



Costs Decision

Hearing held on 9 October 2019

Site visit made on 9 October 2019

by Alison Partington BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1st November 2019

Costs application in relation to Appeal Ref: APP/N5660/W/19/3227258 89 Effra Road, London SW2 1DF

- 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 Lambeth for a partial award of costs against Flutterby Ltd.
 - The hearing was in connection with an appeal against the refusal of planning permission for the partial refurbishment of existing public house building (Use Class A3/A4) together with the erection of a rear first floor extension, 3 x rear dormers and 1 x front dormer window to provide 3 residential units (Use Class C3).
-

Decision

1. The application for an award of costs is dismissed.

The submissions for the Council of the London Borough of Lambeth

2. The Council made an application for a partial award of costs in writing in advance of the hearing but augmented this slightly at the hearing with oral submissions. The application for a partial award of costs relates to the first reason for refusal which concerns the affordable housing contribution.
3. In their submission the Council state that although this matter was a reason for refusal on a previous similar application on the site, it was only at appeal stage that the appellant produced any viability information. Furthermore, a significantly revised version of the "Viability Calculator" was submitted at Final Comments stage. It is claimed that the late submission of the viability evidence by the appellant, was unreasonable. Moreover, it is highlighted that the appellant provided little supporting reasoning to explain the figures used and particularly the substantial changes in the two viability assessments produced.
4. It is suggested by the Council that it was this lack of clarity in the appellant's evidence that appeared to be the reason why the procedure was changed from Written Representations to a Hearing. The submission of this late evidence required them to carry out additional scrutiny of the appellant's evidence using consultants and the production of a further statement. The revised procedure also resulted in additional costs in terms of appearances at the hearing. As such, they consider the appellant's behaviour was unreasonable and resulted in unnecessary expense.

The response by Flutterby Ltd

5. The appellant responded verbally to the Council's claim for costs at the hearing. They stated that there was clearly a genuine difference of opinion between the parties regarding this matter which was reflected in the debate that had taken place at the hearing. They indicated the evidence submitted at Final Comments stage sought to augment and clarify their previous evidence and highlighted that the Council made no objection to its submission. They also indicated that it was agreed that the Council could have additional time to look at the evidence.
6. In addition, they highlighted that the decision to change the procedure was not made by them, and given the need to debate the evidence it was the right decision. In contrast to this appeal, they suggested that none of the written representation appeal decisions referenced by the Council showed that the Inspectors had needed to undertake any detailed analysis of viability evidence. Moreover, they highlighted that it was the Council's decision to appoint consultants to look at the viability evidence rather than assessing it themselves.

Reasons

7. The *Planning Practice Guide* (PPG) advises that parties will normally be expected to meet their own costs in relation to appeals, and that costs may only be awarded against a party who has acted unreasonably, and thereby caused the party applying for costs to incur unnecessary, or wasted, expense in the appeal process. The PPG highlights that introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen, are circumstances that may give rise to a procedural award of costs.
8. The appeal scheme had 7 reasons for refusal one of which related to whether the scheme should provide an off-site contribution towards affordable housing. In the absence of either a legal agreement to secure such a payment or a financial viability assessment showing it would not be viable to do so, it was considered, by the Council, that the proposal would be contrary to development plan policies.
9. The appellant's appeal statement was accompanied by a completed "Viability Calculator". This indicated that the viability of the scheme was such that it would not be required to make an affordable housing contribution. However, the evidence provided no justification for any of the figures they had used. In addition, their statement questioned whether, given national guidance, a scheme of this size should be required to make a contribution.
10. The Council's appeal statement indicated that there were a number of errors in how the appellant had utilised the calculator. They corrected these errors and their statement included two versions of the calculator, one using the appellant's figures, and one using figures they considered appropriate. These both indicated that the scheme was viable and should make an affordable housing contribution. Their statement also set out detailed evidence as to why they considered the development plan policy requiring affordable housing contributions from schemes of less than 10 units outweighed national guidance.

11. At this stage the appeal was being dealt with under the written representation procedure and so had a Final Comments stage. At this stage the appellant provided another version of the Viability Calculator, which revised a number of the figures they had previously utilised, but still concluded the scheme would be unable to make any contribution. Whilst a breakdown of the building costs was provided, no other justification was provided for the figures or why a number of them had significantly altered.
12. From the evidence submitted by both parties the matter of whether the appeal scheme would be able to make a contribution to affordable housing was clearly disputed by the parties. Whilst the appeal was initially considered as a written representation appeal, on reviewing the evidence submitted by the parties regarding viability it was decided to alter the procedure to a hearing as it was considered that the Inspector would need to question the viability evidence that had been submitted.
13. I accept that the change of procedure made the appeal process more complicated. However, the appellant's evidence regarding viability was only provided at various stages of the appeal process, with a lot of the supporting justification only being provided at the hearing itself. Moreover, the appellant's position changed quite significantly during the appeal process. I consider that the inconsistency in their evidence and the late stage at which much of it was provided does represent unreasonable behaviour.
14. Nevertheless, whilst I accept that as a result of this the Council's work of assessing the appellant's evidence on this matter has had to be done later than would have been the case, it would still have had to be done by the Council at some stage. Whilst the Council used consultants to assess the appellant's evidence, there is nothing to suggest that this would not have been the case if the evidence had been submitted earlier.
15. Therefore, even though I consider the appellant acted unreasonably in this regard, I consider that this has not given rise to extra expense by the Council in dealing with the appeal. As it has not resulted in wasted or unnecessary expense, I do not consider a partial award of costs, as described in the PPG, is justified.

Alison Partington

INSPECTOR