Commentary:

The case concerned an application for statutory review by Swale Borough Council (the "Council"), following the Planning Inspector's decision to award costs to the appellant developer after allowing their appeal against the Council's refusal to grant planning permission. The judge refused the application.

The application for planning permission by SW Attwood and Partners ("Attwood") was refused by the Council refused permission for four reasons, including insufficient affordable housing provision and traffic mitigation. Attwood appealed the decision. Prior to the hearing, a jointly commissioned report on viability found that the development was only marginally viable and accordingly the Council withdrew the reason for refusal regarding affordable housing. On the highways issue, the parties reached an agreement regarding mitigation obligations (largely driven by the evidence of the Council's expert); the Council agreed to withdraw this reason for refusal as well.

The Inspector allowed the appeal and granted permission. The Inspector also found that the Council's behaviour was unreasonable and ordered that the Council pay Attwood's costs of the appeal proceedings based on withdrawn reasons for refusal.

The Council challenged the costs decision, alleging that it distorted how matters arose and how the Council dealt with them (on the affordable housing issue) and that the Inspector erred in law in their decision on the highways issue, because the Council had 'won' the argument in negotiations.

The judge emphasised the wide statutory discretion of a planning inspector to award costs under s250(5) of the Local Government Act 1972. He then summarised the case law on awarding costs as follows:

- i. the Secretary of State is entitled to adopt a policy about costs and having done so his inspectors must apply it;
- ii. the policy is that costs may be awarded against a party for unreasonable behaviour resulting in unnecessary or wasted expense;
- iii. "unreasonable" means unreasonable in the ordinary sense of the word, not unreasonable in a *Wednesbury* sense;
- iv. a Council's behaviour may be unreasonable if its refusal of planning permission could not be supported by substantial evidence, but that is not the only test and there may be other relevant factors;
- v. one example is if a developer signs a section 106 agreement; it is accepting that it is reasonable even though the inspector may not be persuaded that it is necessary.

On the affordable housing point, the judge pointed to the Council's refusal to accept the report it jointly commissioned, and its failure to engage with Attwood until late in the day. In relation to the highways issue, the judge held that the inspector's decision was not flawed. The Council should have grappled with the issue of mitigation at the time of refusal, not when the hearing was imminent (this could then have been resolved without the need for further evidence).

Case summary prepared by Jed Holloway