



Costs Decision

Hearing Held on 28 July 2020

Site visit made on 27 July 2020

by S M Holden BSc(Hons) MSc CEng MICE CTPP FCIHT MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 August 2020

Costs application in relation to Appeal Ref: APP/K3605/W/19/3235260 Former San Domenico Restaurant, Portsmouth Road, Cobham KT11 1EN

- 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 Euro Garages Ltd for a full award of costs against Elmbridge Borough Council and Highways England.
 - The hearing was in connection with an appeal against the refusal of an application for planning permission for the demolition of existing main building and the construction of a new petrol filling station (Sui Generis) with ancillary convenience store (Use Class A1) and food to go outlet (Use Class A5), 4 no pump islands, canopy, underground tanks, revisions to vehicular access, parking and circulation arrangements, landscaping and associated works.
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Decision

1. The application for an award of costs against Elmbridge Borough Council is refused.
2. The application for an award of costs against Highways England is allowed in the terms set out below.

Submissions

3. The appellant submitted a written costs application. The Council and Highways England provided written responses. A further written response was provided by Highways England the evening before the Hearing.
4. At the Hearing the Council did not add to its written submissions but the appellant and Highways England made additional representations. Both alleged that the other party had caused them unnecessary delays and had not engaged effectively with the planning process.

Reasons

5. The Planning Practice Guidance (PPG) advises 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. Unreasonable behaviour may be procedural, relating to the process, or substantive, relating to the issues arising from the merits of the appeal. The PPG also advises that costs applications may relate to events that occurred before the appeal. Behaviour and actions by the parties at the time of the planning application can therefore be taken into account when considering whether or not costs should be awarded.

Elmbridge Borough Council

6. The Council was entitled to rely on the advice of Highways England in relation to the effects of the proposal on the safety of the A3. It could not have granted planning permission in the face of an unresolved objection from Highways England as a statutory consultee. Neither could it have permitted the development subject to a condition, knowing that it would be unable to discharge such a condition without a Departure from approved standards being accepted by Highways England. As it appeared highly unlikely that such a Departure would be granted, after much deliberation and effort it refused the application.
7. The Council did not behave unreasonably or cause the appellant to incur unnecessary or wasted expense in the appeal process. The application for an award of costs against the Council is therefore refused.

Highways England

8. From what I read and heard there seems little doubt that the appellant and Highways England caused each other delays during the period that the application was being determined. However, it seems to me that Highways England could have been clear in the initial round of consultation that the existing access was inadequate due to the lack of separation distance with the Painshill junction. The access is woefully short of current design standards. No amount of 'tinkering' with the existing access would resolve this fundamental problem. A Departure to those standards had been agreed in 2011 to make using the existing access safer, not as a means of accommodating an intensification of its use.
9. I acknowledge that it can be difficult to define 'red lines' and 'tipping points' in relation to risks. However, in my view, Highways England failed to apply its own top priority of safety on the SRN in relation to the appeal proposal. The existing access is highly unsatisfactory and well below the standards that would normally be required on a 3-lane dual carriageway. Furthermore, this section of the A3 was known to be experiencing a cluster of crashes.
10. It should therefore not have been difficult for Highways England to conclude that any additional traffic generated by the proposal would be likely to result in an unacceptable increase in the risk of conflict and collisions on the A3. It should have been willing to say so much earlier in the planning process, even though it would have been aware that the existing lawful use of the site could recommence at any time. Highways England should also have been prepared to make a judgement about the likelihood of that actually happening. It should have done so setting aside the effects on the access of potential improvements to the Wisley interchange that were under consideration during the time that the application was being considered.
11. Instead, it appears to me that Highways England simply failed to assess this scheme on its own merits. It should have made it clear to the appellant much earlier that the proposal was unacceptable. In doing so, Highways England should have been prepared to defend that decision robustly at any subsequent appeal, which is exactly what it did at the Hearing. However, its evidence was either provided late or at the very last minute in the appeal process. If Highways England had given a firm view during the application stage it might also have had to address issues relating to the restrictions that its decision

placed on the site in development terms. However, in my view its top priority of ensuring that the SRN can operate safely should have been leading to an identification of a long-term objective of extinguishing this access. This would have been preferable to suggesting that minor adaptations to the access to accommodate additional traffic would be given positive consideration.

12. Highway England's failure to be clear from the outset resulted in the appellant pursuing a series of somewhat meaningless tasks, suggesting minor changes to the access and egress, and undertaking a Road Safety Audit. In reality such studies were never going to address the fundamental problems of the access to this site. From the guidance set out in TD42/95 and CD122 of the Design Manual for Roads and Bridges (DMRB), it is clear that priority junctions are unacceptable on a 3-lane dual carriageway. Furthermore, the gap between the site access and the Painshill junction is seriously deficient. Permitting a development which discharged additional traffic onto to the A3 from such an access would therefore be highly likely to lead to more crashes.
13. As a consequence of this lack of clarity, the appellant felt it necessary to pursue the appeal. In its initial response to the cost's application, Highways England also failed to appreciate that having indicated that highway safety was a determining factor in the Council's assessment of the application, it was for it to defend its case. It was only during the appeal, and then late in the process, that Highways England produced the compelling evidence that has led to the dismissal of the appeal.
14. I therefore find that unreasonable behaviour by Highways England, resulting in the appellant incurring unnecessary and wasted expense, as described in the PPG, has been demonstrated and a full award of costs is justified.

Costs Order

15. 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 Highways England shall pay to Euro Garages Ltd, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
16. The applicant is now invited to submit to Highways England to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Sheila Holden

INSPECTOR