
Costs Decisions

Inquiry opened on 19 November 2013

Site visits made on 19 and 21 November 2013

by Paul Griffiths BSc(Hons) BArch IHBC

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

Decision date: 21 February 2014

Costs application in relation to Appeal A: APP/V5570/A/13/2199042 Land to the South of Chadwell Street, London EC1R 1YE

- The application is 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 application is made by Petchey (Islington) Ltd [formerly Gaillard (Islington) Ltd] for a partial award of costs against the Council of the London Borough of Islington.
 - The inquiry was in connection with an appeal against the refusal of planning permission for redevelopment of land to south of Chadwell Street (vacant car park) to provide seven new houses with associated access, amenity space, and landscaping arrangements.
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Decision

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

The submissions for the Appellant

2. Amongst other things, paragraph A3 of Circular 03/2009¹ outlines that the costs regime is aimed at ensuring as far as possible that planning authorities properly exercise their development control responsibilities, rely only on reasons for refusal which stand up to scrutiny and do not add to development costs through avoidable delay or refusal without good reason.
3. In the light of advice in paragraph A19 of the Circular, the appellant seeks a partial award of costs relating to reason for refusal no.2, in part, reason for refusal no.3, in full, and reason for refusal no.4, in part. The Council has behaved unreasonably in relation to these aspects of its case and this has led to the appellant incurring unnecessary or wasted expense.
4. Paragraph B3 of the Circular stresses the importance of discussion and agreement, about outstanding issues, between the principal parties, in order to avoid, where possible, confrontation at appeal stage.
5. Paragraph B4 gives examples of unreasonable behaviour which include resistance to, or lack of co-operation with the other party in providing information, or discussing the appeal, thereby extending the duration of the appeal and associated expense; and withdrawal of a reason for refusal resulting in wasted preparatory work and/or attendance of a witness or representative person who proves not to have been required.

¹ Circular 03/2009: *Costs Awards in Appeals and Other Planning Procedures*

6. Paragraph B16 sets out that authorities will be expected to produce evidence to show clearly why the development cannot be permitted. The decision notice should be framed and reasons should be complete, precise, specific and relevant to the application. Planning authorities will be expected to produce evidence at appeal stage to substantiate each reason for refusal with reference to the development plan and all other material considerations. If they cannot do so, costs may be awarded against them.
7. Paragraph B25 outlines that whenever appropriate, planning authorities will be expected to show that they have considered the possibility of imposing relevant planning conditions to allow development to proceed. A planning authority refusing planning permission on a planning ground capable of being dealt with by condition risks an award of costs where it is concluded on appeal that suitable conditions would enable the proposed development to go ahead.
8. The Council's third reason for refusal, relating to the housing mix, was withdrawn on the Friday before the Inquiry started, despite the decision not to pursue it having been taken some time earlier, it seems. The reason for refusal is notable for its failure to cite CS Policy CS 12 which promotes the provision of family-size housing units. Indeed, the Council's planning witness seemed unaware of the North London Strategic Housing Market Assessment of March 2011 until receipt of the appellant's evidence.
9. By the time the appellant heard of the Council's intention to withdraw, evidence to address this reason for refusal had been prepared. The unreasonable action of the Council, in relation to reason for refusal no.3, has caused the appellant to incur unnecessary and wasted expense.
10. In terms of the Council's second reason for refusal, the appellant takes issue with the element that relates to issues around loss of light affecting neighbouring residential occupiers. A report on this matter was submitted with the originating application but it is clear that the Council misread it. The appellant offered to meet with the Council to discuss the subject as far back as September 2013 but this was not taken up. As a consequence, the appellant prepared additional evidence for the Inquiry, to bolster that prepared for the application, only to find that on the Friday before the Inquiry started, the parts of reason for refusal no.2 relating to loss of light had been withdrawn. Again this unreasonable conduct caused the appellant to incur unnecessary and wasted expense.
11. The Council's fourth reason for refusal which deals with the living conditions of prospective occupiers of the development was withdrawn on the Friday before the Inquiry with the exception of the references to Unit 7. The appellant had already addressed this fully in evidence and it is clear that, in any event, any concerns about access could be dealt with by condition. This all had to be spelt out at the Inquiry. Again, the Council's unreasonable actions have caused the appellant to incur unnecessary and wasted expense.

The response by the Council

12. The Council has sought to adopt a reasonable and proportionate approach, has no 'in principle' objections to the application but does question the scope. In terms of reason for refusal no.2, it is clear from the Officers' report that only sunlight was at issue. The extent to which the appellant has sought to address daylight is not a cost that should be borne by the Council.

13. Indeed the evidence dealt with the impact on 23 Myddleton Square where there was a breach of the standards that the initial report had failed to properly address. Those costs should not fall on the Council because this shortfall would have had to have been addressed in any event. The appellant's witness was cross-examined by the representative of Dr and Mrs Lyons on this matter. Furthermore, the Council's part withdrawal of reason for refusal no.2 did not lengthen the duration of the Inquiry to any significant degree.
14. In terms of reason for refusal no.3, the council has no objection in principle but withdrawing on the Friday prior to the Inquiry is better than on the eve, or on the day. In terms of the scope of costs, the appellant's witness had to attend the Inquiry, present evidence, and be cross-examined, on the claimed benefits of the proposals, in particular, in any event. The issue of housing mix is central to the consideration of benefits.
15. Reason for refusal no.4 was not withdrawn in its entirety – Unit 7 remained a live issue and the appellant's witness still had to address the points raised about it in evidence and at the Inquiry.

Further Comments by the Appellant

16. In terms of reason for refusal no.2, the Council cannot avoid the fact that it refers specifically to loss of light. If, as the appellant is entitled to expect, the reason is precise and specific, then both daylight and sunlight had to be addressed. It is not the case that there was a breach of standards in relation to 23 Myddleton Square. A more detailed assessment was carried out but the result was the same as the initial assessment.
17. As far as reason for refusal no.3 is concerned, it is better for the Council to have withdrawn than to have pursued it, but it would have been better not to have imposed it in the first place. Then, it would not have been necessary to address it in evidence – it could have been agreed and an assessment of benefits included in a Statement of Common Ground. Instead, it was a matter that had to be dealt with at some length.
18. The appellant's witness was required to deal with reason for refusal no.4. Notwithstanding communications that took place, the proposal was always able to meet the required standards.

Reasons

19. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only 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.
20. Having regard to the specific paragraphs of the Circular referred to by the appellant, the Council is correct not to question the principle of an award. It is clear to me that the Council has behaved unreasonably and that this has led to the appellant incurring unnecessary and wasted expense. What is at issue is the scope of the award and it is with that in mind that I turn to the specific points raised by the appellant.
21. In terms of reason for refusal no.3, it is fair to say that the appellant would have had to make some reference to housing mix in order to properly calibrate the benefits the proposal brings forward.

22. However, the failure to withdraw reason for refusal no.3 earlier in the appeal process meant that the appellant had no alternative but to address the issue in evidence, in full. If the Council had withdrawn it earlier, or indeed not imposed it at all, some discretion would have been possible in terms of the level of detailed evidence necessary. That possibility was removed by the Council's unreasonable initial imposition, and subsequent withdrawal after evidence had been prepared.
23. I take a similar stance in relation to the elements of reasons for refusal nos.2 and 4. Matters around sunlight and daylight would have needed to have been addressed anyway, in response to interested persons, or my own questions. I may well have had questions too about the nature of the proposal in terms of the living environment they would provide for prospective occupiers.
24. However, the late withdrawal of elements of the Council's reason for refusal nos.2 and 4 meant that the appellant had little alternative but to address them in full on the basis that the Council would be pursuing these reasons for refusal at the Inquiry. The ability of the appellant to approach these aspects of the proposals in a more proportionate manner was taken away by the Council's actions. Moreover, even if I had agreed with the Council that a lift was required to make the access to Unit 7 acceptable in policy terms, this was a matter that could have been dealt with very simply, by condition.
25. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Circular 03/2009, has been demonstrated and that a partial award of costs is justified.
26. In terms of scope, this is the difference in costs to the appellant in addressing reason for refusal no.2, in part, no.3, in full, and no.4, in part, in the manner rendered necessary by the Council's adherence to those reasons for refusal, in full, up to a point just before the Inquiry opened, and what costs would have been incurred had the Council not imposed the reasons for refusal in that form in the first place, or withdrawn their objections in this regard earlier in the appeal process, before the preparation of evidence.

Costs Order

27. 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 Islington shall pay to Petchey (Islington) Ltd [formerly Gaillard (Islington) Ltd], the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in addressing reason for refusal no.2, in part, reason for refusal no.3, in full, and reason for refusal no.4, in part, on the basis set out above.
28. The applicant is now invited to submit to the Council of the London Borough of Islington, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Paul Griffiths

INSPECTOR