Costs Decisions

Site visit made on 12 April 2023

by David Prentis BA BPI MRTPI

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

Decision date: 17 May 2023

Costs application in relation to Appeal A Ref: APP/H2265/W/22/3300796
83 High Street, West Malling ME19 6NA

- 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 Caxton House Investments Limited for a full award of costs against Tonbridge and Malling Borough Council.
- The appeal was against the refusal of an application for planning permission for demolition of existing small outbuilding, demolition of brick element of and alterations to existing ragstone wall, demolition of a curved garden wall, and the construction of two houses with associated hard landscaping, boundary wall extension, cycle stores and fencing.

Costs application in relation to Appeal B Ref: APP/H2265/Y/22/3300801
83 High Street, West Malling ME19 6NA

- The application is made under the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 89 and Schedule 3, and the Local Government Act 1972, section 250(5).
- The application is made by Caxton House Investments Limited for a full award of costs against Tonbridge and Malling Borough Council.
- The appeal was against the refusal of listed building consent for demolition of existing small outbuilding, demolition of brick element of and alterations to existing ragstone wall, demolition of a curved garden wall, and the construction of two houses with associated hard landscaping, boundary wall extension, cycle stores and fencing.

Decision – Appeal A

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

Decision – Appeal B

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

Reasons

3. Planning Practice Guidance (PPG) states that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has caused another party to incur unnecessary or wasted expense in the appeal process. Unreasonable behaviour may be procedural, relating to the process, or substantive, relating to issues arising from the merits of the appeal. It is convenient to start with the allegations of substantive unreasonable behaviour.

Appeal A

4. The Council's first reason for refusal identified harm in relation to listed buildings and the conservation area resulting from "*the sub-division of the plot*". The officer's report included the following comments in the assessment of heritage assets:

> *"The proposal therefore involves the infilling of a likely medieval burgage plot that was retained when the listed buildings were constructed, and its separation into separate curtilages. This would cause harm to that part of the setting of the listed buildings which contributes towards their significance, and to the character and appearance of the Conservation Area."*

5. The reason for refusal does not identify any other harm to heritage assets. It is therefore reasonable to infer that the rationale for the first reason for refusal was based mainly or entirely on the premise that the appeal site was a likely medieval burgage plot.

6. Nevertheless, the Council's statement of case concedes that the appeal site is not a medieval burgage plot. Having accepted this fundamental change in its understanding of the site history, the Council should, acting reasonably, have re-evaluated both its first reason for refusal and its overall balancing of the planning merits. There is nothing before me to indicate that this ever happened.

7. On the contrary, the Council's statement of case puts forward an entirely new rationale for the first reason for refusal, arguing that the proposal would represent a cramped form of development, uncharacteristic of the High Street development pattern, and that the scale of the proposal would not respect the prominence of No 83 and its listed stable block. Whatever the merits of those points, they bear no relation to the wording of the first reason for refusal. Moreover, they are directly contrary to the assessment set out in the officer's report which included the following:

> *"I note the comments regarding the scale of the building considering the proposal to be overdevelopment of the site. The site however lies within a rural service centre setting where a tight knit form of development would not be uncommon. I therefore do not consider the form of the development would be harmful to the character of the area."*

8. I conclude that the Council has failed to substantiate the first reason for refusal. This is one of the examples of types of behaviour which may result in a substantive award of costs against a local planning authority set out in the PPG[1].

9. The second reason for refusal relates to the proposed use of materials. It is clear from the officer's report and the statement of case that the concern related to one of the materials proposed, namely cementitious boarding that was proposed to be used as a contrasting material on specific parts of the elevations. The PPG notes that refusing planning permission on a ground

[1] Reference ID: 16-049-20140306

capable of being dealt with by a condition risks an award of costs. In my view this is a matter that could have been addressed by a planning condition in all the circumstances of this case.

10. My overall conclusion is that the Council failed to re-evaluate its case, having accepted a fundamental change to the basis on which it determined the application. It failed to substantiate the first reason for refusal. A suitable planning condition could have overcome the second reason for refusal, thereby enabling the proposal to go ahead. This amounted to unreasonable behaviour, which caused the appellant to incur wasted expense in mounting Appeal A. In view of my conclusion on substantive matters, it is not necessary for me to comment on the appellant's submissions in relation to pre-application advice.

Appeal B

11. The single reason for refusal asserts that the proposal would be contrary to paragraph 202 of the National Planning Policy Framework (the Framework). However, paragraph 202 of the Framework is concerned with circumstances where there would be harm to the significance of a designated heritage asset. The reason for refusal does not identify any such harm in relation to the works which required listed building consent.

12. Nor is any such harm identified in the officer's reports or the Council's statement of case. The officer's report on the Appeal B application for listed building consent concluded that demolition of the outbuilding would have a neutral effect on significance whilst the removal of brickwork from the ragstone boundary wall would be beneficial. It concluded that the demolition of a curved boundary wall at the rear of the site, which is of modern construction, would not be harmful to significance.

13. The only justification for refusing listed building consent to be found in the officer's report is that the works are no longer required, following refusal of the associated planning application for the erection of two houses. This reasoning could have merit in circumstances where the works would cause some harm to significance. However, no such harm is alleged here. Indeed, some heritage benefit was identified.

14. The Council has not identified any reasonable basis for the refusal of listed building consent. The refusal amounted to unreasonable behaviour which caused the appellant to incur wasted expense in mounting Appeal B.

Conclusions

15. For the reasons given above, I conclude that the conditions for an award of costs have been met in both cases.

Costs Order – Appeal A

16. 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 Tonbridge and Malling Borough Council shall pay to Caxton House Investments Limited the costs of the appeal proceedings described in the heading of this

decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

17. The applicant is now invited to submit to Tonbridge and Malling 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.

Costs Order – Appeal B

18. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 3 of the Planning (Listed Buildings and Conservation Areas) Act 1990, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Tonbridge and Malling Borough Council shall pay to Caxton House Investments Limited the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

19. The applicant is now invited to submit to Tonbridge and Malling 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.

David Prentis

Inspector