
Costs Decisions

Hearing held and site visits undertaken on 25 October 2022

by Tom Bristow BA MSc MRTPI AssocRICS

an Inspector appointed by the Secretary of State

Decision date: 14 December 2022

Costs application A in relation to Appeal Ref: APP/W1905/W/22/3296357 Finsbury Court, Parkside, Waltham Cross EN8 7TH

- The application is made under the Town and Country Planning Act 1990 as amended, sections 78, 322 and Schedule 6, and the Local Government Act 1972 as amended, section 250(5).
 - The application is made by Mr J Milne of RG Airspaces Developments Ltd. for a full award of costs against Broxbourne Borough Council.
 - The hearing was in connection with an appeal against the refusal of the Council to grant planning permission for development described in the Council's decision notice of 17 March 2022, in respect of application Ref 07/21/0985/F, as 'development of the site to provide a building of up to four storeys accommodating 10 new homes comprising 3no. one bed and 7no. two bed flats associated car and cycle parking and landscaping'.
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Costs application B in relation to Appeal Ref: APP/W1905/W/22/3296357 Finsbury Court, Parkside, Waltham Cross EN8 7TH

- The application is made under the Town and Country Planning Act 1990 as amended, sections 78, 322 and Schedule 6, and the Local Government Act 1972 as amended, section 250(5).
 - The application is made by Broxbourne Borough Council for a full award of costs against Mr J Milne of RG Airspace Developments Ltd.
 - The hearing was in connection with an appeal against the refusal of the Council to grant planning permission for development described in the Council's decision notice of 17 March 2022, in respect of application Ref 07/21/0985/F, as 'development of the site to provide a building of up to four storeys accommodating 10 new homes comprising 3no. one bed and 7no. two bed flats associated car and cycle parking and landscaping'.
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Decisions

1. Costs application B is refused. Costs application A is, however, allowed within the terms set out below.

Reasons

Context

2. The Planning Practice Guidance ('PPG') explains how costs may be awarded against a party who has behaved unreasonably, and thereby directly caused another party to incur unnecessary expense at appeal.¹ Costs applications may relate to events, but not to expenses incurred, before an appeal was brought.²

¹ Reference ID: 16-028-20140306.

² PPG Reference ID: 16-032-20140306.

Procedural matters

3. The appellant's application for an award of costs was made in writing. The Council provided a written rebuttal at the hearing, to which the appellant responded via comments of 7 November 2022.³
4. The Council's application for an award of costs was made at the hearing as part of their written rebuttal. The Council also added to that verbally. The appellant's rebuttal to the Council's application is in their comments of 7 November 2022. Each party has had appropriate opportunity to consider, and to respond fully to, the case made by the other.⁴

Application A, the appellant's case

5. Claims made by the appellant and Council revolve, in part, around the same matters. With reference to various examples given in the PPG of types of behaviour that may justify a substantive award of costs, the appellant's application is on three principal grounds. Firstly the appellant argues there was 'no evidential basis' for six disputed obligations sought by the Council (the 'disputed obligations').⁵
6. Secondly, the appellant argues that the Council's objection to the scheme in terms of design, or local character and appearance, lacked justification. They aver that the reasons for refusal given in the Council's decision notice of 17 March 2022 both diverge from the discussion of application Ref 07/21/0985/F at Committee, and are vague and unsubstantiated (notably in respect of the interaction of parking, landscaping and biodiversity).
7. Third, the appellant contends that the Council were unreasonable in terms of engagement over a Statement of Common Ground ('SoCG') associated with the proposal. They say that the process of agreeing a SoCG collapsed because of the Council's 'failure to agree straightforward points – for example that a site within walking distance of transport links is in a sustainable location.'

The Council's case

8. The Council's case for an award of costs similarly addresses matters related to attempting to agree a SoCG. They claim the aforementioned 'straightforward points' were, in actuality, matters of judgement as opposed to manifestly facts.
9. The Council also contend that the 'evidence provided by the appellant has been misleading in relying on existing amenity space and double counting the provision. The application is therefore not policy compliant'. Additionally the Council argues that there was a 'late submission of and lack of clarity in relation to the S106...'. And, similarly, that the appellant acted unreasonably in not submitting evidence in relation to the Council's position on housing land supply based on a detailed document provided to them before the hearing.

Reasons

³ See schedules 3 and 4 to the associated appeal decision for document history.

⁴ Noting the procedural manner in which the appeal was dealt with as referenced in paragraph 3 of the associated appeal decision.

⁵ Those set out in paragraphs 1.6 to 1.11 of the section 106 agreement dated 5 December 2022.

10. Given the overlap between costs applications A and B, I deal with the matters they raise thematically.

Infrastructure obligations

11. As above matters related to the disputed obligations are common to both claims. In respect of the disputed obligations, the Council explains that 'it clearly has an evidential basis for requestion contributions, being the NPPF, the Borough of Broxbourne Local Plan, and the Council's Infrastructure Delivery Plan ['IDP']' (my emphasis). The Council's position is arguable, but only so far. As noted in the associated appeal decision, the Local Plan makes provision for infrastructure contributions and obligations based on the IDP. There is then an intricate methodology, again detailed in the appeal decision, which the Council have applied to derive requested contributions from specific 'non-strategic' development.
12. However, the disputed obligations in this instance bear little meaningful scrutiny. In the associated appeal decision I set out 6 principal shortcomings of the Council's approach. Chief amongst those reasons are that it is well-nigh impossible to discern how contributions sought have been calculated, or to which projects they relate. The Council's approach appears, in part, to have been founded on what is it is reasonable to request rather than what is necessary (an approach inconsistent with paragraphs 55 and 57 of the National Planning Policy Framework, 'NPPF').⁶ The Council's approach is also said, on occasion, to draw from certain individuals' 'professional judgement'. That inherently cannot be interrogated.
13. Accordingly any delay by the appellant refining an agreement under section 106 of the Town and Country Planning Act 1990 as amended (the '1990 Act') cannot be said to be unreasonable. The logical gulf between the parties prevented clarity. Whilst the judgement handed down in *Elsick* should, in my view, be treated with some caution as set out in the appeal decision,⁷ nonetheless the appellant clearly explained their position to the Council in that respect before appealing.⁸
14. Even if I am wrong in my reasoning in the associated appeal decision and above, within the terms of the Council's rebuttal to the appellant's application for costs it cannot reasonably be argued that 'an evidential basis for requested contributions' can amount simultaneously to both £263,870 and £121,160 (see paragraph 47 of the associated appeal decision). Alternatively, if an evidential basis suggests two figures so divergent, it is likely inadequate. I appreciate resourcing pressures facing many authorities. No methodology can ever be perfect or perpetually updated. However I cannot other than conclude that the Council's approach in this instance to disputed obligations had such little substantiation that the appellant's hand was forced into appealing. I find that the Council's position in respect of disputed obligations was, by consequence, on the basis 'vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis'.⁹

⁶ Reflected in Regulation 122 of the Community Infrastructure Levy Regulations 2010 as amended.

⁷ *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited* (Scotland) [2017] UKSC 66.

⁸ Including via way of a legal opinion in respect of obligations to the Council (in advance of the Committee consideration of application Ref 07/21/0985/F).

⁹ PPG Reference ID: 16-049-20140306.

Statement of Common Ground (SoCG)

15. As above matters related to the SoCG are common to both applications A and B. The process of agreeing a SoCG is, however, incidental in this instance. As set out in the Planning Inspectorate's Procedural Guide to appeals, a SoCG is useful in refining the extent of the disputed matters in advance of a hearing or inquiry. However it does not necessarily alter the cases of individual parties, or any areas of common ground or of dispute between them. In my experience, notwithstanding legislative provisions, it is relatively common for a SoCG to be absent without impeding fair proceedings. If absent, that is largely a matter for the Inspector to take account of as necessary (rather than indicating unreasonable behaviour in and of itself).
16. As noted in paragraph 37 of the associated appeal decision there is extensive documentation relating to the history of exchanges between the appellant and Council (particularly, but not confined to, planning obligations). Although, commendably to both main parties, engagement appears to have been ongoing throughout the application and appeal processes, clear differences of perspective remained at appeal. In that context the devil is in the detail; one person's fact may be another's judgement, and *vice versa*. Whether a location is 'sustainable' is a surprisingly hard question to answer.

Character and appearance

17. Whilst the officer's report associated with the proposal recommended refusal only on grounds of the absence of disputed obligations, the second and third reasons for refusal in the Council's decision notice of 17 March 2022 relate, broadly, to matters of character and appearance.
18. The minutes of the Council's Planning and Regulatory Committee meeting of 1 March 2022, at which the scheme was considered, record matters related to design. The appellant states that there was no discussion at Committee in relation to 'massing, scale and height', with the principal topic of discussion in respect of design relating instead to external materials. I accept materials may be a matter often capable of being resolved via condition. Be that as it may, I am not in a position to reach a view on that argument (in the absence of anything more definitive as to proceedings).
19. The appellant also takes issue with the, admittedly nebulous, phraseology of the Council's third reason for refusal. That uses the ambiguous term 'overdevelopment', and in part can be read so as to relate alone to the four 'relocated' parking spaces proposed. Similarly the potential implications of the scheme in terms of 'biodiversity gain' are mentioned fleetingly, and there is no reference to Local Plan policies or elements of the NPPF there.
20. Evidently the Council's reasons for refusal could have been much clearer. However Members are not bound to accept the recommendations of officers. If we turn to matters of fact, conscious that is a somewhat divisive term in these proceedings, the proposed development would be taller than existing blocks at Parkside, it would both directly and indirectly reduce the openness of the site including via the relocation of car parking spaces elsewhere, and it differs in design to neighbouring Finsbury Court, Greenwich Court and Hyde Court.

21. In that context it is not inherently unreasonable for Members to have taken a different view on character and appearance to the recommendations in the officer report, notwithstanding that I in turn reached a different finding to that of the Council. As above, design is referenced in Committee minutes, and it is difficult to disambiguate one aspect of design from any other; for example a smaller scheme nestled within a site constructed of atypical materials may be acceptable, whereas a larger and clearly visible scheme of that aesthetic may appear discordant.
22. At appeal the Council has, notwithstanding some ambiguity as noted above, reasonably substantiated its case with regard to relevant policies of the development plan and elements of the NPPF (including Local Plan policies DSC1, NEB1, NEB3 and NEB4). Those policies are relevant to matters of biodiversity and landscaping. Paragraphs 30 and 31 of the Council's statement of case describe the site and its surroundings, and make an arguable case in terms of character and appearance. Resolving that matter inherently relies on judgement.

Amenity space

23. Following my reasoning in paragraphs 8 and 31 of the associated appeal decision, the Council's suggestion that the proposal is 'not policy compliant' in terms of amenity space is either an excessive simplification or incorrect. Moreover the 20 square metre outside space recommendation for communal flats is not set out in 'policy', but to be found in the Borough-wide Supplementary Planning Guidance related to design (updated 2013, 'SPG'). Thus the appellant cannot be said to have acted unreasonably in asserting the scheme was acceptable in that regard.
24. In paragraph 30 of the associated appeal decision I set out that it is judgement as to whether the proposal would provide an additional 441 square metres of amenity space 'given that space already exists, regardless of how well tended it is'. I saw first-hand, however, how much of that space is overgrown, having largely been left to its own devices over the years (particularly the south-easterly corner of the site). There is, again, an arguable point there. It is also unclear that any expense has been expended by the Council in defending against that point beyond merely stating that they disagree with the appellant's position.

Housing land supply

25. The Council's claim in this respect related to the identification by the appellant at the hearing of various sites within the Council's housing land supply information, in respect of which there were alleged concerns regarding deliverability.¹⁰ I understand that the appellant was supplied with information in respect of sites before the hearing, and would have potentially been able to make comments beforehand.
26. However the context there is important. The Council's 'part 2' appeal statement addresses matters of housing land supply. The Council provided an update on 15 September 2022 related to certain methodological issues. Similarly a further update was provided by the Council on 22 September 2022 in a similar vein. As

¹⁰ I have recorded sites to which references 6.12, 6.14, 7.1, 7.2, 7.4, 7.8, 7.9, 7.13, 7.14 and 7.15 in the Council's 'Part 2' appeal statement and associated appendices relate.

referenced above the history of engagement between the main parties on this case is extensive.

27. Moreover, despite the appellant seeking an inquiry, the appeal was dealt with principally via hearing. The hearing was therefore effectively the forum for discussion and interrogation of the evidence, rather than that necessarily having to be preceded by yet further exchanges. It does not therefore appear unreasonable for the appellant to have identified certain aspects of the Council's evidence to discuss at the hearing itself. Moreover, as in respect of my reasoning on amenity space, little time was given over to this specific matter at the hearing (amongst housing matters more generally).

Conclusion

28. For the above reasons, with reference to the approach in the PPG, I conclude that the appellant has not acted unreasonably, and that application B should be refused. Similarly two of the three principal grounds advanced by the appellant in respect of application A relate to points which are arguable and where the Council, notwithstanding certain shortcomings, has reasonably justified their opposition to the scheme as a matter of judgement.
29. However I have set out above that the Council's approach to infrastructure contributions was unreasonable with reference to the approach in the PPG. Therefore a partial award of costs is justified. Whilst the appellant has not precisely enumerated the costs that they have incurred at appeal, the PPG specifies that may include the time spent preparing for an appeal and attending the appeal, including the use of consultants to provide detailed technical advice.¹¹ Clearly some expense has been expended in that regard.

Costs Order

30. In exercise of the powers under section 250(5) of the Local Government Act 1972 as amended 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 Broxbourne Borough Council shall pay to Mr J Milne of RG Airspace Developments Ltd., the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of addressing the first reason for refusal given in the Council's decision notice of 17 March 2022 in respect of application Ref 07/21/0985/F; such costs to be assessed in the Senior Courts Costs Office if not agreed. Mr J Milne of RG Airspace Developments Ltd. is now invited to submit to Broxbourne 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.

Tom Bristow
INSPECTOR

¹¹ Reference ID: 16-032-20140306.