
Costs Decisions

Hearing Held on 9 July 2019

Site visit made on 9 July 2019

by Nicola Davies DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 July 2019

Costs application A in relation to Appeal Ref: APP/U5360/W/19/3225209 35 London Lane, Hackney, London E8 3PR

- 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 Intex Properties Ltd for an award of costs against London Borough of Hackney.
 - The hearing was in connection with an appeal against the refusal of planning permission for a proposed development described as *"Demolition of existing building and reconstruction of Mentmore Terrace and London Lane elevations and new 4 storey rear return over basement. Comprising 9 residential flats (Use Class C3) with commercial floorspace (Use Class B1) with ancillary cycle parking and refuse storage"*.
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Costs application B in relation to Appeal Ref: APP/U5360/W/19/3221706 35 London Lane, Hackney, London E8 3PR

- 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 Intex Properties Ltd for an award of costs against London Borough of Hackney.
 - The hearing was in connection with an appeal against the refusal of planning permission for a proposed development described as *"Demolition of existing building and construction of a 6 storey building over 2 basement levels comprising 7 residential flats (Use Class C3) with employment floorspace (Use Class B1) together with ancillary cycle parking and refuse storage"*.
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Decision

1. Applications A and B for an award of costs are refused.

Preliminary Matters

2. As set out above there are two costs applications on this site and this decision letter deals with both applications. Although there are differences between the proposals in terms of unit numbers and design, the appellant's concerns centre around viability, unit mix and demolition of a non-designated heritage asset and these concerns are common to both costs applications. For this reason, I have dealt with these matters within this single decision letter.

Reasons

3. 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.

4. The appellant asserts that it has had to defend a greater number of issues at appeal because the Council did not negotiate during the course of either planning applications processes and that this was unreasonable behaviour on the part of the Council. I have been referred to email communications between the appellant and the Council in support the appellant's costs applications.
5. It is said that the Council did not undertake a full assessment of the viability of the appeal schemes and this has put the appellant to unreasonable cost both at the planning application stages and in defending its position at appeal. The appellant highlights that the Council did not provide an objective analysis or evidence to substantiate the reduced benchmark land value (BLV) adopted by the Council, as well as its position on an alternative scheme without a basement/basements and different unit mix.
6. The Council advises that reviewing viability reports is discretionary and not material to the appeal. I consider this to be a rather dismissive approach on the Council's part, particularly as the appellant has born the costs of the Council's viability review, as is requested by the Council. Furthermore, I consider the Council could have been more open and transparent in respect of its own viability conclusions by disclosing its assessment that lead to the conclusions it has reached. Whilst this would be best provided at the earliest opportunity during the course of the consideration of both of the planning applications, it could have better informed the appeal process and allowed both parties to seek and aim to settle differences or narrow down disagreements over BLV and/or build costs, which is in the spirit of the appeal process. Whilst the appellant asserts that the Council's has made inaccurate assertions, I have no substantive evidence before me that would conclusively demonstrate this to be the case.
7. That said, the appellant is clear that the proposals put forward are optimising schemes for the site and viabilities have been undertaken for each of the proposed developments. However, the appellant, in my view, has not demonstrated, by way of viability, that a policy compliant scheme would not be financially viable at the site and, therefore, the option of the site to host a policy compliant scheme cannot be definitively ruled out. Furthermore, to demonstrate that the proposals before the Council are the only viable scheme for developing the site, the appellant would benefit from providing an assessment of other schemes, potentially without a basement or basements or comprising a different housing mix, in order to demonstrate that alternative schemes could clearly be discounted.
8. There will be, from time-to-time, proposals before the Council that require viability to be tested. The appellant is critical of the Council's handling of its appraisals of viability, most notably in relation to the Costs B proposal. It appears to me, based upon the information provided, that the Council needs to set out its procedures for testing viability clearly, as well as the work undertaken in relation to this. Notwithstanding this, even if Council had handled this matter differently, I cannot say for certain that this would have narrowed the issues in dispute and/or avoided the appeals.
9. The appellant contends that the Council did not have due regard to the approval that is in place under the Prior Notification process that would allow for the existing building at the site, which the Council considers to be a non-designated heritage asset, to be lawfully demolished. As I see it, whilst the

Prior Notification approval would allow for the building to be demolished, it does not correspond that that approval will be implemented. Until such time as the building is lawfully demolished the Council is entitled to consider the merits and attributes of the existing development at the site and the impact of its loss under the planning application process.

10. The appellant argues that the Council's pre-application advice did not highlight the existing building at the site to be a non-designated heritage asset. However, the Council contend that it indicated in its pre-application advice that the retention of the building was desirable, and that the principle of demolition was not acceptable. This appears to me to set out the Council's stance in respect of the principle of demolishing the building at the pre-application stage. A subsequent heritage statement identified the history and interest of the building that enabled further consideration of the building's heritage status.
11. With regard to Costs B application only, the Council's decision letter included a refusal reason relating to trees (refusal reason 3). The appellant asserts that the Council did not take into consideration a letter from the appellant's arboricultural consultant and the Council confirms that this was indeed the case. I accept that had that letter been considered by the Council this may have avoided the imposition of refusal reason 3. Whilst this could be said to be unreasonable behaviour on the part of the Council, it is clear to me that the two paragraphs provided by the appellant within the statement of case to defend this refusal reason has not put the appellant to significant and unreasonable waste of time or expense.
12. I am satisfied that the Council has considered the circumstances of the proposed developments in accordance with the applicable development plan policies. Whilst I consider that more proactive discussions and information sharing between parties, particularly with regards to viability, would have been beneficial, I cannot conclude with any degree of certainty that the appeals would have been avoided or that a significantly lesser number of issues would have been in disputed between parties.
13. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Nicola Davies

INSPECTOR