
Costs Decisions

Hearings held on 15 March 2022, and 6 September 2022

Site visits made on 21, 22, 23 March 2022, and 8 September 2022

by Patrick Whelan BA(Hons) Dip Arch MA MSc ARB RIBA RTPI

an Inspector appointed by the Secretary of State

Decision date: 10 November 2022

Costs application in relation to Appeal Ref: APP/K3605/W/21/3275789 Esher Place, 30 Esher Place Avenue, Esher KT10 8PZ

- 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 Elmbridge Borough Council for a partial award of costs against Birchwood Homes Ltd.
 - The hearing was in connection with an appeal against the refusal of planning permission for the change of use from conference centre (D2) to residential (C3) to provide 21 flats with associated single and two-storey extensions to east wing, parking, bin and cycle stores, landscaping and alterations to fenestration following removal of existing external staircase.
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Costs application in relation to Appeal Ref: APP/K3605/W/21/3275803 Esher Place, 30 Esher Place Avenue, Esher KT10 8PZ

- 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 Elmbridge Borough Council for a partial award of costs against Birchwood Esher One Ltd.
 - The hearing was in connection with an appeal against the refusal of planning permission for a contemporary extension to the main house to accommodate 8 x 2-bed flats.
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Costs application in relation to Appeal Ref: APP/K3605/W/21/3275808 Esher Place, 30 Esher Place Avenue, Esher KT10 8PZ

- 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 Elmbridge Borough Council for a partial award of costs against Birchwood Esher Three Ltd.
 - The hearing was in connection with an appeal against the refusal of planning permission for the erection of 3 x 3-bedroom mews houses.
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Costs application in relation to Appeal Ref: APP/K3605/W/21/3275811 Esher Place, 30 Esher Place Avenue, Esher KT10 8PZ

- 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 Elmbridge Borough Council for a partial award of costs against Birchwood Esher Two Ltd.
 - The hearing was in connection with an appeal against the refusal of planning permission for the erection of 4 x 3-bedroom semi-detached houses.
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Decisions

1. The application for a partial award of costs in respect of each of the appeals is refused.

Reasons

2. The costs applications were made in writing. There is a single ground. It applies similarly in each appeal. It is that the appellants introduced fresh and substantial evidence at a late stage. This necessitated the extra expenses of preparatory work, and the attendance of consultants at the Hearing of the appeals.
3. The Government's 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. The PPG sets out examples of unreasonable behaviour which may give rise to a procedural award against an appellant. These include introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen.
4. The Procedural Guide¹ sets out that the Inspector will take into account the material submitted to the LPA as well as all the appeal documents and any other matters that are material to the appeal. The PPG makes it clear that an award of costs shall relate to the costs incurred during the process by which the Inspector's decision is reached. While the evidence about viability only emerged when the appeals were made, it rebutted one of the LPA's reasons for refusal. It was not therefore unreasonable for the appellants to submit the evidence with the appeal, and for the LPA to meet their own costs in covering it, at appeal.
5. I appreciate the frustration of the LPA who consider that the appellants changed the developments during the determination of the planning applications from at first providing affordable housing to later not providing affordable housing. I also understand that its validation process seeks to recover the costs of reviewing financial viability appraisals during the determination of planning applications. And, I have taken into account the appeal decision letters² given by the LPA.

¹ Procedural Guide, The Planning Inspectorate, February 2022

² Appeal decisions APP/K3605/W/22/3291046 & APP/K3605/W/20/3253785

6. However, in this case, without planning obligations to secure the affordable housing, which was intended when the applications were made, the provision of affordable housing was never certain. The lack of affordable housing, when the LPA determined the applications, cannot therefore be considered a change to the developments.
7. I acknowledge that the appeal process should not be used to evolve a scheme and that it is important that what is considered by the Inspector is essentially what was considered by the LPA, and on which interested people's views were sought. However, in these cases, there was no affordable housing when the LPA determined the applications; and there was no affordable housing when the appeals were made. There was no evolution.
8. Moreover, both the LPA and the interested parties made detailed representations on the affordable housing issue, which was one of many at appeal and before me. More significantly, the lack of affordable housing was one of the reasons for refusals of the applications, against which the appellants have the right of appeal, and the right to make their case.
9. In these circumstances, and notwithstanding the principle established in *Wheatcroft*, I could not conclude that the evidence on affordable housing would materially alter the applications as determined by the LPA, and lead to prejudice. It follows, therefore, that the appellants did not introduce fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen.

Conclusion

10. I conclude that for the reasons set out above, unreasonable behaviour resulting in unnecessary expense during these appeals, as described in the PPG, has not been demonstrated. For this reason, and having regard to all other matters raised, the partial awards for costs as sought in each appeal are therefore not justified.

Patrick Whelan
INSPECTOR