
Costs Decision

Site visit made on 14 February 2017

by R J Jackson BA MPhil DMS MRTPI MCMi

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 24 February 2017

Costs application in relation to Appeal Ref: APP/L3625/W/16/3162422 40 Blackborough Road, Reigate RH2 7BX

- 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 White, 1GCC Ltd for a partial award of costs against Reigate & Banstead Borough Council.
 - The appeal was against the refusal of planning permission for demolition of the existing dwelling and erection of two detached dwellings with associated access, parking and landscaping.
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Decision

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

Reasons

2. 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 application relates to two of the reasons for refusal and it is convenient to deal with them separately, and I will first deal with that relating to affordable housing.
4. Planning permission was refused on 15 August 2016 with the Council including as a reason for refusal that the proposal failed to provide a contribution towards the provision of affordable housing. The reason for refusal was effectively withdrawn by letter dated 21 December 2016. The main issue here being whether at the time the Council made its decision was this reason reasonable and, if so, was it withdrawn at the first possible opportunity when reviewing its case, when it realised that it was no longer reasonable to defend its position.
5. Although the relevant Written Ministerial Statement (WMS) was issued in November 2014 indicating that local authorities should no longer seek contributions towards affordable housing for schemes of 10 dwellings or fewer, there was litigation which led, ultimately, to the Court of Appeal ruling¹ on 11 May 2016 that the WMS was lawful.
6. The Court of Appeal made clear that the WMS, while expressing a view in unqualified terms, should be read in the context of Section 38(6) of the

¹ Secretary of State for Communities and Local Government v West Berkshire District Council and another [2016] EWCA Civ 441

Planning and Compulsory Purchase Act 2004 (as amended) and Section 70(2) of the Town and Country Planning Act 1990 (as amended) and the legal fact that application of the policy must allow for the possibility of exceptions.

7. In this context it is clear that the Council had a development plan policy, Policy CS15 of the Reigate and Banstead Local Plan: Core Strategy (the RBCS), which was relatively recently adopted in July 2014, that allowed for the Council to negotiate contributions towards affordable housing from proposals for additional dwellinghouses. The adoption of the RBCS post-dated the publication of the National Planning Policy Framework (the Framework) and is generally in accordance with it. Specifically this policy broadly accords with paragraph 50 of the Framework which indicates that local planning authorities should, where they have identified that affordable housing is needed, set policies for meeting this need on site unless a financial contribution of broadly equivalent value can be robustly justified.
8. Although there had been appeal decisions going back to January 2015 on this topic I consider that the Court of Appeal decision represented clarity on the situation and it was not unreasonable for the Council from that date (May 2016) to re-consider whether it might have a case to justify such contributions. This was an entirely reasonable course of action, and this concurs with the costs decision² provided to me.
9. As I understand it the Council sought to justify such contributions in a number of appeals, but it was only with an award of costs against it dated 3 November 2016 that it came to the conclusion that it no longer wished to pursue this and therefore led to it withdrawing the reason for refusal. Members' approval for this course of action was given on 23 November 2016.
10. However, the earlier costs award was only in light of two other appeal decisions the Council had already received dated 11 October and 20 October 2016, where it had sought to justify contributions towards affordable housing. It was a failure to act on these decisions that led to the costs award.
11. The appeal the subject of this application was made on 3 November 2016 and I have nothing to show that the Council was aware that an appeal was to be lodged before that date. The relevant legislative provisions³ require an appellant to serve the local planning authority with a copy of the appeal so it would have been able to proactively advise the appellant that it was no longer seeking to defend that reason for refusal after that date. Certainly they should have proactively taken action after 23 November, and I consider that letters should have been sent out within a week, that is 30 November.
12. As I have indicated above, in August when it made its decision on the application it was reasonable for it to have sought a contribution. However, the failure to take action following the lodging of the appeal was unreasonable as it showed that the Council was persisting in objections to elements of a scheme which an Inspector has previously indicated to be acceptable. The national Planning Practice Guidance (the PPG) is clear⁴ that Councils are at risk of an award of costs in these circumstances.

² Paragraph 3 of costs decision in relation to Appeal Ref: APP/L3625/W/16/3154480

³ Article 37, The Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended)

⁴ Reference ID: 16-049-20140306

13. However, in sending the letter that it did on 21 December to indicate that it no longer wishing to defend that reason for refusal the Council brought to an end its unreasonable behaviour. As such the time period for an award is quite limited, between 30 November and 21 December 2016.
14. The second requirement of an award of costs is that it led to unnecessary or wasted expense. I do not have any evidence that there was any expenditure in relation to this reason for refusal during this period as there is no requirement to set this out in any application, but there may well have been. This is a matter for the parties to resolve between themselves.
15. Turning next to the reason relating to the effect of the development on the living conditions on the occupiers of adjoining properties. This application was principally was made on the basis that the reason for refusal could have been partially overcome by conditions and that the remainder of the reason was without merit.
16. As can be seen in my appeal decision, I concluded that the use of conditions in the manner suggested by the appellant would not have been reasonable and consequently following the guidance in the Framework and PPG such a condition should not be imposed. This meant that the proposal would have resulted in an unacceptable loss of privacy and this part of the reason for refusal was therefore reasonable.
17. In respect of the balconies, I found that any person using the balcony is likely to be more obvious to an observer and increase the perception that a neighbour was being overlooked when compared with that person being within a room behind a window. It was then a matter of judgement as to the degree of overlooking. While I did not agree with the Council that the balconies would give rise to an unacceptable level of overlooking, the Council justified its position, and this was a reasonable position for it to take.
18. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated in respect of the reason for refusal relating to affordable housing only, and for only between the two dates, and that a partial award of costs is justified.

Costs Order

19. 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 Reigate and Banstead Borough Council shall pay to Mr White, 1GCC Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred between 30 November 2016 and 21 December 2016 in respect of the fourth reason for refusal relating to affordable housing; such costs to be assessed in the Senior Courts Costs Office if not agreed.
20. The applicant is now invited to submit to Reigate and Banstead 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.

RJ Jackson

INSPECTOR