The Planning Inspectorate

# Costs Decision

Site visit made on 13 March 2019

**by J D Westbrook BSc(Hons) MSc MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date:**

**Costs application in relation to Appeal Ref: APP/L5240/W/18/3210228**
**102 Foxley Lane, Purley, CR8 3NB**

- 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 Frankham Developments Ltd for a full award of costs against the Council of the London Borough of Croydon.
- The appeal was against the refusal of planning permission for the demolition of the existing house and garage and the erection of a three-storey building comprising six two-bedroom and three three-bedroom flats, with the formation of a vehicular access and provision of associated parking.

## Decision

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

## Reasons

2. The Planning Practice Guidance (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. Such unreasonable behaviour may be either procedural (ie. relating to the process of the appeal) or substantive (ie. relating to the issues arising from the merits of the appeal).

3. Paragraph 033 of the PPG on Appeals notes that "although costs can only be awarded in relation to unnecessary or wasted expense at the appeal or other proceeding, 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". In this case, the claims of the appellant relate to the actions and behaviour of the Council before the application was submitted, and during the determination of the application, including the decision notice itself.

4. The proposed development involves the demolition of a detached house and its replacement with a three-storey block of nine flats at 102 Foxley Lane. The matter is complicated by the fact that the appellants had an option to purchase the appeal property prior to submitting the application, and had also at that time recently benefitted from a planning permission to develop the adjacent site at No 104 by similarly demolishing a detached house and erecting a three-storey block of nine flats. No 104 had also been the subject of an option to purchase by the appellants, although the option had been re-assigned to a third party a few months after receiving planning permission for the proposed development on that site.

5. Planning permission for the current proposal was refused by the Council on two grounds. The first reason was that the proposal would fail to address the site's potential for optimising housing delivery and contributing to the borough's need for affordable homes. The basis for this reason for refusal would appear to be that the appellants had previously sought and been given pre-application advice relating to a different scheme that involved the co-development of the two adjacent sites for a single development of a large building containing 24 flats. The appellants subsequently returned to the Council with a proposal for a development based on No 102 alone, and involving the erection of a building containing nine flats. The fact that two separate schemes for Nos 102 and 104 would result in a net reduction of six flats from the potential 24 proposed for the joint scheme was deemed to fail to optimise the housing delivery on the sites, and would avoid a requirement to deliver some affordable housing.

6. I have sympathy with the Council's desire to optimise housing delivery and achieve the provision of much needed affordable housing. However, there is a difference between "optimisation" of housing provision, having also given consideration to a wide range of other planning issues, and "maximisation" of housing provision on a site. This is made clear in documentation produced by the Mayor of London and used by the Council in its determination of the proposal.

7. This issue in itself would not be considered unreasonable, since there is a degree of interpretation involved. However, the mere fact that a developer seeks pre-application advice on a proposal does not mean that that scheme, or a variation on it, will necessarily be the one adopted by the developer. In this case, the Council raised a number of concerns about the draft proposal and it is entirely possible that the combination of concerns could have rendered the proposal undesirable from the perspective of the appellants. Nevertheless, the Council raised issues of ownership of both sites and contended that one scheme should be undertaken over both sites to achieve "optimisation".

8. At the time of the application, it was not clear whether the appellants in fact benefitted from ownership of both sites. It appears that at this time they had only options to purchase what were in effect two separate sites, one of which already had a planning permission for development of nine flats, and which could have been commenced at any time. Furthermore, the Council raised concerns that the single building proposed at the pre-application stage was over-large and that one option could be to break it up into two blocks. The Council accepts that this would have resulted in the development providing less than the original 24 flats proposed, although there is no way of knowing how many units might have been lost following re-design.

9. In the light of the uncertainties facing the appellants resulting from the pre-application advice, and the fact that the adjacent site already benefitted from a separate planning permission, I consider it unreasonable for the Council, in this case, to impose assumptions of ownership of both sites upon the appellants, and to use this assumption to determine that only a combined development could deliver optimum housing delivery. I accept that the Council attempted to determine ownership through its own investigations, but I do not consider, in this case, that evidence of two options to purchase two separate sites from separate owners, at two different times, justifies the assumption that a combined development of both sites is necessarily a feasible option for an applicant.

10. Insofar as the Council based its decision upon adopted Council and Mayoral planning policies, and justified its decision in relation to those policies, I do not consider that the Council acted unreasonably in this particular respect. The appellants contend that the Council accepted the suitability of the size and siting of the proposed development at one point in its officers report, and then contradicted this in the decision notice. However, the Council only accepted the size and siting in the context of townscape, while noting its undesirability in the context of its impact on the residential amenities of the occupiers of an adjacent property. This is perfectly reasonable.

11. The appellants also contend that the use of the term "visual intrusion" in the second reason for refusal is somewhat vague. I have some sympathy with this contention, although the context of the officer's report and the wording of the decision notice, makes the basis of the Council's reasoning sufficiently clear in this case.

12. In conclusion, I find that the Council has not acted unreasonably in its attempts to deliver on adopted policies relating to housing delivery and residential amenities. However, it has acted unreasonably with regard to consideration of the ability and feasibility of the appellants to deliver a combined scheme, based upon assumptions gained from partial information on options to purchase only. This has required the appellant to produce further evidence on this matter, and on this matter alone I find that an application for costs is justified.

13. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated, and that a partial award of costs is justified.

**Costs Order**

14. 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 Croydon shall pay to Frankham Developments Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the need to provide evidence regarding the terms of option agreements and ownership rights relating to Nos 102 and 104 Foxley Lane; such costs to be assessed in the Senior Courts Costs Office if not agreed.

15. The applicant is now invited to submit to the Council of the London Borough of Croydon, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*J D Westbrook*

INSPECTOR