

Costs Decision

Hearing held on 7 September 2016

Site visit made on 7 September 2016

by M Seaton BSc (Hons) DipTP MRTPI

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

Decision date: 17 February 2017

**Costs applications in relation to Appeal Ref: APP/P4605/W/16/3143604
Land at the corner of Aston Lane/Wellhead Lane and to the rear of Aston
Lane, Perry Barr, Birmingham, B42 2SY**

- The appeal was against a refusal of planning permission for a residential development with access.

Application A:

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Birmingham City Council a full award of costs against Westleigh Partnerships Limited.
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Application B:

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Westleigh Partnerships Limited for a full award of costs against Birmingham City Council.
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Decisions

1. Application A by the Council for an award of costs is dismissed.
2. Application B by the applicant for an award of costs is dismissed.

Reasons

3. The Planning Practice Guidance 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. Whilst the Guidance sets out a series of examples of behaviour whereby either a procedural or substantive award of costs may be justified, neither list is stated to be exhaustive. Both applications for costs have been made and responded to in writing and are timely.

Application A

4. The Council contends that the applicant has acted unreasonably by virtue of their initial submissions made to the Planning Inspectorate advising that the appeal should be dealt with by a public inquiry. This was as opposed to the Council's insistence that the appeal would be capable of being progressed on the basis of the written representations procedure, which ultimately the
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applicant concurred with in making a further request to change the appeal procedure to written representations. The Council alleges that it incurred wasted expense in preparing to defend the appeal through the public inquiry procedure, through the appointment of Counsel as legal representation, the commissioning of a property consultant, and unnecessary work and costs in preparing proofs of evidence and the re-notification of all interested parties regarding the change in procedure.

5. I have reviewed the submissions and available information pertaining to the changes of procedure during the course of the planning appeal. I have no reason to dispute that expenditure was entered into by the Council in making initial preparations for a public inquiry, as I also have no doubt would have been the case for the applicant. Nevertheless, I am mindful that whilst the parties may identify which procedure they consider to be the most appropriate, under Section 319A of the Town and Country Planning Act 1990, it is the Secretary of State who retains the duty to determine the procedure for dealing with various appeals. This duty is exercised taking into account the various criteria for determining the appeal procedure as set out in Annexe K of the *Procedural Guide for Planning appeals – England (2016)*, and may be reviewed and changed if circumstances alter at any point before a decision is made.
6. In this instance, whilst initially a public inquiry was agreed to be the most appropriate procedure, this was reviewed by the Planning Inspectorate at a later stage in light of the failure to agree a suitable date within a reasonable timescale, and also being mindful that both parties had been willing at various points to pursue the written representations procedure, and indeed that there was agreement in principle to this revised procedure. However, this decision was taken by the Planning Inspectorate taking all factors into account, and was not imposed by one or other of the parties. I am also mindful that in any event a further review undertaken by the Inspector appointed to determine the appeal under the written representations procedure, concluded that as a consequence of the amount of detailed and technical evidence involved including that relating to marketing and noise, testing through questioning at an oral event would be the most appropriate way to progress.
7. I have considered the Council's contention that the work it had undertaken in connection with the preparation for the public inquiry amounted to wasted expense. However, I do not agree with this argument as I have no doubt that any technical or substantive work undertaken at this early stage would ultimately have also been relevant and of use to the preparatory work undertaken in connection with the Hearing. I also note that the Council no longer contends the appointment of a property agent at an early stage in connection with the public inquiry to be unreasonable, given the appearance of the aforementioned agent at the Hearing.
8. As a consequence of the above, I do not find the applicant to have behaved unreasonably in respect of procedural grounds related to the determination of the appeal procedure, with the decision-making procedure having ultimately been determined by the Planning Inspectorate. I do not therefore agree that any expenses that the Council has been forced to engage in could be considered to either be unnecessary or wasted. I therefore find that unreasonable behaviour, as described in the Planning Practice Guidance, has not been demonstrated.

Application B

9. The applicant's application for an award of costs is premised upon the contention that the Council has behaved unreasonably in refusing planning permission, due to a failure to engage with the applicant to overcome objections particularly in respect of noise, and that the Council was obstructive in its approach to the discussion of the merits of the case due to competing pressures to determine the nearby strategically important wholesale markets relocation.
10. The applicant has indicated that it is believed that the potential for redevelopment of the appeal site was unduly influenced by the long term aspirations for the land to the north of the railway line, with their own noise consultants unable initially to fully assess the impacts of noise from the proposed wholesale markets on the appeal proposals due to the neighbouring planning application having not been submitted at that point. It is also indicated that there was a general unwillingness on the part of the Council to share the details of their objections on noise and vibration grounds, with requests to see the comments denied.
11. In considering this matter, I note that there is agreement between the parties that concerns over the relationship between the appeal proposals and the future proposals for the strategic markets were expressed at a meeting between the Council and the applicant on 25th February 2015. Encouragement was given to working with the consultants for the Wholesale Markets in respect of mitigation with no formal proposals or details of the scheme available and in the public domain at that point. In this respect, I have had regard to Appendix A of Cundall's *Environmental Noise and Vibration Report* dated 25th May 2016 report, which indicates in an e-mail from the Council's Environmental Protection Officer (EPO) to the applicant's noise consultants, that an initial contact had been made by the Council with the noise consultants of IM Properties (the Owners of the Hub Site) to encourage liaison with the applicants.
12. It is noted that the applicant submitted the planning application in early March shortly after the February meeting, and it was highlighted that the application was accompanied by a noise assessment. The assessment indicated, at paragraphs 6.32 and 6.33 of the Planning Statement, the intent to work with officers in the Council's Regulatory Services team and the appointed noise consultants of IM Properties in addressing noise related matters.
13. The evidence before me indicates that the Council's EPO had formulated a consultation response to the submitted noise assessment on 29th April 2015, which was forwarded to the Planning Officer on 11th May 2015. However, it is evident from the e-mail of 22nd May 2015 that the Council were not prepared to release details of the further work that *would be necessary to properly assess the impact of existing noise sources*, stating disagreement that *the payment of a planning fee justifies an automatic right of access to internal council consultee views*. In this respect I have also had regard to the applicant's chronology of repeated contact with the Council both by e-mail and telephone between 20th May 2015 and 11th June 2015, in advance of the originally intended determination date for the application, the content of which I note has not been disputed by the Council.
14. Whilst I accept that the Council's contact with the applicant of 22nd May 2015 demonstrates a certain level of engagement on the application, I consider this

to be somewhat tempered by the failure to provide or communicate in full the concerns or outstanding issues relating to noise from internal consultees when requested. Nevertheless, whilst I have had regard to the applicant's chronology of events, I note that it does not address the full span of the application. Having regard to both the Council's submissions and the Introduction to the Cundall report, it is clear that a meeting was convened with the Council's Planners and Environmental Protection team on 18th June 2015, at which point an 8-week extension of time was agreed to allow the presentation of further information to address the Council's concerns. It is also indicated in the Cundall report that a further meeting with the Council, and also representatives from IM Properties, was held on 29th July 2015, some time prior to the determination of the planning application at Planning Committee on 3rd September 2015.

15. I am mindful that costs may only be awarded in relation to unnecessary or wasted expense at the appeal. However, I have also had regard that the Planning Practice Guidance advises that *behaviour and actions at the time of the planning application can be taken into account in the Inspector's consideration of whether or not costs should be awarded*. Whilst I accept that the Council's initial stance in respect of the internal consultations was at best unhelpful, I am satisfied that during the overall course of the planning application that there was ultimately a reasonable level of engagement, albeit delayed, with the applicant in relation to noise issues prior to the determination of the planning application. Furthermore, I am not persuaded that there is any compelling evidence that the Council was acting in a deliberately obstructive manner as a means of favouring the Wholesale Market development over the appeal site.
16. I have had regard to the applicant's contention that the decision on the planning application was made without any attempt to discuss or negotiate the legal agreement. However, I note that the legal agreement was ultimately submitted as a Unilateral Undertaking, for which there is no apparent evidence that a draft was produced by the applicant during the course of the planning application. Furthermore, I consider that neither Affordable Housing nor securing the provision of public open space could be considered to comprise unusual matters which could not have been anticipated during the course of the planning application or in light of existing Council guidance. As a result of the Council's position on the merits of the proposals during the planning application, it is understandable that this was a matter which was not pursued, but I observe could have been accommodated within a resolution to grant planning permission had the Planning Committee chosen to make an alternative decision.
17. The applicant has also drawn my attention to the expressed concerns of the City Designer with regards to the layout, massing and appearance of the development as shown on the indicative plans. However, given that all matters other than access were reserved, and that this was not a matter identified as a reason for refusal, I do not consider this to have been a critical matter in the assessment of the proposals, and was one which could have been satisfactorily addressed at reserved matters stage.
18. As a consequence of the conclusions which I have reached above, I am satisfied overall that the Council have not behaved unreasonably on procedural grounds in relation to engagement with the applicant to overcome objections particularly in respect of noise, or that the Council was unreasonably

obstructive in its approach to the discussion of the merits of the case as a consequence of the nearby wholesale markets relocation. I do not therefore find that unreasonable behaviour, as described in the Planning Practice Guidance, has been demonstrated.

M Seaton

INSPECTOR