
Costs Decisions

Hearing held on 17 January 2017

Site visit made on 17 January 2017

by Wendy McKay LLB Solicitor (Non-practising)

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

Decision date: 23 March 2017

Costs application in relation to Appeal A Ref: APP/K3605/C/16/3149571 514 Molesey Road, Walton-on-Thames, KT12 3PW

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Hubert Vincent for a full or partial award of costs against Elmbridge Borough Council.
 - The hearing was in connection with an appeal against an enforcement notice alleging without planning permission and within the last 10 years, the intensification of residential use of the land by the siting and use of two residential caravans resulting in a material change in the character of the area.
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Costs application in relation to Appeal B Ref: APP/K3605/W/16/3147815 514 Molesey Road, Walton-on-Thames, KT12 3PW

- 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 Hubert Vincent for a full or partial award of costs against Elmbridge Borough Council.
 - The hearing was in connection with an appeal against the refusal of the Council to grant planning permission for the use of land for the stationing of two caravans for residential purposes.
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Decisions

Appeal A

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

Appeal B

2. The application for a partial award of costs is allowed in the terms set out below.

The submissions for Mr Hubert Vincent

3. The costs applications in respect of both appeals were made orally at the Hearing. They are applications for full awards of costs with partial awards being the fall-back position. The Planning Practice Guidance (PPG) paragraph 030 (Reference ID: 16-030-20140306) advises that costs may be awarded where a party has behaved unreasonably; and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

4. The Appellant seeks the costs of the entire appeal as a result of the Council's unreasonable behaviour. In relation to the partial award, what is sought is first, the costs of the Appellant's representatives, Mr Green and Ruth Reed, attending the Hearing and, secondly, the costs incurred since the update on the Council's housing land supply was made public, namely, those expenses which post-date September 2016.
5. The applications have been made in a timely manner in accordance with the PPG paragraph 035 (Reference ID: 16-035-20161210). They were not made prior to the Hearing, as one of the grounds is based on substantiation of the Council's reasons for refusal/reasons for issuing the notice and, if that point had been made earlier, the Council might have brought evidence to the appeal. The five year land supply situation could change every day and there could be no certainty that the evidence would not be substantiated in that regard.
6. The PPG paragraph 49 (Reference ID: 16-049-20140306) sets out the type of behaviour that may give rise to a substantive award of costs against a local planning authority. Reliance is placed upon the examples set out at bullet points 1, 2, 3, 5 and 13, namely, preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failure to produce evidence to substantiate each reason for refusal on appeal; vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis; acting contrary to, or not following, well-established case law and not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.
7. On the first bullet point, the planning application should have been permitted having regard to the Development Plan. The Council failed to report the densification point which is part of Development Plan Policy CS17. The Council used that policy as a reason for refusal of the application. The Council also failed to properly consider the character of the area. It just looked at the houses to the north and did not consider the houses to the south and east. It also failed to take into account the prevalence of caravans in other gardens and, in character and appearance terms, it made an artificial distinction between caravans in ancillary use and caravans in separate residential use. There is little difference between them in terms of character and appearance.
8. On the second bullet point, the Council has failed to substantiate its reasons for refusal of the planning application and its reasons for issuing the enforcement notice. Turning to the effect on character and appearance, the Council has failed to take account of relevant factors and there has been a failure to substantiate this matter for the reasons set out above. In terms of the impact upon amenity, there is little evidence that there has been any detrimental impact – merely vague assertions. The Council accepts that the house would have sufficient amenity space. For the caravans, the Council has tried to point to the housing standards and it does not have a local standard for amenity space for caravans. It has not made reference to the Caravan Sites Good Practice Guidance.
9. On the third bullet point, the claimed impact on residential amenity amounts to no more than vague and generalised assertions. The Council could have

measured levels and sought information on impact rather than relying on unsubstantiated assertions.

10. On bullet points 5 and 13, a partial award is sought. If it is accepted, based upon the above submissions, that the Council has behaved unreasonably then a full award of costs of the planning appeal should be granted and also the enforcement appeal costs, as the enforcement action follows from the refusal of planning permission on the part of the Council. However, if that is not accepted then there are two matters which have occurred subsequent to the refusal of planning permission. These are first, the decision in the *Suffolk Coastal* case dated 17 March 2016 which is now the leading authority on the approach to be taken in the absence of a five year housing land supply. This was exhibited within the appendices to the Appellant's Statement of Case submitted in July 2016. Secondly, the Council's Cabinet was sent a paper which became a public document in September 2016. This accepted that the Council did not have a five year housing land supply when measured against the OAN¹.
11. In September 2016, the Council should have reviewed all its ongoing appeals relating to housing in the light of this change. There are two things which flow from that: first, there is no evidence that the Council reviewed its case after the submission of its Statement of Case in August 2016. It has not been considered against the balancing test in the Framework, paragraph 14. Secondly, it has not assessed what the effect on its housing supply policies would be in the light of the *Suffolk Coastal* case.
12. If the Inspector should disagree that the Council has been unreasonable in the first instance but agrees that the Council should have reviewed its position in September 2016, then a partial award of costs is sought in respect of the work carried out since then. This comprises the provision of the new housing land supply information submitted by the Appellant and the attendance of Mr Green and Ruth Reed at the Hearing. It is unreasonable of the Council not to have considered the effect of the lack of a five year housing land supply or the *Suffolk Coastal* case. The enforcement notice has just flowed from the planning application refusal and if the Council had reviewed its position in September 2016, it would have withdrawn the notice. However, the enforcement action does not warrant an attack in its own right.

The response by Elmbridge Borough Council

13. The Council's response to the costs applications was submitted in writing at the Hearing, and given orally in part.
14. The main arguments put forward are first, in relation to the PPG, paragraph 49, bullet point 1: at the time of the planning decision in October 2015, the Council issued its decision having regard to the relevant material considerations and policies in force at the time which included, inter alia, that there was a five year housing supply (AMR 2014/15). With regard to development density, that is a matter for the Inspector to consider. However, the Council's view is that the retention of these mobile homes would be harmful to the character of the area for the reasons set out in the officer's report.

¹ Objectively assessed need

15. On the PPG, paragraph 49, bullet points 2 and 3: the Council provided evidence in the form of the officer's report and appeal Statement. Whilst the Appellant disputes the reasons for refusal and the Council's assessment, this is the reason the appeal process exists and, as such, it is considered that the evidence provided in the officer's report and the appeal Statement is adequate. It should be noted that the Appellant has referred to the mobile homes not complying with the Council's recommendation in terms of amenity space etc. However, as the mobile homes have not been declared for use by travellers, or the site as a caravan site, the Council had no option but to consider the proposal against its own residential amenity etc. standards as set out in the adopted Design and Character SPD.
16. On the PPG, paragraph 49, bullet points 5 and 13: the Council viewed this case on the basis of the intensification of use of the site caused by the retention of the mobile homes and the detrimental impact this would have on the character of the area and residential amenity for the host dwelling and the amenities of future occupiers rather than as a development proposing a net gain in residential units in the urban area. As such, considerations of the five year housing supply etc. were not considered relevant at the time of the application but were considered during the course of the Hearing.
17. In responding to this claim, the Inspector is requested to note that the Appellant's costs application has not been made in writing before the Hearing or Inquiry in line with best practice (PPG paragraph: 035 Reference ID: 16-035-20161210).
18. Consequently, the Council states that there is no basis for concluding an award of costs is appropriate or necessary at this time and respectfully requests that the claim be rejected.

The counter response by the Appellant

19. The Council's first bullet point of its written costs submissions relates to paragraph 49, bullet point 1 of the costs guidance. In the last sentence of the second paragraph of that response, the Council reiterates its position that: "*the retention of these mobile homes would be harmful to the character of the area for the reasons set out in the officer report.*" The Development Plan, Policy CS17, requires within this location a minimum density of 30 dwellings per ha. It is only in: "*...exceptional circumstances, where overriding harm to the valued character of the area would occur as a result of the application of the minimum density threshold, development at a lower density, which maximises the efficient use of land, may be acceptable.*" The Council accepts that this is not an area with a "*valued character*", so that caveat does not apply. This is a mandatory part of the Development Plan and the Council has ignored it and suggests that it is a matter of judgment. It is not – it is a part of the Development Plan and s.38(6) applies.
20. On the Council's second bullet point, the last sentence of that part of the response states: "*...as the mobile homes have not been declared for use by travellers, nor the site as a caravan site ...*". This is baffling as the application was for the use of land for the stationing of two caravans for residential purposes. That is an application for a caravan site. The Appellant has no idea what else it is an application for. A caravan site is a use of land for caravans. This comment reveals a lack of understanding on the part of the Council. That part of the response is itself unreasonable.

21. On the Council's third bullet point, it has gone back to saying that the case was viewed on the basis of the intensification of the use of the site, but it is an application for a material change of use, not intensification. The Appellant should not have to bear the burden of the cost of defending this case because the local planning authority does not understand land use. Even if it were intensification, there was still a need to consider the development as providing a net gain in residential units. The Council states that the development was not considered as a net gain in residential units. That again is unreasonable behaviour. The fact that the Council did not consider the five year housing land supply to be relevant at the time of the application is unreasonable in itself and no defence of the failure to review the case in September 2016. The Council says that it did not review the matter because it did not consider it to be relevant. That is unreasonable behaviour. The Council does not mention any case law, such as the *Wenman* or *Suffolk Coastal* cases, because it did not regard the five year housing land supply as being relevant. It is not for the Appellant to pay for the Council's lack of understanding of the planning system.

Reasons

22. The 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. The purpose of the costs application process is to decide whether or not an award of costs in respect of the appeal is justified on the available evidence in a particular case.
23. The PPG provides that awards against a local planning authority may either be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal. The PPG sets out examples of situations where an award of costs might be applicable. The examples given in the PPG mainly relate to planning appeals and are not exhaustive. The Appellant places particular reliance upon the five examples set out above.
24. The Appellant is critical of the Council's approach to the consideration of the character of the area and the densification aspect of Core Strategy Policy CS17. The latter is indeed an aspect of that policy which is not mentioned in the officer's report, although reference is made to the need to maximise the efficient use of urban land whilst responding to the positive features of individual locations. The background to that policy explains that increasing densities has to be treated sensitively in order that the character of the local area is not threatened through the introduction of inappropriate development.
25. Whilst I do not agree with the Council that the development would be harmful to the character and appearance of the area, as is evident from my decision on the planning appeal, that assessment is ultimately a matter of planning judgement. I do not consider that the Council acted unreasonably in placing greater emphasis upon the more generous plot sizes along Molesey Road or in its general approach to assessing the effect on character and appearance including the application of Policy CS17 as a whole. The densification issue is a factor to which I attribute only modest weight. This is not a case where development has been prevented or delayed which should clearly have been permitted having regard to its accordance with the development plan, national policy and any other material considerations.
26. The Appellant submits that the Council has failed to produce evidence to substantiate its reasons for refusal. However, these reasons all raise matters

where a planning judgement has to be made and relevant policies applied in the light of the available evidence and facts. The officer's report and the appeal Statement expand and explain in more detail the Council's concerns and the reasons for its objections to the development. Further oral evidence was provided by its officers at the Hearing.

27. Whilst the Appellant disputes the reasons for refusal, the appeal process, as the Council points out, provides a means whereby its planning decisions can be challenged. It is only where the Council has unreasonably refused an application or unreasonably defended an appeal that it is at risk of an award of costs being made against it. Although the Council reached a different conclusion following its assessment of the issues of character and appearance, noise disturbance and the provision of amenity space, I do not believe that its stance on these issues was unreasonable. Whilst the comment made in its costs response in relation to the use not being a caravan site use is perhaps surprising², there was still substantial evidence provided by the Council on the question of the adequacy of the amenity space provision both before and during the Hearing. The Model Standards 2008 for Caravan Sites in England are only a guide to be considered in the context of applying site licence conditions. They are not prescriptive and do not have the status of development plan policy. In my view, the Council produced evidence to substantiate each reason for refusal on appeal and it has not behaved unreasonably in that respect.
28. The Appellant contends that the Council has made vague and generalised assertions in relation to the impact upon residential amenity. However, the Council has provided evidence on this topic which is set out in the officer's report and its appeal Statement. At the Hearing, the Council's concerns in relation to this matter were explained. In my view, it was entirely reasonable for the Council to rely upon the professional judgement of its officers in relation to the impact of noise in this situation, even though noise measurements had not been taken and a technical assessment had not been carried out. Although I do not consider that there would be a significant adverse noise impact, the available evidence leads me to conclude that there would be some harm to the amenity of the occupants of No 514. The Council's objection on this ground cannot be dismissed as being merely based upon vague and generalised assertions about the proposal's impact.
29. Turning now to the partial award that is sought, the Appellant submits that it was unreasonable of the Council not to have considered the effect of the lack of a five year housing land supply or the *Suffolk Coastal* case. Whilst it is incumbent upon parties to review their cases when new evidence emerges, I do not consider that the change in position in relation to the housing land supply meant that it was inevitable that the appeals would fail, even with the different balancing test, and that the Council would consequently have withdrawn the notice. Given the Council's fundamental objections to the development, it is unlikely that its opposition to the appeals would have altered. In the light of the other material considerations and evidence it relies upon, that would not have been an unreasonable stance to adopt and it is likely that it would still have been necessary for the Hearing to have taken place. The costs of Mr Green and Ruth Reed attending that event do not therefore represent unnecessary expense on the part of the Appellant.

² See s.336(1) of the 1990 Act and s.1(4) of the Caravan Sites and Control of Development Act 1960

30. However, had the Council reviewed its position in September 2016 and communicated its change of stance to the Appellant then his agent would not have had to carry out the additional work involved in the preparation of the revised housing land supply information dated December 2016. The preparation of that 'Assessment of five year housing land supply' dated December 2016 by the Appellant's agent represents unnecessary expense incurred as a result of the Council's unreasonable behaviour. It is appropriate for a partial award of costs to be made in respect of that unnecessary expense. However, that is the extent of the award to be made. Since the enforcement appeal did not include an appeal on ground (a), this applies only to the partial application made in respect of the planning appeal and only to one aspect of that.
31. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

32. 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 Elmbridge Borough Council shall pay to Mr Hubert Vincent, the costs of the appeal proceedings for Appeal B described in the heading of this decision limited to those costs incurred in the preparation of the 'Assessment of five year housing land supply' dated December 2016; such costs to be assessed in the Senior Courts Costs Office if not agreed.
33. The applicant is now invited to submit to Elmbridge 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.

Wendy McKay

INSPECTOR