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## Costs Decision

Site visit made on 30 November 2022

**by Alexander O'Doherty LLB (Hons) MSc MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 2 March 2023**

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### **Costs application in relation to Appeal Ref: APP/N5090/W/22/3295865 Annex Land to 765 Finchley Road, London NW11 8DS**

- 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 Alexander Beare for a full award of costs against the Council of the London Borough of Barnet.
  - The appeal was against the refusal of planning permission for development described on the planning application form as, "The proposal seeks development on annex land to 765 Finchley Road, London NW11 8DS to erect One Zero carbon stealth, energy efficient home with associated garden areas".
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### **Decision**

1. The application for an award of costs is 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.

### *Design<sup>1</sup>*

3. The Council gave pre-application advice which was generally supportive of the scheme before them at pre-application stage. Although the Council subsequently refused planning permission for the resulting planning application, the applicant has accepted that the Council were entitled to do so, given that the Council is not bound to adopt the advice given at pre-application stage in its decision-making. The Council's Officer's Report provided an adequately-reasoned assessment of the proposed development in terms of its effect on the character and appearance of the area, with reference being made to the site's context and the design credentials of the proposal.
4. Therefore, I do not consider that the Council made vague, generalised or inaccurate assertions about the proposal's impact, which were unsupported by any objective analysis, or that no explanation or justification was provided for the Council's decision, which differed from the pre-application advice given. Whilst it might have been helpful for the Council to have provided the applicant with the opportunity to make further changes to the scheme before their decision was issued, I have not been referred to any specific requirement for the Council to do so. I therefore consider that the Council's behaviour was not unreasonable in relation to the 'Design' ground raised by the applicant.

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<sup>1</sup> Following the sub-headings found in the applicant's costs application.

## *Reports*

5. At the appeal stage, the applicant provided new supporting evidence in the form of a townscape appraisal<sup>2</sup>, a Transport Technical Note<sup>3</sup>, and a Fire Safety Report<sup>4</sup>. However, the Council mentioned in their appeal statement that, "The appellant provides no new information as part of the statement of case, all information relating to the proposal was assessed during the application stage...". Additionally, the Council's appeal statement did not mention the new supporting evidence.
6. I note that the Council have mentioned that the level of technical detail found in the Transport Technical Note should have been submitted at the application stage, but it does not follow from this that it could not have been referred to in the Council's appeal statement. The Council's claim, that uncertainty has been caused as it is unclear whether the drawings in the Transport Technical Note have been generated from swept path analysis software, does not change the fact that the Transport Technical Note was not addressed in the Council's appeal statement.
7. As the Council's statement did not address this new evidence, which directly related to the Council's reasons for refusal given in their decision notice, I consider that the Council acted unreasonably in relation to the 'Reports' ground raised by the applicant.
8. As explained in detail in the associated appeal decision, the Council were correct to refuse to grant planning permission in relation to the effect of the proposed development on the character and appearance of the area. Accordingly, despite the Council's unreasonable behaviour in failing to address the townscape appraisal in their appeal statement, this issue would likely have required a comprehensive response from the applicant at Final Comments stage even if the Council had directly addressed the townscape appraisal in their appeal statement. Hence, the expense incurred by the applicant in responding to this specific planning issue in the appeal process has not been unnecessary or wasted.
9. On the other hand, given my reasoning in the associated appeal decision that, taking account of the Transport Technical Note and the Fire Safety Report, the appeal proposal is acceptable in relation to highway safety and access for emergency services, had the Council provided adequate reasoning in their appeal statement in relation to the Transport Technical Note and the Fire Safety Report there is a strong possibility that these issues would have fallen away during the appeal process. This did not occur and therefore the applicant incurred unnecessary and wasted expense in responding to these issues in their Final Comments.

## *Legal Agreement*

10. The Council have not disputed the applicant's claim that the applicant e-mailed the Council on 14 September 2021 providing reasons why the matter of the provision for on-going access to the rear garden area for the residents of West Heath Place was not related to the planning application. I note that the

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<sup>2</sup> The Townscape Consultancy (March 2022)

<sup>3</sup> Transport Technical Note, Parking and Access Consideration (i-Transport LLP) (28 March 2022)

<sup>4</sup> Asserson: Fire Safety Report: Fire Safety Report for Finchley Road Site (HornerSalus Ltd) (28 March 2022)

Council's Officer's Report did not directly address the applicant's reasons given in that e-mail.

11. Additionally, the Council's appeal statement did not directly address the arguments put forward in the applicant's Grounds of Appeal in relation to the provision for on-going access to the rear garden area for the residents of West Heath Place, including whether this matter passed the tests for planning obligations set out in Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). As a result, the Council's appeal statement did not directly grapple with the points made by the applicant that the appeal proposal represented a fundamentally different scheme to that considered in appeal decision Ref APP/N5090/W/18/3210067.
12. Although the Council have referred to uncertainty arising from the fact that the Unilateral Undertaking (UU) was submitted in draft form when the appeal was lodged, as the applicant's arguments related to reasons why it was not thought necessary for a UU to secure access to West Heath Place, with the draft UU not containing any text relating to this matter, in my view the applicant's arguments should have been fully explored in the Council's appeal statement, even taking account of the fact that the UU was in draft form.
13. As explained in detail in the associated appeal decision, as the dispute relating to this issue appears to be a private matter rather than being directly related to the proposed development, a planning obligation is not required in relation to this matter. I have taken account of paragraph 16-050-20140306 of the PPG, which relates to the circumstances when an award of costs might not be made against a Local Planning Authority, but as the Council were requiring the applicant to enter into a planning obligation which does not accord with the law, which the PPG identifies as an example of unreasonable behaviour<sup>5</sup>, I consider that the Council acted unreasonably in relation to the 'Legal Agreement' ground raised by the applicant.
14. Given the e-mail referred to above, I consider that this unreasonable behaviour occurred at the point at which the Council's refusal of planning permission was issued. Moreover, similarly to my finding in relation to the 'Reports' ground above, the Council's failure to directly address the applicant's arguments on this matter in the Council's appeal statement also constituted an instance of unreasonable behaviour.
15. If the Council had provided an adequate response in their Officer's Report to the arguments made by the applicant in their e-mail of 14 September 2021 in relation to the provision for on-going access to the rear garden area for the residents of West Heath Place, in all likelihood this issue would not have formed part of the Council's reasons for refusal of planning permission. This did not occur and therefore the applicant incurred unnecessary and wasted expense in responding to this particular issue throughout the course of the planning appeal.

#### *Summary of partial award of costs*

16. On this basis, I consider that the Council acted unreasonably by not adequately responding to the Transport Technical Note and the Fire Safety Report at the appeal stage. Additionally, the Council acted unreasonably by not adequately

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<sup>5</sup> Paragraph 16-049-20140306

responding to the arguments put forward in the applicant's e-mail of 14 September 2021 and in the applicant's Grounds of Appeal in relation to the provision for on-going access to the rear garden area for the residents of West Heath Place via a UU.

17. This unreasonable behaviour caused unnecessary and wasted expense for the applicant in relation to responding to the issues of highway safety and access for emergency services in their Final Comments. It also caused unnecessary and wasted expense for the applicant in responding to the issue of the provision for on-going access to the rear garden area for the residents of West Heath Place via a UU throughout the course of the planning appeal. Thus, the application for costs succeeds to that extent only.

### **Conclusion**

18. I therefore find that unreasonable behaviour resulting in unnecessary and wasted expense in the appeal process, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

### **Costs Order**

19. 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 Barnet shall pay Mr Alexander Beare, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to responding to the issues of highway safety and access for emergency services in their Final Comments, and in relation to responding to the issue of provision for on-going access to the rear garden area for the residents of West Heath Place via a Unilateral Undertaking during the whole of the appeal process; such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to the Council of the London Borough of Barnet, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*Alexander O'Doherty*

INSPECTOR