Ministry of Housing,
Communities &
Local Government

Our ref: APP/P5870/W/19/3241269

Alan Gunne-Jones
Planning & Development Associates,
118 Pall Mall,
London, SW1Y 5ED

By email: a.gunnejones@plandev.co.uk

25 March 2021

Dear Sir

LOCAL GOVERNMENT ACT 1972 – SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 78 AND 320
APPEAL BY WATES CONSTRUCTION LTD
AT LAND AT FORMER ALL-WEATHER PITCH AND ASTRO TURF TENNIS COURTS, ROSEHILL RECREATION GROUND, ROSE HILL, SUTTON SM1 3HH
APPLICATION REF: DM2019/00985

APPLICATION FOR AN AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying his decision on the appeal as listed above.

2. This letter deals with your client's application for a full award of costs against the Council. The application as submitted and the Council's response are recorded in the Inspector's Costs Report, a copy of which is enclosed.

3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.

4. The Inspector's conclusions are stated at CR2.14-2.19. She recommended that your client's application for a full award of costs be refused.

Mike Hale, Decision Officer
Planning Casework Unit
Ministry of Housing, Communities & Local Government
3rd Floor, Fry Building
2 Marsham Street
London, SW1P 4DF

Tel 0303 444 5374
Email: PCC@communities.gov.uk

5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in her report and accepts her recommendation. Accordingly, he has decided that a full award of costs against the Council, on grounds of 'unreasonable behaviour', is not justified in the particular circumstances. The application is therefore refused.

6. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.

7. A copy of this letter has been sent to the Council.

Yours faithfully,

M A Hale

Mike Hale
This decision was made by the Secretary of State and signed on his behalf

The Planning Inspectorate

Costs Report to the Secretary of State for Housing, Communities and Local Government

by R Barrett BSc (Hons) MSc Dip UD Dip Hist Cons MRTPI IHBC

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

Date 26 November 2020

TOWN AND COUNTRY PLANNING ACT 1990

THE COUNCIL OF THE LONDON BOROUGH OF SUTTON

APPEAL MADE BY WATES CONSTRUCTION LTD.

Inquiry held on 9-16 September and 24 September 2020

Former all-weather pitch and astro turf tennis courts, Rosehill Recreation Ground, Rose Hill, Sutton SM1 3HH

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Former all-weather pitch and astro turf tennis courts, Rosehill Recreation Ground, Rose Hill, Sutton SM1 3HH

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Wates Construction Limited for a full award of costs against the Council of the London Borough of Sutton (the Council).
- The inquiry was in connection with an appeal against the Council's decision to refuse planning permission for development described as, 'Erection of a four-storey building creating a new eight form entry secondary school, including a sixth form, a Special Educational Needs (SEN) school for secondary age students and a detached part-one, part-two storey sports hall (Use Class D1), modification of existing access from Rose Hill, provision of areas of hard playing space, car parking, cycle parking and hard and soft landscaping works and other associated works'.

Summary of recommendation: that the application be refused.

1.1 Both the appellant's costs application and Council's response were made in writing, along with all final comments, summaries of which were submitted at the Inquiry. (IQ22 and 23)

The Submissions for Wates Construction Ltd.

1.2 The Council's behaviour has been unreasonable in the context of both procedural and substantive matters.[1]

1.3 The Planning Practice Guidance (PPG) provides that costs applications may relate to events before the appeal or other proceeding was brought[2] and that behaviour and actions at the time of the planning application can be taken into account in the consideration of whether or not costs should be awarded[3].

1.4 If the Council had behaved proactively during the pre-planning and planning application process, particularly in relation to resolving points which the Council perceived as technical issues with the application, then the appeal could have been avoided or the issues to be considered significantly narrowed. The detail in relation to the instances and reasons why matters could have been resolved prior to the planning application being determined is provided. This is highlighted by the subsequent resolution of technical matters concerning trees, biodiversity and air quality following submission of the appeal, as well as the resolution of matters concerning planning obligations.

1.5 There has also been a lack of co-operation by the Council since the lodging of the appeal. The Council has consistently failed to adhere to deadlines for

[1] Paragraph: 031 Reference ID: 16-031-20140306 and the Joint Ministerial Policy Statement – planning for schools development (2011), specifically bullet point 6.

[2] Paragraph: 032 Reference ID: 16-032-20140306

[3] Paragraph: 033 Reference ID: 16-033-20140306

submission of documents and has not proactively engaged with the appellant in a timely manner in order to narrow down issues as requested by the Inspector following postponement of the Inquiry due to the Covid 19 pandemic. Details of failures in this regard are provided.

1.6 The Council has been unreasonable in its steadfast position that the appellant should utilise all of Sutton Local Plan site allocation S98 when there is no clear policy imperative, or legal requirement, in that regard. It is clear from the site allocation and lease negotiations that its northern section would only be required for additional parking if the planning application (and subsequent planning permission) showed it was required. The planning application confirms that the red line application site can accommodate the number of parking spaces required by policy and this was accepted by the Council at the pre-application stage. For the Council to continue to prejudice its proper assessment of the planning application as a result of adopting an unjustified position on the utilisation of the full site allocation is therefore unreasonable. Moreover, the Council has confirmed, in the statement of common ground relating to design, character and appearance[4] that it is not necessary to use the northern part of the site allocation in order to produce an acceptable scheme design.

1.7 If the Council had been open to the appellant's position that it was not necessary to utilise the full site allocation, then the appellant considers that the appeal could have been avoided. Even if the decision maker considers that an appeal could not have been avoided, it is very clear that it would have been contested on fewer grounds and therefore have taken up less Inquiry time.

1.8 The Council has persisted in its position during the appeal process and failed to proactively respond to the appellant's various submissions which sought to narrow down the matters at issue. This justifies a full award of costs against the Council.

1.9 Even if that is not accepted, it is clear that the appeal could have explored fewer issues, taking up substantially less inquiry time. This would justify an award of costs to the appellant in relation to the additional costs which have been incurred as a result.

2. The Response by the Council

Co-operation with the other parties/party

2.1 The appellant did not afford sufficient time to have meaningful discussion at pre application stage, hence the Council would not sign a Planning Performance Agreement. The appellant would not agree to an extension of time to resolve all remaining planning issues post submission. The Council has followed the advice in paragraph 94(b) of the National Planning Policy Framework (NPPF) and paragraphs 38 to 46 in particular. The appellant's decision to follow an unattainable timescale to take its proposals through the planning process has

[4] CD 11.8

meant that the Council had no reasonable alternative other than to refuse permission, because the parties' positions on key issues had no prospect of being resolved within a reasonable timescale.

2.2 The Council made it plain throughout the application process that all communications must be through the case officer. However, the appellant communicated direct with other Council departments and other consultees. This meant that information was missed or received by the case officer late in the process.

2.3 The appellant complains that external consultees were not consulted immediately on validation of the application, but all such consultee responses were received in good time for inclusion in the report to Committee. The appellant was given ample opportunity to work with the Council to address all remaining planning issues but refused to address the Council's substantive objections, principally on design and parking/traffic issues. Instead the appellant agreed to address technical issues only.

2.4 The appellant did not engage properly with the Council at pre-application or application stage and there was no collaboration on their part in completely refusing to consider reasonable alternatives to their proposal.

Delay in providing information and failure to adhere to deadlines

2.5 The Council met deadlines and where there was an issue, this was raised and agreed with the Planning Inspectorate at the time. The Council was unable to meet set deadlines twice, due to personal circumstances of the Council's team. The appellant's response on both occasions was deeply disappointing and highly unsympathetic. The appellant made a complaint about the timing of proofs as this would prejudice it meeting the deadline for the submission of rebuttal proofs, then failed to meet the deadline for the rebuttal proofs, with no explanation or extenuating circumstances put to the Planning Inspectorate.

Failure to agree a statement of common ground in a timely manner or not agreeing factual matters common to witnesses of both principal parties

2.6 This is no reflection of the Council's conduct on the appeal. It is not uncommon for matters to remain unresolved as that is the nature of an appeal. It is right that the Council should preserve the integrity of its case by not agreeing to matters of common ground which are plainly set out by the appellant to undermine the Council's case.

Failure to produce clear and cogent evidence to substantiate each reason for refusal and providing vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis

2.7 The Council's evidence is credible and based on sound analysis and the experience of its expert witnesses. Furthermore, the Joint Ministerial Statement states that local authorities should make full use of their planning powers to support state-funded school applications. This should include engaging in pre application discussions with promoters to foster a collaborative approach to

applications and, where necessary, the use of planning obligations to help to mitigate adverse impacts and help deliver development that has a positive impact on the community.

Refusing planning permission on a planning ground capable of being dealt with by conditions where it is clear that suitable conditions would enable the proposed development to go ahead

2.8 No reasons for refusal were carried forward in this appeal that could be addressed by a condition. The Council could not condition either the car park management plan or the construction logistics plan at the time of refusing permission as neither were acceptable. Despite being advised to show a worst case scenario for the management of all users of the shared access and car park as early as November 2018, the appellant was no closer to resolving this at the time of the appeal. The memorandum of understanding with Greenwich Leisure Limited was signed after the date when the proofs of evidence were due in February 2020 and does not say anything about how the shared car park will be managed during school time. This information was requested during the application, amongst other requests and was provided late.

Requiring the appellant to enter into a planning obligation which does not accord with the NPPF on planning conditions and obligations

2.9 This is a matter of opinion on which the two parties do not agree, but this is not symptomatic of unreasonable behaviour by the Council. Overall, the appellant did not produce all necessary justification for their proposal at application stage, particularly in relation to an inadequate transport assessment (which significantly changed its position following pre-application discussions by requesting staff car parking in the shared car park and then retracted this two working days prior to planning committee), an inadequate car park management plan and inadequate construction logistics plan, an inadequate bat survey and a complete lack of analysis of the impact of the development on the Rosehill recreation Ground/Metropolitan Open Land (MOL).

Conclusion

2.10 The appellant has sought to improve or make its case for planning permission through the appeal process. This is against the advice in PPG. The reason why this case has proceeded to appeal is a failure of the appellant to properly engage with the Council and interested parties in seeking to resolve all planning issues either before or during the consideration of the appeal proposal.

2.11 The PPG says that an award of costs cannot be made against the Council for the way in which it considered the application which it did without delay, deciding the application one day after the statutory period. The PPG states that where local planning authorities have exercised their duty to determine planning applications in a reasonable manner, they should not be liable for an award of costs.

2.12 Where a local planning authority has refused a planning application for a proposal that is not in accordance with 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.

2.13 The Council considers that it has met both of the above tests. There are no procedural or substantive grounds for an award of costs and the Council respectfully requests that the appellant's application is rejected in full.

Inspector's Conclusions

2.14 The 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.

2.15 The Council has a fundamental objection to the design of the appeal scheme and therefore without significant revision, in relation to its appearance, relationship to the MOL and alterations to the internal and external learning and teaching environment, a refusal of planning permission was likely. The Council communicated its position at both pre-application and post-submission stages. The appellant did not fundamentally revise its scheme to address the Council's concerns. The Council considered that one way to address its concerns was to use the full Sutton Local Plan site allocation S98, by rearranging the parking requirement to the northern end of the site allocation. In this context, the Council had a clear policy imperative which justified its position, to ensure the scheme met the requirements of site allocation S98 and the design policies of the Development Plan as a whole. In this regard, in taking this position at application stage and at appeal, I consider that the Council acted reasonably.

2.16 During the planning application process, given the Council's position on the design of the appeal scheme, any objection on other technical matters would not have changed the overall outcome at application stage, nor would narrowing the matters in dispute have avoided the need for an appeal. Behaviour of both parties during the application process lacked co-operation and it is clear that it is only by working co-operatively that technical and other matters could have been resolved in a timely manner. The failure to ensure all communications were sent to the case officer and agree to an extension of time would have impacted on the speedy resolution of matters in dispute. Taking all matters into account, I find that the Council acted reasonably, in this regard.

2.17 Matters in dispute were narrowed during the appeal process, as additional evidence was supplied by the appellant. The Council's objections were refined accordingly. Although co-operative working was not always evident and deadlines were missed by both parties, generally evidence, including statements of common ground were produced in a timely manner, taking into account the impacts of the Covid 19 pandemic. Overall, in this regard, I consider that the Council acted reasonably.

2.18 The Council, at appeal, produced clear and cogent evidence to substantiate each reason for refusal, supported by objective analysis. It based its opposition to all matters it raised on the planning merits. In relation to each outstanding

matter, the Council confirmed its position that insufficient information was provided to give the necessary assurance that the development was acceptable in principle. Given that position, it set out clearly why its concerns could not be overcome by a planning condition. Whilst the Council agreed in oral evidence that a safe access to the appeal site could be achieved in principle, that was with the benefit of design development throughout the appeal process and based on a proposed final design confirmed during the Inquiry. In addition, the Council clearly set out its reasons for requiring control of all matters covered by the unilateral undertaking. In all these respects I consider that the Council acted reasonably.

2.19 For all of the above reasons it is therefore concluded that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. Therefore, an award of costs is not justified.

Inspector's Recommendation

2.20 That the application for costs be refused.

R Barrett

INSPECTOR

Ministry of Housing, Communities & Local Government

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RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand,London,WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act
With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act
Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.