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## Costs Decision

Inquiry Held on 16 January 2018

Site visit made on 16 January 2018

**by G D Jones BSc(Hons) DipTP DMS MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 01 February 2018**

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### **Costs application in relation to Appeal Ref: APP/E3525/W/17/3183051**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Kingsway Homes Ltd for a full award of costs against St Edmundsbury Borough Council.
  - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for the erection of 46 no. apartments with commercial unit (A1, A2, A3 or B1(a) use) at ground floor level, communal landscaped podium garden, accesses, undercroft parking, landscaping and associated infrastructure.
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### **Decision**

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

### **Reasons**

2. The Government's Planning Practice Guidance states that irrespective of the outcome of the appeal, costs may only 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.
3. The appellant's application was made in writing at the Inquiry. In summary, it is made on the basis that the Council now finds the appeal proposals to be acceptable and should have reached this conclusion at the time the appeal was lodged bearing in mind that the scheme has not changed during that period. The appellant makes reference to what are described as the 'key dates' of 6 March 2017, when it submitted the latest viability appraisal, and 25 August 2017, when the appeal was lodged. The appellant considers the Council acted unreasonably in delaying a proposal which should have been granted planning permission, which is the position the Council now adopts.
4. In its oral response to the costs application the Council asked that it should be 'rejected'. I was advised that the chronology of events is important – there were a number of matters that delayed the determination of the application, including initially objections from statutory consultees and latterly the question of the scheme's viability and whether or not it could support the delivery of affordable housing. The Council stressed that affordable housing delivery is an important issue and that in respect to this proposal it first raised concerns in this regard as early as June 2016. With the appellant's agreement, it subsequently sought independent assessment of the scheme's viability in October 2016 following which there was a great deal of dialogue between the

- main parties on this matter, as summarised in the Council witness's proof of evidence.
5. In contrast to the appellant's submissions, the Council stated that there was further work and dialogue after 6 March 2017 particularly in respect to the assessment of the estimated building costs, which had increased 'significantly' from the original appraisal that accompanied the application. Following further independent assessment on behalf of the Council, estimated build costs were agreed between the parties in July 2017. The parties agreed a number of extensions to the statutory determination date, the last of which expired on 7 July 2017. On 16 August 2017 the Council wrote to the appellant indicating that its officers would prefer to continue to work with the appellant towards exploring the potential for a viable alternative scheme at the appeal site.
  6. The Council added that at that stage the evidence indicated that, although the proposed development was complex and the site constrained, a less costly acceptable form of development could be achieved at the site. The Council also advised that it had a duty to establish if such a scheme could be achieved in order to be certain about whether affordable housing could be viably delivered as part of the site's redevelopment. The Council stressed that in its view it undertook reasonable investigation of viability in response to the appellant's submissions and communicated effectively.
  7. Notwithstanding the Council's submissions, the evidence indicates that although the estimated build costs did increase this did not affect the viability threshold. On this basis the evidence on the viability of the scheme did not change significantly from March 2017. Moreover, the onus was on the Council, as local planning authority, to consider and determine the proposals that formed the planning application before it rather than some other, unspecified, potential alternative scheme.
  8. In any event, the written feedback provided by the Council on 18 August 2017, in my view, gives no reason to believe that the Council was likely to grant planning permission for the appeal scheme. It seems likely that that email played at least a part in the appellant's decision to lodge the appeal a week later. Subsequently the Council concluded that had the appeal not been lodged it would have granted planning permission subject to conditions and planning obligations as set out in its officer's report dated 3 November 2017. The Council's position on the matter has remained consistent thereafter as reflected in its evidence.
  9. Notwithstanding the undisputed importance of affordable housing, given the matters outlined above, I have found no significant changes in circumstances since 7 March 2017 that would have prevented the Council from coming to the conclusions that it finally formally came to on 3 November 2017. In any event, I see no reasonable justification for the Council's position having changed so markedly from that set out in writing to the appellant on 18 August 2017 compared to the contents of the officer's report of 3 November 2017.
  10. On that basis it appears that the Council could and should have determined the application prior to the appeal being lodged and that, in light of the Council's feedback at that time, the appellant acted reasonably in making the appeal. This amounts to unreasonable behaviour on the part of the Council that, as a consequence, led to the appeal and to the appellant incurring unnecessary or wasted expense in the appeal process.

**Costs Order**

11. 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 St Edmundsbury Borough Council shall pay to Kingsway Homes Ltd, the costs of the appeal proceedings described in the heading of this decision.
12. The applicant is now invited to submit to St Edmundsbury 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

*G D Jones*

INSPECTOR

TETLOW KING PLANNING