
Costs Decisions

Hearing Held on 22 November 2022

Site visit made on 21 November 2022

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

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

Decision date: 24 January 2023

Costs applications 1 and 2 in relation to Appeal Refs:

APP/A3655/C/21/3282731 and APP/A3655/C/21/3282732

Warehams Grange Sutton Green Road, Sutton Green, Guildford, GU4 7QH

- The applications are 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 applications are made by Mr and Mrs Bance for a full award of costs against Woking Borough Council.
 - The appeal was against an enforcement notice (as corrected) alleging construction of a detached single storey structure.
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Costs application 3 in relation to Appeal Ref: APP/A3655/D/21/3288976

Warehams Grange Sutton Green Road, Sutton Green, Guildford, GU4 7QH

- 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 Bance for a full award of costs against Woking Borough Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for erection of extension to dwelling, consisting of pool house, plant room, loggia and garage / car port (Part Retrospective application).
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Decisions – all applications

1. The applications are refused.

Preliminary Matters

2. The costs applications were submitted in writing by the applicants at the Hearing. The issues raised in the costs applications are inter-related and to avoid duplication I have dealt with them together.
3. The Planning Practice Guidance (PPG) advises that parties in planning appeals should normally meet their own expenses. However, costs may be awarded where a party has behaved unreasonably, and that behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. The PPG provides examples of unreasonable behaviour, procedurally or substantively, which may result in an award of costs against a local planning authority. The applications were made and responded to in writing and therefore there is no need to rehearse the detailed points made.

The submissions for Mr and Mrs Bance

4. The main thrust of Mr and Mrs Bance's case is that full awards of costs are justified because the entirety of the appeals could have been avoided, if the

Council had reviewed its case promptly when matters were raised by the applicants and that the case made by the Council at the Hearing is different to that put before members when the enforcement action was authorised. It is also claimed that the appeal against the refusal of planning permission would not have been required if the enforcement notice had been withdrawn. Moreover, the applicants consider that the Council's determination of the planning application was flawed and informed by its position in relation to the enforcement notice.

5. In substantive terms the applicants consider that the Council; prevented or delayed development which should clearly be permitted; failed to produce evidence to substantiate each reason for refusal; required them to enter into a planning obligation which does not accord with the law or relevant national policy; refused to enter into pre-application discussions and did not review its case promptly following the lodging of the appeals. In procedural terms the applicants consider that there was a lack of co-operation from the Council, delays in providing information or other failure to adhere to deadlines, it only supplied relevant information at appeal, did not agree a statement of common ground (SOCG) in a timely manner and introduced fresh and substantial evidence at a late stage necessitating extra expense for preparatory work.

The response by Woking Borough Council

6. The Council maintains that it has acted reasonably on both a procedural and substantive basis and that its officers have acted diligently and carefully in this case, making concessions where appropriate. It also states that a difference of opinion does not present with it any element of unreasonableness.

Reasons

7. In considering the issues raised by the applicants, it is important to understand the sequence of events leading up to the notice being issued on 10 August 2021, the section 78 planning application being refused on 3 December 2021 and prior to and at the Hearing.
8. The Council's Officer Report (the Officer Report) which sought approval, from its Planning Committee, for enforcement action is dated 29 June 2021. Within that report there is a description of the site, the planning history, relevant planning policy, background to the report and the reasons why it is considered expedient to take enforcement action are outlined. There are five reasons listed why the Council considered it was expedient to take enforcement action, these included:
 - The unauthorised development constitutes inappropriate development in the Green Belt which is, by definition, harmful to the Green Belt. Moreover, the development significantly harms the openness of the Green Belt due to its bulk, mass, and the increased spread of development across the site. No very special circumstances (VSC) have been identified and officers remain to be convinced that VSC would exist, or carry sufficient weight to outweigh the significant harm to the Green Belt, which must be afforded substantial weight...
 - The 'guest cottage' element of the unauthorised development is entirely self-contained and could be occupied independently from the main dwelling. As an independent unit it would be out of keeping with the pattern and form of surrounding development....

- The unauthorised development does not constitute permitted development under Schedule 2, Part 1, Class E of the General Permitted Development (England) Order 2015 (as amended) (the GPDO) because a) it exceeds the size tolerances, and b) it contains primary living accommodation. In any case, the implementation of permission granted under PLAN/2018/0186 has resulted in the loss of these rights as per Condition 5 attached to the consent.
9. Prior to that report being produced site visits took place and there was correspondence between the applicants and the Council on the 1 June and 28 June 2021. Within that correspondence the agent requested clarification in respect of the specific reasons why the building as constructed did not constitute permitted development and provided information relating to the sequence of events and why in their opinion the building was not a breach of planning control. A further site visit was carried out on the 9 July 2021, and it appears that at the site visit the Council's Officer, Mr J Kidger, indicated the reasons why the building was not considered to be permitted development. These included whether the building was within 2m/outside of the curtilage of the dwelling, whether the building incorporated primary living accommodation and the sequence of construction with regards to the 2018 planning consent¹.
10. Further correspondence between the parties took place in July 2021 and within it the Council stated that it considered that permitted development rights were withdrawn earlier within the planning history and a condition on the 2000 planning consent² was cited. The agent requested a copy of the 'red line' plan submitted with that planning application but the only copy available was in black and white. The subsequent correspondence sets out the disagreement between the parties relating to the condition on the 2000 planning consent. Correspondence from the agent on 29 July 2021 related to the curtilage of the dwelling, the use of the building and the sequence of events relating to the installation of an oven and beds within it, appeal decisions and case law in respect of 'primary living accommodation', the potential separate occupation of the building, expediency, planning permission, the redline on the 2000 planning consent and the demolition of the stables.
11. Prior to the notice being issued in August 2021 the Council had altered its position as to which condition attached to which planning consent it considered withdrew permitted development rights affecting the appeal site. As such, the reasons for issuing the notice refer to the 2000 planning consent and not the 2018 planning consent cited within the Officer Report. However, the reasons for issuing the notice in all other respects reflect those within that report.
12. The applicants submitted a planning application to retain the building as constructed and to attach it to the main dwelling with the construction of a short section of wall. That planning application was refused in December 2021 for the following reasons:
- The proposed extension, taken cumulatively with previously implemented, non-original extensions shown to be retained, would result in disproportionate additions over and above the size of the original building and therefore constitutes inappropriate development in the Green Belt which is, by definition harmful to the Green Belt.

¹ Ref No: PLAN/2018/0186

² Ref No: PLAN/2000/0566

Furthermore the proposed extension would harm the openness of the Green Belt by reason of its bulk, mass and the increased spread of development across the site. No very special circumstances have been advanced which would clearly outweigh the harm to the Green Belt by reason of inappropriateness, and loss of openness, nor is it considered that such very special circumstances would exist in this instance. The proposed extension is therefore contrary to Policy CS6 of the Woking Core Strategy (2012), Policy DM13 of the Development Management Policies Development Plan Document (DMP DPD) (2016) and Section 13 of the National Planning Policy Framework (the Framework).

- Because the 'pool house' element of the proposed extension would not share a common access with the main dwelling and would not be physically incorporated within it, and has not been designed in such a way that renders it incapable of being occupied separately from the main dwelling, it is contrary to the provisions of Policy DM9 of the Development Management Policies DPD (2016) as regards acceptable ancillary accommodation, irrespective of whether a condition, or planning obligation, could be imposed or entered into by the applicant to require that it be occupied as such.
13. During the determination of that planning application a draft planning obligation was submitted by the applicants and there is correspondence between the parties in respect of that document. The applicants submitted a draft SOCG to the Council in October 2022 and within a pre-hearing note I requested that a SOCG be submitted by 11 November 2022. That date was subsequently revised. On the 15 November 2022 Council Officers conducted a site visit at the invitation of the applicants' agent. Within the SOCG the Council conceded that it accepted the applicants' evidence in relation to whether; the building was within 2m/outside of the curtilage of the dwelling and the incidental use of the building. Moreover, the Council also stated that it now considered that the building did not meet the limitations and conditions at E.1(e)(i) and E.3 of Class E of the GPDO.
14. The applicants undertook alterations to the building between the 15 and 21 November 2022. Two versions of the SOCG were submitted as a finalised and completed one could not be agreed by the parties. A number of documents were cited at section 7.3 of the one version of the SOCG which the Council considered were of relevance to the Hearing, including 2 appeal decisions.
15. Even though the Council made concessions prior to and at the Hearing in respect of the ground (c) appeal it still maintained that the detached single storey structure was in breach of planning control. I have found in my substantive decisions, relating to the ground (c) appeals against the enforcement notice, that it has not been demonstrated that condition 5 of the 2000 permission applies to the area where the detached single storey structure has been constructed. Nevertheless, this followed a detailed analysis of all the documentary and oral evidence that is before me and involved a matter of judgement.
16. However, I have also found that at the date the enforcement notice was issued the detached single storey structure did not meet the limitation at E.1(e)(i) and it was not permitted by Class E of the GPDO. Moreover, in my judgement the alterations to the chimney, undertaken after the 15 November 2022, cannot reasonably be treated as forming part of the operational development that was

undertaken to substantially complete the single storey detached building. As such, I have agreed with the Council that the detached single storey structure constitutes a breach of planning control.

17. The specific reasons as to why the structure does not meet the limitations and conditions of Class E of the GPDO are different to that stated by the Council and its Officer in 2021 and within its Statement of Case. Nonetheless, the Council's concessions within its version of the SOCG invariably saved time at the Hearing and even though only part of the structure exceeded the limitations and conditions of Class E the whole of the development is a breach of planning control. It was therefore not unreasonable for the Council to continue to contest and resist the ground (c) appeals and not withdraw the enforcement notice. Additionally, even had I found that the Council had acted unreasonably on this matter, which I do not, the behaviour would not have led the applicants to incur unnecessary or wasted expense in the appeal process as the information to demonstrate whether the structure constituted a breach of planning control would have been required in any event. Furthermore, even though the applicants consider that the requirements of the enforcement notice, to demolish the whole structure, are unreasonable that does not constitute unreasonable behaviour and ground (f) specifically allows consideration of such matters.
18. I have disagreed with the Council within the ground (a) appeal and deemed planning application and section 78 planning application as I have allowed the appeals. However, whether the alleged breach of planning control/the development constitutes inappropriate development in the Green Belt, its effect on the openness and purposes of the Green Belt, whether the development would constitute ancillary accommodation with regard to the development plan, whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations and if so, whether this amounts to the very special circumstances required to justify the development all involve matters of judgement. Whilst the section 78 application was not determined by members at a planning committee the Council's Delegated Report is a comprehensive and detailed evaluation of those issues and the weight to be attributed to them.
19. Additionally, I am mindful that paragraph 50 of the PPG states that "*Where a local planning authority has refused a planning application for a proposal that is not in accordance with the development plan policy, and no material considerations including national policy indicate that planning permission should have been granted, there should generally be no grounds for an award of costs against the local planning authority for unreasonable refusal of an application.*" As such, I do not consider that the Council prevented or delayed a scheme which should clearly be permitted. The Council's submitted evidence supported the reasons for issuing the notice and the reasons for refusal and I do not consider that the Council's evidence which explained the reasons for the Council's stance was materially deficient in its reasoning. Moreover, there is little evidence to indicate that additional pre-application discussions or the Council reviewing its cases more promptly would have avoided the appeals altogether. Consequently, I do not consider that the Council acted unreasonably in these regards.
20. I have found that sections 1 through to 9 of the schedule of the submitted legal obligation would meet the statutory tests as set out at paragraph 57 of the

Framework. Therefore, it does accord with national policy. One of the appeal decisions³ cited by the Council in its version of the SOCG related to 1 Lime Grove and the erection of a single storey detached building comprising an annex. Due to the details of that case the Inspector found that the proposal would not be ancillary to the main dwelling and treated it in the same way as a proposal for a new dwelling. As such, the impact on the Thames Basin Heaths Special Protection Area (SPA) was taken into account. It was not unsurprising then that the applicants' agent stated at the Hearing that a draft legal obligation relating to mitigation for the SPA impacts could be completed during the Hearing if it was required.

21. Nevertheless, after discussions at the hearing the Council confirmed that the development would be treated as a residential extension rather than a freestanding unit for the purposes of the development plan policy. As such, it was not necessary for a legal obligation relating to the SPA mitigation to be completed. Therefore, the Council did not require that the applicants enter into a planning obligation which does not accord with the law or relevant national policy. The applicants have also questioned the Council's imposition of a clause within the completed legal obligation relating to the Council's costs incurred in connection with the obligation and the amount of that payment. Nonetheless, in my experience this type of clause is routinely included within legal obligations during the appeal process and the Council have not acted unreasonably in these respects. It is not within my jurisdiction to determine whether the amount of the costs agreed to were reasonable or not.
22. The correspondence between the parties from 2021 through to the date of the Hearing indicates that, though there were some delays in replying to emails by the Council, its Officers did not refuse to co-operate with the applicants' agents. The Council initially refused to review the draft SOCG submitted by the applicants due to its length and when it had been submitted within the procedure timetable. The Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 do not require the parties to provide or complete a SOCG. However, the provision of a SOCG is seen as best practice and can narrow down the issues to be discussed at a Hearing. After receiving my Pre-Hearing Note the Council agreed to review the SOCG and as stated previously 2 versions of it were before me at the Hearing. The Council refused to sign drafts of the SOCG as it did not or could not agree to all the statements within them. Moreover, its Officer/s attended a site visit arranged by the applicants to ensure the current Officer/s agreed or did not agree with the case put forward by previous Officer/s. Yet it was clear from those documents where the disagreements between the parties lay and the Council's concessions invariably saved time at the Hearing. As a result, based on the evidence before me it has not been demonstrated that the Council acted unreasonably in this respect.
23. A plan indicating the 'red line' in respect of the 2000 planning consent was requested by the applicants' agent in July 2021. The plan supplied by the Council was a black and white copy as that was the only copy on their records. However, shortly before the Hearing the Council cited 'supplementary maps showing the land area' in its version of the SOCG. It is not clear why those maps were not referred to within its Statement of Case. However, the applicants had time to review those maps and discussions were undertaken in

³ Ref No: APP/A3655/D/21/3280816

respect of it at the Hearing. Their provision did not significantly lengthen proceedings and there is little evidence to indicate that the Council deliberately concealed them or that it provided information that is manifestly inaccurate or untrue. Furthermore, a discussion with regard to the 2000 planning consent and the relevant planning condition would have been required in any event. Additionally, even though I have found that it has not been demonstrated that condition 5 of the 2000 permission applies to the area where the detached single storey structure has been constructed this involves a matter of judgement. Therefore, the Council did not act unreasonably in these respects.

24. The Council also made concessions and altered its specific reasons as to why the structure was a breach of planning control after the site visit on the 15 November 2022. As a result, an appeal decision⁴ was cited by the Council which it considered provided support for its case. I understand the applicants' frustration at the Council's late concessions and alterations to its ground (c) appeal. The Council's barrister cited a High Court judgment⁵ at the Hearing in relation to whether the provisions of the GPDO can be applied retrospectively. That had not been cited previously and therefore time was required over the lunch break for the judgment to be read and comments made on it. However, as stated previously that behaviour would not have led the applicants to incur unnecessary or wasted expense in the appeal process as the information to demonstrate whether the structure constituted a breach of planning control would have been required in any event.
25. The appeal decision relating to 1 Lime Grove was cited by the Council within its version of the SOCG and it did not provide any explanation as to why it considered it supported its case prior to the Hearing. As stated above, given the content of that appeal decision in relation to the SPA it is not unsurprising that the applicants appear to have had drawn up a draft planning obligation in relation to this matter. However, that document was not submitted as part of the evidence before me. Moreover, after discussions on the relevance of the appeal decision at the Hearing the Council confirmed that the development would be treated as a residential extension rather than a freestanding unit for the purposes of the development plan policy. As such, it was not necessary for a legal obligation relating to the SPA mitigation to be completed. I agree that it would have assisted all parties if the Council had outlined what parts of the appeal decision were relevant to the case before me prior to the Hearing. Nonetheless, there is little to indicate that the Council acted unreasonably in this matter.

Conclusion

26. I therefore find that, in all instances, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. For the reasons set out above and having had regard to all other matters raised, awards of costs are not justified.

D. Boffin

INSPECTOR

⁴ Ref No: APP/D3640/X/14/3001083

⁵ *RSBS Developments Ltd v SSHCLG & Brent LBC* [2020] EWHC 3077 (Admin)