
Costs Decisions

Hearing held on 5 January 2017

Site visit made on 6 January 2017

by Paul Freer BA (Hons) LLM MRTPI

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

Decision date: 14 March 2017

Costs application in relation to Appeal Ref: APP/X5210/C/16/3149980 Land at 148 Camden Street, London NW1 9PA

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Redcourt Ltd for a full or partial award of costs against the Council of the London Borough of Camden.
 - The hearing was in connection with an appeal against an enforcement notice alleging the unauthorised erection of a two storey rear extension at ground and basement level to create a substandard residential maisonette.
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Costs application in relation to Appeal Ref: APP/X5210/W/16/3152151 148 Camden Street, London NW1 9PA

- 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 Mr Leo Kaufman for Redcourt Ltd for a full award of costs against the Council of the London Borough of Camden.
 - The hearing was in connection with an appeal against the refusal of planning permission for an alternative layout to Ground Floor Flat B.
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Decision: The applications are refused.

Procedural Matters

1. An application for a full award of costs was initially made by Mr Leo Kaufman for Redcourt Ltd in writing prior to the Hearing, this solely in relation to the appeal made under section 78 of the Town and Country Planning Act 1990 (APP/X5210/W/16/3152151). The Council responded to that application in writing prior to the Hearing. At the Hearing itself, Mr Leo Kaufman on behalf of Redcourt Ltd added two further grounds to this application for costs. The first was a full application for costs in relation to the appeal under section 174 (APP/X5210/C/16/3149980), but was conditional upon the enforcement notice being found to be a nullity. The second additional application was for a partial award of costs, confined to the second reason for the issue of the enforcement notice relating to parking stress and congestion in the surrounding area. The Council responded to these additional grounds verbally at the Hearing.

The submissions by Mr Leo Kaufman for Redcourt Ltd

2. The application for costs is in three parts and it is convenient to separate these into discrete elements.
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The section 78 appeal (APP/X5210/W/16/3152151)

3. The applicant contends that the only reason why planning permission was refused is that the Council demanded unreasonable payments to process a Section 106 Agreement to restrict the issue of parking permits. The application was satisfactory in all other respects. In the appellant's view, to insist on receiving exorbitant monetary payments for a simple standard procedure was tantamount to a form of blackmail. The applicant also considers that, following the judgment in *Oxfordshire County Council*¹, it was outrageous for the Council to seek 'monitoring fees'.
4. The applicant also contends that the Council failed to determine the application in a positive and proactive way, and therefore did not act in accordance with paragraphs 186 and 187 of the National Planning Policy Framework (Framework). In particular, the applicant points out that the case officer did not convey the applicant's draft Section 106 Agreement to the Council's legal advisors. In addition, the applicant considers that the Council has failed to produce evidence to substantiate its reason for refusal and that the Council did not promptly review this evidence when the appeal was lodged.

The section 174 appeal (APP/X5210/C/16/3149980) – nullity

5. The applicant considers that it was unreasonable behaviour on the part of the Council to issue an enforcement notice that was a nullity on the basis, in summary, that it confuses operational development and a material change of use. It follows, in the applicant's view, that the appeal should not have been necessary and that the appellant incurred wasted expense in submitting the appeal. This application is, however, predicated upon the eventuality that I found the notice to be a nullity and the applicant expressly accepts that this application would fall away if the notice was found not be a nullity.

The section 174 appeal (APP/X5210/C/16/3149980) – parking stress and congestion in the surrounding area

6. The second reason for the issue of the enforcement notice contends that the alleged breach of planning control results in parking stress and congestion in the surrounding area. The applicant considers that it was unreasonable behaviour on the part of the Council to rely upon a reason for issuing the notice where the impacts alleged to have been caused could have been controlled under other legislation. The applicant therefore considers that to treat the restriction of car parking permits as a planning matter for the purposes of the enforcement notice constitutes unreasonable behaviour, and that the second for the issue of the enforcement notice should not have been included.

The response by the Council of the London Borough of Camden

7. It is convenient to separate the Council's response to the applications for costs into the discrete elements identified above.

The section 78 appeal (APP/X5210/W/16/3152151)

8. The Council confirms that the legal and monitoring fees sought in relation to the draft Section 106 Agreement initially submitted are set by the Council's Cabinet and cannot be waived. These fees are clearly set out in the Camden

¹ *Oxfordshire County Council v Secretary for State for Communities and Local Government and others* [2015] EWHC 186 Admin

Planning Guidance 8 – Planning Obligations (“CPG8”). The Council explains that it is standard industry practice to charge legal fees for these types of agreement, and that the Council has acted in a reasonable manner by treating the applicant on exactly the same footing as other developers.

9. The monitoring fee is not a planning obligation made pursuant to section 106 of the 1990 Act, but is rather a fee charged under section 111 of the Local Government Act 1972. The monitoring fee sought is directly related to the increased expenditure incurred through the administrative and monitoring burden arising from the grant of planning permission, and is consistent with Council policy as set out in CPG8. The Council therefore considers that it has acted reasonably in seeking to recover these costs from those deriving benefit from the grant of the planning permission.
10. The Council explains that it was proactive in pursuing the progression of the draft Section 106 Agreement, indicating that it wrote to the appellant on numerous occasions in November 2015 as well as in January and April 2016. It was therefore the applicant, and not the Council, that did not proceed with the progression of the legal agreement.
11. The Council did provide evidence to substantiate the need for a legal agreement, specifically that 103 parking permits were issued for every 100 spaces that are available. In the Council’s view, this demonstrates that the appeal site is located within a highly stressed parking zone. The Council confirms that it did review this evidence once the appeal was lodged, and that it complied with all the relevant deadlines in the appeal process.

The section 174 appeal (APP/X5210/C/16/3149980) – nullity

12. The Council consider that the notice as drafted was an attempt to define a breach of planning control that is difficult to encapsulate in words and that, should the notice be found to be a nullity, it is only because the drawings submitted with the application submitted in 2013 were not sufficiently clear. The Council therefore considers that the notice could not have been drafted any differently.

The section 174 appeal (APP/X5210/C/16/3149980) – parking stress and congestion in the surrounding area

13. The Council’s policy in relation to car free development is set out in Policy DP18 of the London Borough of Camden Local Development Framework Development Policies document. The breach of planning control alleged in the enforcement notice is the direct opposite of that which Policy DP18 seeks to achieve. This could not be controlled by any other means and was therefore fair and reasonable that the applicant should have expected the Council to seek to mitigate that impact through a legal agreement to restrict the issue of parking permits.

Reasons

14. The Planning Practice Guidance 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. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to

follow good practice. The Planning Practice Guidance specifically advises that a local planning authority may be at risk of an award of costs being made against it by preventing or delaying development which should clearly be permitted and/or by requiring that the appellant enter into a planning obligation which does not accord with the law or relevant national policy in the Framework.

15. Although to some extent inter-related, it is convenient to consider the applications for cost in the discrete elements in which they were presented.

The section 78 appeal (APP/X5210/W/16/3152151)

16. The background to this application for costs is that the planning application was submitted on 21 May 2015 without, at that time, an attendant Section 106 Agreement. A Section 106 Agreement drafted on behalf of Redcourt Ltd was then submitted on 19 August 2015. The Council did not formally respond until 29 September 2015 when Ms Patricia Tavernier, a Legal Assistant in the Council's Legal Services team, wrote to the agent then acting for Redcourt Ltd. In that e-mail, Ms Tavernier set out in some detail the legal and monitoring fees that the Council would charge for processing the Section 106 Agreement. Because it was the scale of those fees that led Redcourt Ltd not to take advantage of the Council's services in this respect, it is helpful to set out those fees here.
17. In her e-mail, Ms Tavernier anticipated the total costs as being £1,227 made up of £680 as the Council's legal fees, a one-off monitoring fee of £531 and £16 for Land Registry Charges. It was also explained that if negotiations became protracted and the Council's legal fees exceed £680, then a fee of £275 per hour would be charged until such time as the matter was completed. There was no indication as to how many hours might be required to complete the agreement or the seniority of the officer that would undertake the work. Although I have not been provided with a copy, it would appear that Ms Tavernier then sent to Redcourt Ltd a copy of a standard Section 106 Agreement adopted by the Council in relation to the restriction of parking permits.
18. On 2 November 2015, Mr Kaufman of Redcourt Ltd e-mailed Ms Tavernier querying whether the Council's version of the Section 106 Agreement was enforceable given the High Court judgment in *Westminster City Council*². I note that there was no mention in this e-mail to the Council's fees or to the inclusion of a monitoring fee in the Council's standard agreement. A reply to that e-mail setting out the Council's position was sent by Ms Tavernier later that same day.
19. On 18 November 2015, Mr Kaufman again e-mailed Ms Tavernier, asking how the agreement offered by the Council differed from that found not be necessary by an Inspector in an appeal decision relating to a property in Hatton Garden, and how it differed from that originally submitted by Redcourt Ltd. The reply by Ms Tavernier, dated 20 November 2015, indicated that the standard agreement used by the Council had been worded in such a way that it complied with the Town and Country Planning Act 1990 but did not go into further detail. However, Ms Tavernier did indicate that she would be pleased to enter into more detail but that, because this went beyond the drafting of the Section 106

² *Westminster City Council v Secretary of State for Communities and Local Government and another* [2013] EWHC 690 (Admin)

- Agreement, it would require fees charged by the hour in accordance with the Council's procedures.
20. There the matter rested until 18 January 2016 when, concerned with the lack of progress, Ms Tavernier proactively e-mailed Mr Kaufman asking whether the Council's draft Section 106 Agreement had been approved for execution. I have not been provided with a copy of a response to that e-mail, if there was one, but on 18 April 2016 Mr Kaufman e-mailed the case officer for the planning application. I have not been provided with a copy of that e-mail but, from the reply, it is apparent that it raised the issue of the Council's fees for processing the Section 106 Agreement.
21. The case officer, Mr Da Costa, replied that same day and set out again the Council's charges for processing the Section 106 Agreement. This e-mail also indicated that the fees would still be applicable whether or not the Council prepared the draft agreement, and pointed out that it would take more time to go through Redcourt Ltd's agreement line by line to ensure that all the necessary wording was included. The case officer questioned why, if the agreement produced by Redcourt Ltd is the same as that offered by the Council, Mr Kaufman would not accept the Council's agreement. The e-mail concluded by confirming that the Council would prefer to settle the matter amicably without the need to refuse the application for the lack of a Section 106 Agreement.
22. In a further e-mail the following day, Mr Da Costa re-affirmed that the Council had carefully reviewed the wording of its Section 106 Agreements in the light of previous decisions. It also confirmed that the Council could not accept the agreement produced by Redcourt Ltd because of the errors within it, but noted that it contained a substantially similar obligation to that offered by the Council. The e-mail confirmed that the legal and monitoring fees were set by the Council's Cabinet and explained that they could not be waived. The e-mail concluded by asking Mr Kaufman whether he would like to proceed with the Council's Section 106 Agreement or, alternatively, that he understood that the Council would refuse the application for the lack of a Section 106 Agreement.
23. I have set out this exchange of correspondence in some detail because it addresses two of the main grounds upon which the application is predicated: the foundation for the Council's legal and monitoring fees, and the extent to which the Council acted proactively in processing the planning application. I shall consider these two factors in turn.
24. The appellant has not sought to argue that the charging of fees by the Council for reviewing the Section 106 Agreement is itself *ultra vires*: the suggestion is that there is no justification for charging for an undertaking of a type that is widely used in the Borough. However, it is clear that the Council's legal and monitoring fees were set by the Council's Cabinet. Whatever the applicant's views may be on the reasonableness or otherwise of the level at which these fees were set, they were set by a democratically elected body acting within the scope of its powers. The Council has explained that these fees are applied equally to all developers, and I take the Council's point that it would have been inequitable and unreasonable not to apply these fees to the applicant. Moreover, the appellant was not under any obligation to use the Council's services in this respect: indeed, in the event, the appellant did not do so.

25. I understand that other local planning authorities take a different approach: the applicant explained that Brentwood Borough Council provide a template to be completed by an applicant free of charge. However, the decision not to charge fees for that service is also within the scope and discretion of that Council's powers. As a local planning authority, I see no reason why the London Borough of Council should not be entitled to adopt its own approach and set its own fees accordingly.
26. I understand the applicant's concern that the fee structure adopted by the Council is open-ended and that, aside from the assurances given by officer in the Council's legal team, the applicant had no way of knowing the final cost at the outset of the process. I can therefore understand why the applicant was dissuaded from taking advantage of the Council's services. However, I do not consider this to be tantamount to a form of blackmail: the Council's fee structure is clearly designed to ensure that the fees charged for using the Council's services cover the costs incurred, given that the final figure would depend upon the amount of work involved and that this cannot be ascertained at the outset. The open-ended aspect of the Council's fee structure was clearly conveyed to the applicant, such that the fee structure was very transparent. I also note that the Council clearly indicated that not adopting the Council's standard agreement could involve more fees.
27. I therefore consider that the Council acted reasonably in seeking to recover these costs, insofar as they relate to the legal fees associated with the processing of a Section 106 Agreement. In this respect, and contrary to the view held by the applicant, I can understand the rationale for charging fees by a local planning authority which receives a large number of legal agreements to process, given this high volume of legal agreements could potentially take up a considerable proportion of the Council's time and resources.
28. In relation to the monitoring fees, the judgment in *Oxfordshire County Council* is clearly the starting point. In my view, that judgment requires careful reading. In paragraph 53 of that judgment, Mrs Justice Lang took the view that the Inspector in that particular case was entitled to conclude that the costs of administration and monitoring would be included in Oxfordshire County Council's resources and budget for the discharge of its functions under section 106 of the 1990 Act. That was an exercise in planning judgment which the Inspector was entitled to make, and was one of the considerations that led Mrs Justice Lang to conclude that the Inspector in that case had not erred in law in that respect and was entitled to conclude that the monitoring fee sought by Oxfordshire County Council was not necessary to make the development acceptable in planning terms.
29. However, in paragraph 53 of that Judgment, Mrs Justice Lang also expressly states that how those monitoring costs would be met was plainly a relevant consideration in deciding whether or not a contribution to those costs was necessary to make the development acceptable in planning terms. It follows, on my reading, that Mrs Justice Lang was not indicating that monitoring fees could never be sought in the context of a section 106 Agreement: on my reading, Mrs Justice Lang is simply expressing her finding that in the context of that particular case the Inspector was entitled, in the exercise of his planning judgment, to conclude that monitoring fees were not necessary to make that development acceptable in planning terms.

30. In relation to the current appeal, the question that arises from the *Oxfordshire County Council* judgement is therefore whether or not the monitoring fees sought by the Council were necessary to make the development acceptable in planning terms. The Council explain that the monitoring fee sought is directly related to the increased expenditure incurred through the administrative and monitoring burden arising from the grant of planning permission, and is consistent with Council policy as set out in CPG8.
31. The Unilateral Undertaking that is before does not include the provision of monitoring fees but, because the Unilateral Undertaking is defective in other fundamental respects, I did not have to reach a conclusion as to whether a provision for monitoring fees was necessary. Nevertheless, in considering the Section 106 Agreement submitted to it and in exercise of its planning judgment, the Council was entitled to take the view that monitoring fees were necessary to make the development acceptable in planning terms. That will always be a matter of planning judgement based on the particular facts of each case and would need to be justified on a case by case basis. On that basis, I consider that as a matter of principle the Council did not act unreasonably in seeking monitoring fees as part of the Section 106 Agreement in this case.
32. The exchange of correspondence set out above to my mind demonstrates that the Council was consistently and proactively seeking the completion of a suitably worded Section 106 Agreement and thereby seeking to avoid refusing planning permission. I note in particular that in January 2016, concerned with the lack of progress, Ms Tavernier proactively e-mailed Mr Kaufman asking whether the Council's draft Section 106 Agreement had been approved for execution. I also note that the Council responded to the applicant's e-mails promptly, in most instances the same day or the following day. I am therefore satisfied that the Council acted generally in accordance with paragraphs 186 and 187 of the Framework in this respect and did not act unreasonably.
33. The evidence provided by the Council to substantiate the need for a legal agreement was limited to confirming that 103 parking permits were issued for every 100 spaces that are available. The Council had not undertaken car parking surveys of the Controlled Parking Zone to establish parking conditions at the time and, in that respect, the evidence of actual parking conditions presented by the Council was neither comprehensive nor definitive. Nevertheless, this evidence must be considered in the context of the policies within the development plan. These policies, which carry the full force of Section 38(6) of the 2004 Act, clearly state that the Council will expect development to be car free within Controlled Parking Zones that are easily accessible by transport. In that context, I am satisfied the evidence of parking stress provided by the Council was sufficient to show that a legal agreement to restrict car parking permits was necessary.
34. The Council confirms that it did review this evidence once the appeal was lodged. I have no reason to doubt that it did so, and as such acted in accordance with the Planning Practice Guidance.

The section 174 appeal (APP/X5210/C/16/3149980) – nullity

35. This application was predicated upon the eventuality that I found the notice to be a nullity. However, I have found that the enforcement notice was not a nullity and therefore, in accordance with the basis on which the application was made, this application does not fall to be considered.

The section 174 appeal (APP/X5210/C/16/3149980) – parking stress and congestion in the surrounding area

36. The applicant considers that it was unreasonable behaviour on the part of the Council to rely upon a reason for issuing the notice where the impacts alleged to have been caused could have been controlled under other legislation. However, the appellant does not explain in detail what other legislation the Council could rely upon to achieve that objective or how these would operate. By way of example, whilst the Council could enforce against parking otherwise than in accordance with existing parking controls by issuing penalty notices, by definition this could only take place once the vehicle was occupying a parking space and therefore contributing to parking stress in the Controlled Parking Zone (CPZ). Such a measure would therefore not address the Council's policy objective of reducing congestion and parking stress in the CPZ in the first instance.
37. Moreover, the need for a legal agreement in this case derives directly from the development for which planning permission is required and sought. Consequently, as a matter of principle, I find nothing unreasonable in the Council seeking to control any adverse impacts arising from the development in that respect through an agreement pursuant to section 106 of the Town and Country Planning Act 1990.

Conclusion

38. In summary, I consider that the Council dealt with the application in a professional manner and in so doing acted entirely within its remit as the local planning authority. The Council issued a valid enforcement notice based on sound planning reasons. The decision to refuse planning permission in the absence of a suitably worded Section 106 Agreement was also well founded, and I am satisfied that the planning harm identified by the Council could not have been addressed under other legislation. The Council has therefore not acted unreasonably and has not caused the appellant to incur unnecessary expense in submitting the appeal. It follows that an award of costs is not justified.

Paul Freer

INSPECTOR