



Costs Decision

Hearing Held on 1 October 2019

Site visit made on 1 October 2019

by H Miles BA(hons), MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 November 2019

Costs application in relation to Appeal Ref: APP/A5840/W/19/3224561 54 Camberwell Green, London, SE5 7AS

- 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 Viewranks Ltd for a full award of costs against the Council of the London Borough of Southwark.
 - The hearing was in connection with an appeal against the refusal of planning permission for Full Planning Permission for change of use of the building from Class C2 (care home) to residential (Class C3), a part three and part four storey rear extension including basement, and additional floor and mansard to the existing building in order to provide 38 one to three bedroom flats. Provision of one on-site disabled car parking space, cycle parking and a refuse enclosure at ground level.
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Decision

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

The submissions

2. The appellant's case was made in writing. The Council's response was made orally at the hearing, and the appellant made some further points orally as well. Details of the oral submissions are set out in the Annexe at the end of this decision.

Reasons

3. The Government's Planning Practice Guidance (PPG) advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Claims can be procedural – relating to the process; or substantive – relating to the issues arising from the merits of the appeal. In this case the appellant is seeking a full substantive award and a partial procedural award.
4. The substantive points in the appellant's case include that the Council has not followed well established case law in giving weight to alternative options for development of land which are not planning applications. Also, that the Council has made vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis as, in the appellant's view, the proposed development complies with the development plan and there are no material considerations which would indicate that it should otherwise be refused. A summary of the procedural grounds are that the submission of the 'alternative scheme' with the Council's statement of case was fresh and

- substantial evidence introduced at a late stage necessitating preparatory work that would not otherwise have arisen. Also, that the Council changed their position as to whether they would agree a bilateral legal agreement for one of the two proposed affordable housing options and as such that there was a lack of cooperation by the LPA in regard to the drafting of the legal agreements.
5. As can be seen in my main decision I do not find any reason why there would be exceptional circumstances which lead to an alternative option being relevant in this case. Furthermore, that the alternative scheme presented is vague in nature and unlikely to come about. As such the consideration of this (or another hypothetical) alternative scheme would be contrary to well established case law, and this behaviour is unreasonable.
 6. As can be seen in my main decision I find that the proposed development is in accordance with the development plan. I appreciate that Members are able to disagree with the conclusions of their officers, and I understand that the reason for refusal relates to the fact that a more efficient use of the land could provide higher levels of affordable housing (not to the fact that the proposed development would not provide the maximum amount of affordable housing). However, given my comments above regarding the reasonableness of considering alternative options on the basis of well-established case law, the position that the proposed development is inefficient is not supported by objective analysis. This therefore represents unreasonable behaviour.
 7. In relation to the procedural matters, the 'alternative scheme' was submitted with the Council's statement of case in support of the reason for refusal. Notwithstanding my comments above in relation to the substantive issue regarding this evidence, this information substantiates the Council's case as to why it refused planning permission. Although I acknowledge that this was agreed to be submitted a few days past the original deadline, nevertheless, this would not amount to fresh and substantial evidence being submitted at a late stage and as such this does not amount to unreasonable behaviour.
 8. In relation to the legal agreements, it appears to me that there were discussions between the parties, albeit that a consensus could not be reached as to the detail of one of the agreements. Where negotiations have run their course and no compromise can be reached it would not be unreasonable for the Council not to continue to negotiate.
 9. As can be seen above, I have found that unreasonable behaviour has been demonstrated on substantive grounds. In summary, that in considering an 'alternative scheme' the Council did not follow well established case law and the refusal of the proposed development was based on inaccurate assertions about a proposal's impact which are unsupported by any objective analysis. On this basis it appears that the Council should not have refused planning permission on this ground and the appellant acted reasonably in making the appeal. As this was the only reason for refusal, the unreasonable behaviour on the part of the Council that has been identified above has, as a consequence, led to the appeal and to the appellant incurring unnecessary or wasted expense in the appeal process. Therefore, a full award of costs is justified.

Costs Order

10. 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 the Council of the London Borough of Southwark shall pay to Viewranks Ltd, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

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

H Miles

INSPECTOR

Documents

Application for costs

Annexe: Submissions Made Orally at the Hearing

Council

12. The Council disagree that they have been uncooperative and states that there have been discussions back and forth.
13. The alternative scheme follows from the reason for refusal, so its submission is not totally out of the blue. The illustrations show that the site can do better. The appellant had time to consider these plans so no prejudice occurred.
14. The Legal team were responsive, although they could not agree a policy compliant level of affordable housing so there was some disagreement. The Council would expect Solicitors to be present at the hearing in any case, whether or not they needed to finalise the legal agreement.
15. Members made the decision that the viability assessment was outweighed. It was open to them to make that decision. There is pressure on Councils to provide more affordable housing and Southwark is not meeting its targets, so it is not unreasonable that each scheme should be scrutinised.

Appellant

16. Exceptional circumstances are required before regard can be had to an alternative scheme. The Council had not sought to demonstrate that there are exceptional circumstances.
17. There is an agreed position that the Inspector cannot be assured that planning permission would be granted for the alternative scheme. This means that the alternative scheme is immaterial, or if it is material it can only be afforded limited weight. No evidence was provided that this should attract substantial weight in the planning balance.
18. The Council should not have run a case based on a vague and inaccurate alternative without considering the relevant tests.
19. The Council has accepted if they hadn't produced an alternative scheme they would not have a case.
20. The Council are also acting contrary to Planning Practice Guidance, acting contrary to or not following established case law.
21. In terms of the alternative scheme, the appellants interpreted the reason for refusal as relating to the maximum amount of affordable housing that might be provided relating to the redevelopment of the site. Time and money were spent on material supporting the appeal scheme in comparison to a full redevelopment scheme.
22. The test is whether that unreasonable behaviour (in terms of having time to consider the alternative scheme) wasted time. The appellant's work rebutting the redevelopment option was wasted work.
23. The appellant considered that there was no response to their points made at paragraphs 16-20 above.