The Planning Inspectorate

Costs Decisions

Inquiry Held on 29-30 June, 1, 6 and 8 July, 28-29 September 2021
Site visit made on 2 July 2021

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 July 2022

Costs applications

- Costs application 1 is made by Kilnbridge Construction Services Limited for a full or partial award of costs against the Council of the London Borough of Havering.
- Costs application 2 is made by the Council of the London Borough of Havering for a partial award of costs against Kilnbridge Construction Services Limited.

Applications made in relation to:

Appeal A Ref: APP/B5480/C/19/3236400
Land North of Willoughby Drive, Rainham RM13 7BW

- The applications are made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The Inquiry was in connection with an appeal against an enforcement notice alleging a material change of use of land to commercial uses in connection with a waste recycling business and associated operational development.

Appeal B Ref: APP/B5480/W/21/3270498
Kilnbridge Waste Recycling Facility, York Road, Rainham RM13 7BW

- The applications are made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The Inquiry was in connection with an appeal against the refusal of planning permission for improvements to York Road and part of Willoughby Drive.

Decisions

Costs application 1

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

Cost application 2

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

Preliminary Matters

3. The costs submissions were submitted after the close of the Inquiry and were dealt with in writing.

4. Costs applications were made by both main parties against the behaviour of the other main party and I will deal with both applications together.

Reasons

5. 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 costs applications have been made on procedural grounds relating to the process and substantive grounds relating to the issues arising from the merits of the appeal.

6. I note reference in the correspondence to my decision on costs potentially taking the approach of "a plague on both your houses". Much of the tone of the costs applications is aggressive and confrontational, including accusations of operating in a "Trumpian-like style" and seeking "to undermine witnesses' credibility and confidence", alleging "patronising behaviour" and prejudice, and suggesting that arguments put forward were "nonsensical".

7. That continues from the Inquiry. It is possible this may have resulted from the virtual format of the Inquiry, losing certain inhibitions where people are physically present, cameras/screens directly facing one another and reading body language is harder online. However, the allegations quoted above appear to be exaggerated and I consider that neither party approached the Inquiry in such a manner as to conclude their behaviour in these regards was unreasonable. I will focus the remainder of my cost decisions on the facts of the cases.

8. I understand that the Council claim not to have received the draft Statement of Common Ground. The appellant suggests they sent two. It is unclear why communication on this point appeared to break down, although my attention has been drawn to the pressures particularly on the Council arising from the exceptional circumstances of the pandemic. It is not uncommon for Statements of Common Ground not to be agreed. Both parties appear to place the blame on the other, although it has not been demonstrated which, if any, may have behaved unreasonably in this regard. Whilst a Statement of Common Ground may have saved some Inquiry time, it would not be possible to ascertain how much unnecessary or wasted expense would have been caused.

9. I appreciate the Council have a number of concerns relating to this site that have been raised with the appellant. These matters appear to relate to matters outside those subjects of this Inquiry, including relating to an extant planning permission and application[1]. I accept these may be reasonable concerns. Generally, it is unclear how they relate to unreasonable behaviour in relation to this appeal or have resulted in unnecessary or wasted expense in the appeal process. However, I will return to some specific instances later in this decision.

10. The main planning witness, Mr Cunnane, was not available at the point he should have been called to give evidence. That led to a need to a break in proceedings that meant a delay to the Inquiry. It is unclear the reason he considered his other commitment being more important than this Inquiry. Such a request is not inherently unreasonable. We adjourned earlier than we would otherwise have done; nevertheless, it was during the afternoon such that the time lost was modest. Taking all of this into account and given the limited

[1] Planning permission reference P1524.00, appeal reference APP/B5480/A/02/1090910 and application reference P1901.20.

objection from other parties at the time, Mr Cunnane's lack of availability did not amount to unreasonable behaviour in this instance.

11. Mr Cunnane, and other witnesses, had difficulties accessing evidence remotely and using their IT equipment. The Council refer to Officers being redeployed and their systems not being set up for remote working. All parties had limited experience of virtual events and building up the necessary skills to operate them efficiently takes time. I accept that Mr Cunnane's issues with his equipment added to the amount of time he needed to give evidence. I understand that the evidence could have been available in hard copy and he could have been more prepared. That may have meant his evidence could have been dealt with swifter. Nevertheless, on balance I consider that the way the appellant and their advisors acted did not amount to unreasonable behaviour.

12. I note that the rebuttal proof submitted by Mr Adenegan was submitted late but rebuttals are, by their nature, submitted late in the process and can be helpful in resolving issues or highlighting areas of disagreement. In this case, it introduced a new witness as the previous proof was prepared by someone who wasn't called to give evidence. None of that is unreasonable.

13. However, it is suggested that this late proof introduced new evidence. Whilst it did not introduce new main issues, it did seem to introduce new points and provide new interpretation of the evidence beyond responding to the appellant's proof. It is alleged that some evidence had been kept back for presentation in this proof. Whilst there was more detail in this proof and it is possible some of that detail could have been presented earlier, I am not convinced that evidence had been deliberately held back. The proof sought to respond to the appellant's arguments. Although submitted late, it did allow some time for the appellant to prepare and present evidence in response at the Inquiry. On balance, therefore, I conclude that submission of this proof was not unreasonable.

Appeal A

14. It was requested during the course of the Inquiry to amend the plan attached to the enforcement notice to include an area that the Council alleged had been incorporated into the use associated with the Waste Recovery Facility (WRF). Early in the process, I set out that I considered injustice was likely to occur to the appellant if I were to include this within the area marked on the plan as it could have affected their appeal. As a result, I thought I was clear that it was unlikely I would include that section of land into the enforcement notice area. Consequently, the repeated subsequent reference to it was unreasonable and led to unnecessary or wasted expense in the appeal process. I will make a partial award of costs on this point.

15. It is unclear why limited evidence as to when the two storey offices were moved was provided by the appellant. A witness was not produced to demonstrate that the offices were not within the enforcement notice site boundary on the date it was issued, if that were the case. Although there was a lack of evidence, that does not mean evidence was concealed. In my decision, I indicate that the evidence on the location of the offices on the date of issue of the notice was less than conclusive and my decision was taken on the balance of probability. Reference to *Gestmin v Credit Suisse* [2013] EWHC 3560 related to memory, which was relevant to the matter at issue. The enforcement officer was only on site very briefly such that his recollections may not have been

accurate. The length of questioning on this matter may have been long, particularly taking into account the length of time the Council's Enforcement Officer was on site to deliver the enforcement notice, but not to the point of being unreasonable. I accept that it was necessary to take a break for the welfare of the witness, but that was acceded to quickly and without complaint so there was nothing unreasonable in that.

16. A significant amount of time was spent discussing whether the offices remained on the site or had been removed onto the neighbouring WRF and whether the boundary had been moved. It was clear on the site visit that they were no longer located on the site and that was easily agreed. That is a matter that could have been checked before the Inquiry, had the Council visited the site, with or without the appellant, to check the location of the structure. That comprised unreasonable behaviour that led to some unnecessary or wasted expense in the appeal process. I will make a partial award of costs on this point.

17. The state of the site prior to the development focussed on the planning history. Discussions of the history and how the site were developed were necessary to understand the lawful status of the site and its physical condition, particularly in relation to the effect of the development on the openness of the Green Belt. The appellant and Council disagreed on their interpretation of the condition and state of the site. There is nothing unreasonable in that.

18. The appellant suggests that the Council held back photographic evidence of the previous state of the site until late in the Inquiry. Other contents of the files were also submitted late in the Inquiry. Some evidence submitted at this stage may have come from Council files not available on the website. Disclosing such evidence earlier may have meant less time was spent discussing the lawful use and state of the site prior to the development. However, many of the additional documents were available on the Council website so could have been provided by either the appellant or Council. Whilst it would have been helpful to have all the evidence on the history of the site prior to the Inquiry, on balance I consider that there was no unreasonable behaviour and it would not be possible to award costs to either party on this basis.

19. I note the Council suggest that photographs provided by the appellant were "selective". However, photographs are always selective in that they are a snapshot in terms of their field of view and time. It is unclear whether a wider angle would have provided a more complete view or what would have been shown. I see no reason to consider that photographs were presented in such a way to deliberately miss a crucial part or in an effort to be misleading.

20. The Council suggest that questions relating to the interpretation of documents relating to the planning history were put to the wrong witness. However, it is not unreasonable to expect that both planning and enforcement witnesses would have understood those matters and been able to address them in evidence. It is up to parties to determine who is best placed to represent them and written evidence can be taken into account, with appropriate weight attached, where that author does not appear as a witness.

21. It would not be unreasonable for a witness to state that they don't know the answer to a question and it is appropriate and helpful to suggest a later witness deal with the issue, where they would be better placed to assist. The Council's advocate interrupted cross-examination a number of times to make this point

and suggest another witness would have been better able to answer the questions, although the cross-examination continued. It is not for Inspectors to determine to whom questions should be put. I consider that continuing to cross-examine a witness when it is clearly stated that another witness would be better able to answer the questions was unreasonable. I will make a partial award of costs to the Council on this basis.

22. I consider that had the Council Officers taken part in a full tour of the site that they may have better understood how it operates, as I did. Not arriving at a site visit without the appropriate safety equipment specified prior to the event is clearly unreasonable. However, this only affected the visit by one Council officer such that the visit was able to proceed. The appellant has described the operations in detail in the written submissions such that this should not have materially affected the understanding of the operations taking place at the WRF. Most of the WRF can be seen from the entrance to the site. The ability to access the site earlier in the appeal process was also complicated by restrictions that were imposed due to the pandemic. On balance, this did not comprise unreasonable behaviour in this instance.

23. It is alleged that the rebuttal proof of the Council ignored the policies within the London Plan. I am not convinced that is the case. These policies were not relied upon in the reasons for issuing the enforcement notice. Their interpretation of those policies and the weight to be given to them may differ from those of the appellant and my conclusions and that is not necessarily unreasonable provided it is not irrational.

24. It is not unreasonable to focus on certain policies, parts of policies and supporting text. If there are other policies or sections of policies of relevance, these should have been drawn to my attention by other parties at the appropriate time.

25. The appellant suggests that the Council behaved poorly in relation to waste policy matters, including the waste hierarchy. I consider that this was a complex matter. I note that the Council sought to question whether the additional land added throughput as well as efficiency. Given that additional land was provided for the use as WRF, offices, parking and for storage of skips, other containers, machinery and equipment it wasn't unreasonable to consider this may have allowed an increase in throughput. Consequently, it wasn't unreasonable to explore that in detail through the Inquiry. It took a lot of time examining witnesses in order that I should understand the issue properly, which I consider correct and appropriate given that it was not agreed between the parties. I consider that the Council did not behave unreasonably in this regard.

26. Data from the Waste Interrogator was provided. That relates to evidence over a number of years; that provided by the Council being the latest years' data. It is not unreasonable to be selective on the data presented in order to make a particular case. Other witnesses can, and did, present further data to put that in context. I do not consider there was anything unreasonable in that.

27. The appellant suggests that the attitude of the Council to the alternative site search was unreasonable. The Council suggest that the manner in which the appellant searched for sites did not indicate serious intent to find a site, for example in relation to when the search commenced, the appellant's persistence and manner of searching, and with regard to the Freightmaster and Avocet

sites. The Council's criticisms were extremely challenging and I was not persuaded by their case that the search was "faux". Nevertheless, it was not unreasonable to challenge the site search through the appeal process.

28. The appellant suggests that the Council ignored the fact that their senior officers did not assist with the site search. However, whilst that assistance may have been helpful and beneficial, it is not part of the Council's role and any request would need to be balanced with other responsibilities and pressures. On that basis, I consider that the Council did not act unreasonably in this regard.

29. The Council suggested searching outside of London, in Grays. The appellant suggested that would conflict with waste policies of the London Plan. Nevertheless, some waste is imported to the site from Essex and the potential of alternative sites, wherever located, is a matter to be weighed in the balance given potential conflict with policies relating to the Green Belt. As such, there was no unreasonable behaviour in this regard.

30. The effect of noise on neighbouring occupiers was raised as a reason for issuing the enforcement notice. I note the Council accepted that could be dealt with by condition. It is not unreasonable to include a matter that could be addressed by condition on an enforcement notice as there would not be a means to provide that condition. It was not clear to the appellant until late in the process that was the case, after they had commissioned additional work. I am not persuaded that the Council were unable to consult their Environmental Health department for comments other than during the course of assessing a planning application, although I note that this was affected by pressures on the Council arising from the pandemic. On balance, I consider that the Council notified the appellant at a reasonable point in the process that they did not intend to contest this point. I found the evidence presented useful in demonstrating why noise was not considered an issue, bearing in mind the proximity to surrounding residential occupiers. On that basis, in relation to noise the Council did not act unreasonably so as to cause unnecessary or wasted expense in the appeal process.

Appeal B

31. I note that the second appeal was added late into the process and the Council worked to present their evidence to shortened timescales. This was at a difficult point in time as the pandemic had a significant effect on Council services due to Officers beginning to work from home and being deployed to other areas. The Council suggest that the appellant could have used their complaints procedures to chase the application. It should not be necessary to use complaints procedures to speed up processing of applications. However, on balance I consider that, in the unusual circumstances of the pandemic, there was no unreasonable behaviour in this regard.

32. Given the appearance of the access road would change it was not unreasonable for the Council to conclude there would be a visual effect on the openness of the Green Belt. Whilst I have concluded that this appeal should be allowed, both in relation to the effects on the Green Belt and road safety, my decision was made on balance and it is not unreasonable for the Council to have come to a different conclusion.

33. The Council indicate that the highways safety issue could have been resolved prior to the Inquiry had the appellant engaged with the Council more pro-actively. The sequence of events has been described in detail, with both parties struggling to attend meeting times. I understand there was a meeting between the parties the day before the Inquiry started. It is possible that an earlier meeting may have assisted in reducing the differences between the parties, thereby reducing the amount of time spent on this issue at the Inquiry. Given the sequence of events, I consider that both parties were prepared to meet to discuss matters but outside events and pressures intruded, such as jury service and annual leave. This may also have been affected by the shortened timescale for appeal B. On that basis, I consider that there was no unreasonable behaviour by either party in this regard.

34. I note the suggestion that the highway issues should have been dealt with by a round-table discussion. However, this was raised at the start of the Inquiry. Having listened to both parties' views I decided that, on balance, it should proceed within the virtual Inquiry. Neither party acted unreasonably on this point.

35. The Council's highways witness appeared to accept that there was not a highway safety objection to the principle of the development. This was particularly the case once he understood that the proposal would not increase throughput of the WRF, only its efficiency. That means that the works proposed would not increase the amount of traffic on the junction, only relating to the surfacing of the access rather than any wider changes to how the junction and access route operate. Comments on the highways issues through the application and appeal have varied to some extent over time, which may reflect that any decision on highways safety in this case is less clear cut than suggested by the appellant.

36. It is suggested that the concerns over visibility splays were unreasonable. The Council explains that relates to buses stopping close to the junction and restricting visibility. That concern is not unreasonable, albeit I concluded that as the development would not lead to an increase in traffic using the junction, it would not affect highway safety in this location.

37. Significant reference was made to the fatal motorcycle accident that occurred close to the appeal site. However, it was clear that this was unrelated to the junction subject of this appeal or vehicles associated with the WRF. For these reasons, exploring the highways issues was necessary, although I consider that the amount of time spent by the Council in examination of this issue was excessive. On that basis, that amounts to unreasonable behaviour that has led to unnecessary or wasted expense in the appeal process and I will make a partial award of costs on this point.

Reasonableness of the costs applications

38. The appellant suggests that it is unreasonable for the Council to submit a costs application as they did not appear to intend to until they realised the appellant had decided to apply for costs. The Council suggest that they had discussed the prospect of making an application for costs, even if they had not determined whether to do so until the end of the Inquiry. That is not unreasonable.

39. It is not unreasonable for participants to apply for costs in appeal proceedings in principle, provided they can be justified in some way. In this case, both

parties put forward behaviour that resulted in the amount of time at the Inquiry being extended. I have set out above whether I consider those circumstances to be unreasonable and led to unnecessary or wasted expense in the appeal proceedings. However, whatever my conclusion, drawing them to my attention in applying for costs would not be unreasonable behaviour.

Conclusions

40. For these reasons, I have found that aspects of both the appellant and Council's behaviour has been unreasonable. For that reason, I will make a partial award of costs to both parties.

Costs Order

Cost application 1

41. 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 Havering shall pay to Kilnbridge Construction Services Limited, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in:
    - half the time spent questioning witnesses regarding the traffic accident near to the site;
    - half the time questioning witnesses regarding the location of the two storey offices;
    - the time spent relating to the enlargement of the enforcement notice area and potential amendment to the plan attached to the enforcement notice to include that area after the first discussion,

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

42. The applicant is now invited to submit to Kilnbridge Construction Services Limited, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Cost application 2

43. 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 Kilnbridge Construction Services Limited shall pay to the Council of the London Borough of Havering, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to half the time in cross-examination of the Council's Principal Planning Enforcement and Appeals Officer in relation to the history of the site; such costs to be assessed in the Senior Courts Costs Office if not agreed.

44. The applicant is now invited to submit to the Council of the London Borough of Havering, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

AJ Steen

INSPECTOR