

Costs Decision

Site visit made on 18 October 2022

by Mr R Walker BA HONS DIPTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 November 2022

Costs application in relation to Appeal Ref: APP/L5810/W/22/3302175 45 Langham Road, Teddington TW11 9HF

- 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 and Mrs Staton for a partial award of costs against the Council of the London Borough of Richmond-upon-Thames.
 - The appeal was against the refusal of planning permission for erection of a 5-bedroom dwellinghouse with associated outbuilding, parking and landscaping following demolition of the existing bungalow.
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Decision

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

Reasons

2. The Planning Practice Guidance (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. Claims can be procedural – relating to the process; or substantive – relating to the issues arising from the merits of the appeal.
3. The PPG indicates that local planning authorities are at risk of an award of costs if they behave unreasonably by, amongst other things, failing to produce evidence to substantiate each reason for refusal, giving vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis or refusing planning permission on a planning ground capable of being dealt with by conditions. It is on these grounds that the applicants assert that the Council has behaved unreasonably. The Council has defended itself against the assertions.
4. The Council's fifth reason for refusal related to the absence of a Sustainable Construction Checklist (SCC). This was submitted by the applicants' agent to the Council by email on the 1 February 2022. I note that the email address it was sent to was the same address the Council had linked with the planning portal payment. Moreover, although the Council indicate that they have a new email address, it is reasonable for the applicants to have understood that the email address linked with planning portal was correct, being monitored and the document would be received.
5. Moreover, the applicants' agent also re-sent the document to the Council's planning officer on the 19 April 2022 when the officer raised the matter. Given that the application was not determined until the 28 April 2022, the SCC was with the Council in advance of it reaching a decision either way. The Council

was in a position to be able to ensure that the issues being considered at an appeal could be narrowed, thus reducing the expense associated with the appeal. Whether there were other reasons for refusal does not alter this. Moreover, it is immaterial whether other avenues may also have been available, such as a fresh planning application, as once an appeal is made, the parties are within the scope of the costs regime and behaviour should be judged accordingly against the PPG.

6. The Council also withdrew its concerns relating to overlooking (part of the fourth reason for refusal) after it understood that no terrace was proposed by the first-floor rear bedroom windows. The Council accepts that it misunderstood the plans, and an error was made in this regard. It formed one part of the reason for refusal, and there were several other reasons for refusal. Even so, the proposal was still unreasonably refused, in part, based on an inaccurate assertion of this aspect of the proposal's impact. This necessitated a response by the applicants' agent in the appeal submission. It was unnecessary expense that could, and should, have been avoided.
7. In the appeal, it will be seen that the Council defended its position in relation to the effects on outlook from the neighbouring property. The case officer had not viewed the site but relied on other evidence, including photographs. An assessment on outlook is a professional judgement and, although I have agreed with the appellants on this main issue, I do not consider the Council to have behaved unreasonably in making its own judgement as it did. The Council did substantiate its position and as such, even without a site visit, I do not find the Council's behaviour unreasonable in coming to a different conclusion than my own.
8. The applicants submit that the Council failed to substantiate its third reason for refusal, relating to an affordable housing contribution. The appeal was initially scheduled to be determined following a Hearing in October 2022. However, following the Council's withdrawal of its third reason for refusal, the appeal procedure was altered, and it was determined by written representations.
9. The Council's statement of case was dated the 2 September 2022, and sought, amongst other things, to defend its position on the need for an affordable housing contribution. No technical evidence was presented within this statement, and it is understood that this was due to a combination of absences in the lead up to the deadline. Nonetheless, the Council intended to defend its position at the Hearing.
10. However, on the 29 September 2022, the Council informed that its Independent Viability advisor had undertaken a review of its appraisal using the September 2022 Building Cost Information Service (BCIS) figure for the construction costs. This review, I was informed, now showed the appeal scheme having a deficit, and thus an affordable housing contribution was no longer justified. As such, the Council advised that it did not seek to defend its third reason for refusal.
11. The applicants will have spent time preparing for the hearing and had been consistent in their position regarding the affordable housing contribution throughout the process. Although I appreciate that the Council's change in position was not long before the hearing date, given that this review was based on the September 2022 BCIS figure, I do not consider that the Council acted unreasonably in altering its position on the latest data and informing parties

when it did. I have reached this conclusion even though it had the effect of changing the procedure of the appeal to reflect the less complex nature of the remaining matters in dispute.

12. With regards to the second reason for refusal relating to ecology. The applicants did not provide a Preliminary Ecological Appraisal (PEA) with the application. It is put to me that this reason for refusal could have been addressed by way of a condition. However, Circular 06/2005¹ (the Circular) states that *'...is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision'* (paragraph 99). Consequently, it advises that surveys should only be required by a condition on a planning permission in exceptional circumstances. This is reinforced in advice within the PPG.
13. In this regard, without such information before the Council it was not unreasonable behaviour for the Council to have determined the application as it did. The appellants provided a PEA and accompanying bat survey during the appeal. There has been no additional wasted expense as the work was necessary and could not have been conditioned. Moreover, the results of the ecological work undertaken have enabled the final mitigation scheme to be reserved by way of a condition. As such, I do not find the Council behaved unreasonably in relation to this matter.

Conclusion

14. To conclude, the Council refused the application for several distinct reasons. Of these, I have found that its findings in relation to overlooking from a roof terrace that was not proposed, and in refusing the application in the absence of a completed SCC despite it having received a copy of the checklist, amounts to unreasonable behaviour.
15. Time was spent by the applicants' agent in addressing both matters in the appeal submission. This was subsequently unnecessary and wasted expense as the Council did not defend either matter. The extent of this work, and thus, the unnecessary expense involved by the applicants' agent in addressing the SCC and overlooking issues, in their appeal submission, are not matters before me for my consideration.
16. I therefore conclude that a partial award of costs, to cover the expense incurred by the applicants in contesting these distinct parts of the Council's reason for refusal, is justified.
17. I have, however, concluded that the Council did not behave unreasonably in respect of its reasons relating to the affordable housing contribution, ecology and outlook.

Costs Order

18. 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 the Council of the London Borough of Richmond-upon-Thames shall pay to Mr and

¹ Biodiversity and Geological Conservation – Statutory Obligations and Their Impact Within the Planning System

Mrs Staton, the costs of the appeal proceedings described in the heading of this decision; limited to those costs incurred in contesting the fifth reason for refusal (Ref: U0125997) and its fourth reason for refusal (Ref: U0125996) insofar as it relates to overlooking.

19. The applicants are now invited to submit to the 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. Such costs to be assessed in the Senior Courts Costs Office if not agreed.

Mr R Walker

INSPECTOR