

TONBRIDGE & MALLING BOROUGH COUNCIL
HOUSING AND PLANNING SCRUTINY SELECT COMMITTEE

19 March 2024

Report of the Director of Planning, Housing and Environmental Health

Part 1- Public

Matters for Information

1 PLANNING APPEAL COSTS

This report is for information purposes about the amount spent on appeals, focusing on what awards of costs have been made against the Council and how much has been paid out since 2021.

1.1 Background

1.1.1 Costs against a party in a planning appeal can be awarded where:

- a party has behaved unreasonably; and
- the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

Unreasonable behaviour in the context of an application for an award of costs may be either:

- procedural – relating to the process; or
- substantive – relating to the issues arising from the merits of the appeal.

1.1.2 The following table details the planning appeals where a costs application was made and was successful from 2021 onwards.

Table 1 : Cost awards against the Council for unreasonable behaviour

Planning/enforcement Reference	Site Address	Inspectors reference and Procedure	Appeal Decision and date	Costs Decision and amount	Level of decision
19/00786/FL	The Oast House Hollow Lane Snodland	APP/H2265/W/20 /3257861	Allowed 15 th January 2021	Full £1,500	Committee level

		Written representation			Officer Recommendation Approve Committee Overturn
20/02255/FL	1 Green Lane Trottiscliffe	APP/H2265/W/21/3272585 Written representations	Allowed 17 th November 2021	Partial £TBC	Committee level Officer recommendation Approve. Committee Overturn
21/00864/FL	4 And 4A High Street, Snodland	APP/H2265/W/21/3282371 Written representation	Allowed 17th August 2022	Full £11,400	Committee Level Officer Recommendation Approve Committee Overturn
21/01542/FL	Rear Of 78 To 80 High Street, Tonbridge	APP/H2265/W/22/3294498 Public inquiry	Allowed 18 th August 2022	Partial £TBC	Delegated Decision
20/00036/WO RKM	The Bend, The Bend Riding Lane Hildenborough Tonbridge	APP/H2265/C/21/3281643 - 3281644 Written representations	Allowed 20 th January 2023	Partial £360	Enforcement appeal
20/01398/LDE	2 Keepers Cottage, Hurst Wood	APP/H2265/X/21/3273837 Public inquiry	Allowed 26 th April 2023	Full £49,236	Delegated Decision
21/02710/FL & 21/02711/LB	83 High Street, West Malling	APP/H2265/W/22/3300796 APP/H2265/Y/22/3300801 Written representation	Allowed 17 th May 2023	Full £13,172	Delegated Decision

22/02358/FL	2 Albion Close, Hadlow	APP/H2265/D/23/ 3314875 Householder appeal	Allowed 19 th June 2023	Full £1,296	Delegated Decision
20/00023/USE H	Land West of Laxton Farm, Common Road, Hadlow	APP/H2265/C/21/ 3268771 Hearing	Quashed 14 th August 2023	Partial £2,400	Enforcement appeal
22/01353/FL	Woodruff Mill Lane Basted	APP/H2265/D/22/ 3308038 Householder appeal	Allowed 18 th September 2023	Full £2,200	Delegated Decision
22/00113/OA EA	Land at Eccles, East and West of Bull Lane, Eccles	APP/H2265/W/2 3/3321880 Public Inquiry	Allowed 6 th February 2024	Full £tbc	Committee level Officer recommendatio n to refuse
				Total £81, 564	

1.1.3 To summarise we have had 11 cost decisions which have been awarded against the Council as outlined above from 2021. Also, since January 2021, seven costs decisions were refused where the Council were found not to have acted unreasonably.

1.1.4 To add further context since 1st January 2021 we have received 131 appeal decisions. 48 appeals were allowed, 76 appeals were dismissed, and 7 appeals was withdrawn.

1.1.5 When a figure is TBC, this amount is still outstanding.

1.1.6 From the figures provided, householder appeals generally command lower fees. Householder appeals are considered via the fastrack route. The procedure for

householder appeals is simpler and doesn't allow for further consultations or LPA comments which accounts for the smaller amounts claimed in costs.

- 1.1.7 Written representation appeals introduce further statements by both the LPA and the appellant. A consultation exercise also takes place as part of a written representation appeal. This means more parties may be involved from the appellants side such as planning consultants and transport advisors. This can account for the increased amounts in costs claimed, illustrated above, when costs are awarded against the Council under the written representation appeals.
- 1.1.8 Cases heard at hearings are likely to command even higher costs due to the fact they are often held in person. If costs are awarded against the LPA in full, expert witness day rates, accommodation and travel can also be added to the costs of an appeal. TMBC has not had many recent hearings where costs have been involved. From the table above only one partial cost claim has been successful at hearing within the last 3 years.
- 1.1.9 Finally public inquiries will often command the highest fees if costs are awarded against the LPA. On top of the expenses which have been outlined above in the hearing and written representation sections are barrister's fees. Counsel's fees, especially KC's, often amount to a substantial sum. Generally, a greater number of expert witnesses are called for public inquiries. This is illustrated in the table above with a claim of £49,236 for a public inquiry.
- 1.1.10 To minimise the amount of costs paid out when costs are awarded against the LPA, officers seek information to validate claims. These are usually in the form of invoices, hourly rates, breakdowns and timesheets. These are requested to ensure what is claimed is reasonable and can be substantiated. Officers do go back to claimants when the cost claimed are unreasonable to reach an agreement. Costs can be assessed in the Senior Courts Costs Office if not agreed.
- 1.1.11 The most recent costs claim which has been awarded against the Council is Land at Eccles, East and West of Bull Lane, Eccles, Kent, ME20 7EH. This case was heard at public inquiry. The costs against the Council have not been included in this report as have not yet been finalised but they are likely to be significant. The Inspector concluded on the cost application that by not consulting the statutory consultee (National Highways) until late into the application, that the Council had delayed development that should have been permitted and that this was unreasonable behaviour on behalf of the Council.

1.2 Lessons Learnt

- 1.2.1 What we can learn and how we can do better is explored in this section. Costs have been awarded against the Council for both procedural and substantive reasons since 2021.

- 1.2.2 As a department we must ensure our decisions are sound and when harm is demonstrated, it is backed up by policy. We need to also be mindful that a condition may also be appropriate which may negate the reason for refusal. Conditions should be used where they can, in order to prevent a refusal.
- 1.2.3 It is also imperative that the right person leads the appeal. (This will usually be the original case officer, wherever possible) Costs have been awarded against the Council due to the wrong person leading the case. Direct evidence needs to be given where possible.
- 1.2.4 Accurate record keeping is essential to ensure the appeals evidence base is sound. This is especially important when looking at enforcement and lawful development certificates existing appeals. As these generally rely on first hand evidence. If a third party is presenting a case on the Council behalf, they must have access to all records.
- 1.2.5 Clear lines of communication between the Council and the appellant is also required so that errors can be spotted and rectified early. The Council has been criticised for not engaging at the right points. Cooperation and early engagement are key.
- 1.2.6 Costs have been awarded against the Council for non-determination causing unnecessary delays in development. With this in mind, we need to determine cases in a timely manner where possible.
- 1.2.7 The Council also must not bring in new evidence as part of an appeal. Bringing in new grounds is unreasonable. Reasons for refusal must be fully justified at the point of determination.
- 1.2.8 Costs have been awarded as key statutory consultees have not been consulted at the appropriate time. We need to ensure our check list for statutory consultee are followed at the consultation stages of an application and regularly checked and updated to ensure compliance with the legislation. A new tab has been developed in Agile, which requires officers to check the application is complete and correct.

1.3 Legal Implications

- 1.3.1 It is important that decisions are made in line with the development plan and any other material considerations to the reduce risk. Reasons for refusal should be fully substantiated and considered defensible at appeal.

1.4 Financial and Value for Money Considerations

- 1.4.1 The Council's total exposure to costs due to unreasonable behaviour amounts to £81,564, over the last 3 years which excludes the costs associated with the Eccles, rear of 78 To 80 High Street and 1 Green Lane appeals.

1.4.2 However, it also should be noted that unreasonable behaviour is only part of the appeal cost to the Council. The total amount spent on appeals and services associated with appeals /potential appeals between 2020-2024 was £287 446. This figure includes the costs paid out for unreasonable behaviour.

1.5 Risk Assessment

1.5.1 You cannot mitigate the risks of appeals and appeal costs completely as the Planning Inspectorate is a separate independent body. However, as a department/ decision maker, we are acutely aware of the risks of appeal and the potential for costs against the Council. Table 1 above sets out the reasons for costs being awarded.

1.5.2 As decision makers we need to ensure we make reasoned and sound decisions. It is important that officers work together to seek each other's views to ensure consistent approaches. Checking consultation have been carried out correctly is imperative at the early stages of an application. Planning surgeries, one to ones and training all help with consistent and sound decision making. We need to learn from mistakes and be open so colleagues can learn from each other.

1.5.3 A reporting tool has been developed which will highlight when cases are coming up to their statutory expiry to help highlight when we are at risk for non-determination.

1.5.4 As outlined in the Constitution, officers will also warn councillors if they come up with a reason for refusal, that in their view cannot be substantiated and defensible, and there is a significant risk of costs. Regular members training is also essential so all decision makers are aware of the risks.

1.6 Equality Impact Assessment

1.6.1 The decisions recommended through this paper have a remote or low relevance to the substance of the Equality Act. There is no perceived impact on end users.

Background papers:

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Nil

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