The Planning Inspectorate

Costs Decisions

Inquiry held on 11 and 12 October 2016

Site visit made on 12 October 2016

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

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

Decision date: 4 November 2016

Costs application in relation to Appeal Ref: APP/K5600/C/16/3143934
Land at 77 Drayton Gardens, London, SW10 9QZ

- The application is 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 application is made by Mr Maurice Nixon for a full award of costs against The Council of The Royal Borough of Kensington & Chelsea.
- The inquiry was in connection with an appeal against an enforcement notice alleging, without planning permission, the amalgamation of two separate self-contained residential units on the second and third floors of the property.

Costs application in relation to Appeal Ref: APP/K5600/X/16/3136227
Land at 77 Drayton Gardens, London, SW10 9QZ

- The application is made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Maurice Nixon for a full award of costs against The Council of The Royal Borough of Kensington & Chelsea.
- The inquiry was in connection with an appeal against the refusal of a certificate of lawful use or development (LDC) for the amalgamation of two separate self-contained residential units on the second and third floors into a single residential unit.

Decisions

1. The applications for awards of costs are refused.

The submissions for Mr Maurice Nixon

2. The application was submitted in writing and briefly supplemented orally, but can be summarised as follows. With reference to the Planning Practice Guidance (PPG) concerning the award of costs, paragraph ID 16-049, the Council behaved unreasonably in: preventing or delaying development that should have been permitted, having regard to the development plan, national policy and other material considerations; failing to produce evidence to substantiate its reasons; persisting in objections to a scheme, or elements of a scheme, which the Secretary of State previously indicated was acceptable; and not determining similar cases in a consistent manner.

3. Having regard to paragraphs ID 17b-003 and 005 of the PPG concerning effective enforcement, enforcement action should be proportionate and is important to tackle breaches of planning control which would otherwise have an unacceptable impact on the amenity of the area and to maintain the integrity of the decision making process.

4. Reliance is placed on: the August 2014 change of position; the failure to consider whether the change of use was material, as a matter of fact and degree; the unreasonable issue and service of the enforcement notice; and compliance with the development plan.

5. Reference is also made to closing submissions which justify the allegation of unreasonable behaviour more fully.

6. However, the appeals would not have been necessary but for the complete reversal of the Council's established position in August 2014. Without that, an LDC would have been granted and an enforcement notice would not have been served. The way in which the Council changed its position is the antithesis of how planning policy and decisions should be made and this unreasonable behaviour led directly to the expense incurred in these appeals.

7. The planning considerations explored in the appeals were clearly material to the fact and degree assessment of whether there was a material change of use. However, they were unreasonably ignored in favour of the tenuous aspect of the loss of a single dwelling unit.

8. At the time of the enforcement notice, no harm to public amenity was being caused. The integrity of the decision making process was not offended, as the LDC appeal had been lodged. The service of the notice was disproportionate and unreasonable; the Council should have awaited the determination of the LDC appeal.

9. Whilst there may have been issues before 14 June 2016, on that date the Council declared to the High Court that the amalgamation of two units complied with the development plan. Since then, the Council unreasonably failed to withdraw the enforcement notice. Now, Ms Cheung's position is that only Policy CH1 of The Royal Borough of Kensington and Chelsea Consolidated Local Plan (CLP) has been breached, but that is both wrong and unreasonable.

The response by The Council of The Royal Borough of Kensington & Chelsea

10. The application is misconceived, as it is based on an erroneous view of the merits of the appeals. Apart from that, whatever the merits, the parties ordinarily bear their own costs as planning is an exercise in the public interest.

11. The proofs of both witnesses refer to previous appeal decisions touching on this type of development and refusing it. This does not suggest the Council delayed or prevented development that should clearly have been permitted. Two serviceable units have been taken out of occupation for a period in any event and it would have been better if occupation had continued.

12. There has been argument over the course of 2 days as to whether the development accords with the development plan. Those arguments were worthy of consideration. Looking at the thrust and words of the development plan, there is a want of accord with it. Having regard to national policy, we should be anxious to secure housing, rather than lessen the number of units. Material considerations argue for preserving housing in this borough, whether for the rich or less rich.

13. The Council's evidence described the sequence of events, produced the development plan policies and indicated that the development plan had been breached.

14. The Council has not persisted in objections to a scheme which the Secretary of State has indicated is acceptable. This scheme has not been before the Secretary of State and Inspectors have made many decisions which would indicate that this scheme is not acceptable.

15. In terms of consistency, similar cases have been consistently determined (see previous appeals) and the points made in paragraph 2 of the written costs application are ill-founded.

16. With regard to proportionality, enforcement action is important to preserve that which is regarded as important for preservation in the development plan, for example small housing units under saved policy H17 of the Kensington and Chelsea Unitary Development Plan (UDP). Paragraphs ID 17b-005 of the PPG does not mean effective enforcement is not important in the circumstances of this case. The Council saw development being undertaken without planning permission. Even though there was an LDC application and subsequent appeal, an application for planning permission was refused and not appealed. It is suggested that the Council should have awaited the outcome of the LDC appeal, but this would not help the Council to deal with the situation properly.

17. The applicant's description of the change in August 2014 is a misapprehension of what was going on. The Council was not concerned with an application for planning permission in August 2014, or circumstances in which officers report for consideration by the Council and have to give grounds for refusal. The Council was dealing with a dynamic situation, which happens through changing circumstances, without regard to the local planning authority. If the position is one whereby 2 into 1 becomes a change of use, that arises in fact, whatever the local planning authority does. That is why Mr Straker QC's advice to the Council did not say that the matter was controlled by the Council, but that the views of the Council were likely to be determinative. It is a matter of law whether one has something which amounts to development or not.

18. The position is one where, in August 2014, the legal position was recognised because of the operation of circumstances which existed, leading to a view being taken by the Council. The LDC application came forward in July 2015, almost a year after August 2014, and the enforcement notice was more than a year after August 2014.

19. Material change of use is a concept known in law. The Council considered that matter and it is not one which is required by legislation or order to go through any particular process. The Council took this position in August 2014, having had leading counsel's advice. It had to survey matters and arrived at a view that 2 into 1 was a material change of use, because of circumstances in this borough. It is unreal to suppose that when Ms Cheung said the Council was aware of relevant matters, she was speaking nonsense. It is said that considerations were not listed in the LDC report, but by that time it was clear to the Council that 2 into 1 was a material change of use and that view is, at the very least, arguably correct. It has been held to be correct by other Inspectors' decisions. It should have been appreciated that 2 into 1 was a material change of use.

20. August 2014 has received undue prominence in the whole exercise. There has been a misapprehension and a failure to distinguish between the question of whether there was a material change of use and whether planning permission should be granted. The applicant says what happened in August 2014 was the antithesis of how decisions should be made. Having regard to Scarman LJs comments in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment*, we have a complete planning code and one should not add to it. Whether there has been a material change of use is a matter of law and nothing in the code says the exercise has to be undertaken in a particular way.

21. The code says the local planning authority has to keep all maters under review, including social matters, so it is to be expected that from time to time the local planning authority may have to reach a view on whether 2 into 1 constitutes a material change of use. Nothing in the code indicates that what the Council did was wrong.

22. The applicant suggests the change of position in August 2014 was unreasonable behaviour. The legislation says the local planning authority must consider, survey and look at what is happening in its area. That is what the Council was doing and it arrived at a sensible and reasonable view as to what is a material change of use. It undertook the exercise in the way it was required to so that, in advance of the LDC application and enforcement notice, the position of the Council was clear; 2 into 1 does not go.

23. The LDC appeal has no bearing on enforcement. An LDC application just seeks a view at a particular point in time and the chronology does not support an argument that enforcement action was disproportionate.

24. It is an extraordinary proposition that the High Court has said the development plan means 'X'. No concession was made; the judge records that Mr Straker QC did not contend something. That is not the same as conceding. The choice to run a particular argument does not mean other points are conceded and it was not conceded that amalgamation complies with all aspects of the development plan. There was limited argument in respect of the planning permission and it was found that this was a judgement for the Inspector "where other Inspectors might reach the opposite conclusion."

25. There has been no unreasonable behaviour. The applicant argues that all the merits are one way and other arguments are unreasonable. This suggests that 2 days of inquiry were a waste of time. The costs application is predicated on a misapprehension of the legal position; a failure to differentiate between consideration of a material change of use and consideration of all material considerations under section 70.

26. There was no unreasonable behaviour in the conduct of the inquiry and the Council has sought to help the Inspector as best it can. In terms of procedure, the appellant abandoned certain points, but the Council took the view that there was no need to apply for costs.

Reasons

27. 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.

28. Although I concluded on balance that planning permission should be granted, this was on the basis that other material considerations outweighed conflict with the development plan. I did not accept the applicant's case in relation to all of the development plan policies, nor all of his arguments in relation to other material considerations, for example that concerning the 20% buffer under the National Planning Policy Framework. Whilst I ultimately reached a different conclusion to the Council on the deemed planning application, this was not a case of the Council unreasonably preventing or delaying development that should have been permitted.

29. Again, though I came to a different conclusion to the Council on the evidence concerning the merits of the deemed application, it cannot be said that the Council failed to produce evidence to substantiate its reasons for issuing the notice. Indeed, I accepted much of its evidence regarding breach of the development plan.

30. Some appeal decisions had reflected a different view on compliance with the development plan, but others supported the Council's stance. In any event, though other amalgamation proposals have been considered on appeal, the Secretary of State has not previously considered this development and indicated that it was acceptable. In my appeal decision, I explain why I take different view on the development plan from the Inspector in the Stanhope Gardens appeal, which was the subject of *R (oao) The Royal Borough of Kensington and Chelsea v (1) Secretary of state for Communities and Local Government (2) David Reis (3) Gianna Tong [2016] EWHC 1785 (Admin)* (the *Kensington v SSCLG* judgement). In any event, there was an additional policy consideration in this case, which did not apply there, namely saved Policy H17 of The Royal Borough of Kensington and Chelsea Unitary Development Plan.

31. The Council has reached a different view on the lawfulness of amalgamations in the past, most notably on the Landsdowne Crescent application, referred to at paragraph 48 of my appeal decision. However, that decision was made just before the Council reconsidered the materiality of amalgamations in August 2014. The conclusion as to materiality on a fact and degree assessment can change over time, as the planning circumstances change. An LDC under section 192 will only ever certify that a use or operations would be lawful if begun at the date of the application. A number of recent appeal decisions have concluded that amalgamations would constitute a material change of use.[1]

32. In these circumstances, the fact that the Council made different decisions on LDC applications in the past does not mean that this decision was unreasonably made. Although he maintains that circumstances changed again, as indicated at paragraph 55 of my appeal decision, Mr Burroughs accepted that it was not surprising that the Council changed its position in August 2014, against a background of a low completion rate and a forthcoming increase in the housing target. Furthermore, when the Council arrived at the unsurprising view that amalgamations of this type would constitute a material change of use, it was not making a change to its policy, or determining a specific application; it was recognising the legal position at the time. I do not accept that the Council should have gone through any particular procedure to formalise this change in view and, in any event, as I note in paragraphs 32 and 48 of my decision on the appeals, the applicant had already been advised in October 2014 that

[1] See appendices B and C of Ms Cheung's supplementary proof.

amalgamation would be resisted, before he commenced the amalgamation works in May 2015.

33. With regard to paragraphs ID 17-b003 and 005 of the PPG concerning effective enforcement, as indicated at paragraph 32 of my appeal decision, the appellant's planning application for the amalgamation was refused in December 2015 in line with pre-application advice. At the same time, authority was obtained for the service of an enforcement notice. Notwithstanding the absence of any impact on amenity, the Council was confident in its decision that planning permission was required. It considered the development contrary to the development plan and had rejected a panning application accordingly. In those circumstances, enforcement action was appropriate and proportionate to maintain the integrity of the decision making process. It was not unreasonable to take enforcement action without awaiting the outcome of the LDC appeal, which I have rejected anyway.

34. The loss of a single dwelling unit was not a "tenuous aspect", as the applicant suggests. It was a matter which gave rise to conflict with the development plan and significant planning consequences. I have found that, having regard to all material planning considerations, planning permission should nevertheless be granted, but the Council's approach was not unreasonable in the context of what Holgate J described in the *Kensington v SSCLG* judgement as the "threshold purpose of deciding whether planning control even applied."

35. Whilst I accept in paragraph 19 of my appeal decision that the *Kensington v SSCLG* judgement does appear to record a concession regarding compliance with the development plan in that case, I do not consider myself bound by that concession. Whatever view may have been formed by the Council on a previous case, I must make my own assessment in this case. My appeal decision sets out why I do not accept the applicant's contention that the only development plan policy Ms Cheung considered to be breached was Consolidated Local Plan Policy CH1. The development plan policies were considered in detail during the inquiry and, on the basis of the evidence before me and my own reading of those policies, I have found conflict. Furthermore, any concession recorded in the *Kensington v SSCLG* judgement could not relate to saved UDP Policy H17 in any event. That policy did not bite in that case, but it does here. In all these circumstances, it was not unreasonable of the Council to fail to withdraw the enforcement notice following the *Kensington v SSCLG* judgement.

36. Having regard to the PPG, and in particular paragraphs ID 17-049 and 17b-003 and 005, I am not persuaded that the Council behaved unreasonably in relation to either appeal. No award of costs is therefore justified.

J A Murray

INSPECTOR