
Costs Decision

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/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 the Council of the London Borough of Camden for a full award of costs against Mr Leo Kaufman for Redcourt Ltd.
 - 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 application is refused

The submissions for the Council of the London Borough of Camden

1. The essence of the Council's case is that planning permission would have been granted for the development proposed under this application if the applicant had been willing to negotiate with the Council regarding the preparation of a Section 106 Agreement. It follows, in the Council's view, that the entire appeal could have been avoided had the applicant entered into those negotiations, thereby leading to planning permission being granted subject to a properly worded Section 106 Agreement. The Council considers that this failure to enter negotiations on the preparation of a Section 106 Agreement constitutes unreasonable behaviour on the part of the appellant, with the result that the Council incurred wasted and unnecessary expense in defending an appeal that should not have been necessary.

The response by Mr Leo Kaufman for Redcourt Ltd

2. In response, it is indicated that Redcourt Ltd would have been willing to pay the Council's reasonable costs in preparing and processing a Section 106 Agreement, but that the fees requested were considered to be excessive to the point of being a form of blackmail. In addition, there were also issues with a delay in the draft Section 106 Agreement being forwarded to the Council's legal advisors and a lack of response from the Council to that draft agreement. Furthermore, Redcourt Ltd questioned whether the inclusion of a monitoring fee sought by the Council was appropriate having regard to the High Court judgment in *Oxfordshire County Council*¹, a matter which it is considered the Council has still not addressed.

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

Reasons

3. 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 an appellant may be at risk of an award of costs being made against them if the appeal had no reasonable prospect of succeeding, including when the appellant does not co-operate on any planning obligation.
4. 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 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.
5. 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 is 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.
6. 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.
7. 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.

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

- 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 Agreement, it would require fees charged by the hour in accordance with the Council's procedures.
8. 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.
 9. 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.
 10. 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.
 11. I have set out this exchange of correspondence in some detail because, to my mind, it 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. When the need for this agreement was challenged by Mr Kaufman on behalf of Redcourt Ltd, the reasons given by the Council for adopting its position were cogent and clearly stated. The Council had also made it abundantly clear to Mr Kaufman that the consequences of not entering into a suitably worded Section 106 Agreement would be the refusal of planning permission. I am therefore in no doubt that, had Redcourt Ltd accepted the Council's fees for processing its standard Section 106 Agreement or in the alternatively had provided a suitably worded agreement of its own, then planning permission would have been granted. The corollary is, as the Council suggests, that the entire appeal would then have been avoided.
 12. However, this exchange of correspondence also demonstrates that Mr Kaufman, on behalf of Redcourt Ltd, consistently challenged both the need for

and validity of a planning obligation to restrict the issue of parking permits, as well as the scale of fees sought by the Council for processing the Section 106 Agreement. I accept entirely that Mr Kaufman was under no obligation to accede to the Council's fees for processing its standard Section 106 Agreement if, as was the case, he considered those fees to be excessive and not justified. In doing so, I am satisfied that Mr Kaufman was fully aware that the consequences of not doing so were that planning permission would be refused and that an appeal would then be necessary if he wanted to pursue the development.

13. Nevertheless, Mr Kaufman was entitled to exercise his right of appeal and avail himself of the opportunity to demonstrate that a planning obligation was not necessary and/or to submit a Unilateral Undertaking of his own wording. The fact that I have found such a planning obligation to be necessary, and that the Unilateral Undertaking submitted by Mr Kaufman on behalf of Redcourt Ltd was not suitably worded, does not detract from that fundamental principle.
14. The Planning Practice Guidance clearly states that the right of appeal must be exercised reasonably. I find nothing unreasonable in Mr Kaufman's decision, on behalf of Redcourt Ltd, not to accept the Council's fees for processing the Section 106 Agreement and to lodge an appeal against the refusal of planning permission. In the absence of unreasonable behaviour, an award of costs is not justified.

Paul Freer

INSPECTOR