The Planning Inspectorate

Costs Decisions

Hearing Held on 28 August 2019

Site visit made on 28 August 2019

by John Dowsett MA DipURP DipUD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11th November 2019

Costs application A in relation to Appeal Ref: APP/P4605/W/18/3217413
18-20 Albion Court, Frederick Street, Birmingham B1 3HE

- 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 Seven Capital (Albion) Limited for a full award of costs against Birmingham City Council.
- The hearing was in connection with an appeal against the refusal of prior approval for a change of use of a building from office use (Class B1(a)) to a 21no. residential apartments (Class C3).

Costs application B in relation to Appeal Ref: APP/P4605/W/18/3217413
18-20 Albion Court, Frederick Street, Birmingham B1 3HE

- 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 Albion Court Action Group for a full award of costs against Birmingham City Council and Seven Capital (Albion) Limited
- The hearing was in connection with an appeal against the refusal of prior approval for a change of use of a building from office use (Class B1(a)) to a 21no. residential apartments (Class C3).

Decisions

Application A

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

Application B

2. The application for an award of costs is refused.

Reasons

3. The Planning Practice Guidance 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.

Application A (Seven Capital (Albion) Limited)

4. The appellant's application for an award of costs is made on the substantive grounds that the council delayed or prevented development which should clearly be permitted; failed to produce evidence to substantiate the reason for refusal; made vague or generalised assertions about the proposal's impacts;

persisted in objections to a scheme or elements of a scheme which an Inspector has previously indicated to be acceptable; and had not determined similar cases in a similar manner.

5. On the first ground, the Council's reason for refusal is clear in that it states that the proposed reliance on openable secondary glazing and mechanical ventilation to mitigate noise and disturbance from these existing commercial noise sources would not ensure that residents of the development are adequately protected from noise. Whilst the Council's Environmental Health Officer concluded that the mitigation scheme would achieve a suitable internal noise climate, the comments are also very clear that the acceptability of the scheme is contingent on the windows being kept closed. The appellant stated at the hearing that the effectiveness of the noise mitigation relies on the windows being closed and it was also confirmed that the windows and proposed secondary glazing would be capable of being opened. In these circumstances, it has not been shown that the development should clearly have been permitted and it was not unreasonable for the Council to refuse prior approval as the ability of actions outside the control of the appellant or the Council to render the proposed mitigation ineffective would not ensure that a suitable noise environment was achieved.

6. On the second and third grounds, the Council submitted evidence to the hearing including a statement of case, a copy of the officer's report on the application and copies of comments from the Council's Environmental Health Officer. Whilst the Council did not submit a detailed, technical, noise assessment, from the evidence that was submitted, it was clear how the Council's decision had been arrived at, based on the advice of the Council's Environmental Health Officer, who reviewed the noise assessments submitted by the appellant. The Council's evidence also makes plain that the ability to open the windows and secondary glazing undermines the effectiveness of the proposed noise mitigation and this was confirmed by the appellant at the hearing. In this respect, I do not find the Council's behaviour unreasonable.

7. In terms of the fourth ground, persisting in objections to elements of a scheme previously indicated to be acceptable by an Inspector, the appellant cites the appeal decision at 50 Frederick Street[1]. There is no evidence of a previous appeal at 18-20 Albion Court where the matter of noise mitigation has been considered by an Inspector. The appeal referred to relates to a different building and, from the evidence before me, involved a different noise mitigation scheme, in that the building had fixed windows which were to be retained. Whilst the Inspector concluded that the noise mitigation proposed in that case was acceptable, the noise mitigation scheme currently proposed at the appeal building has not previously been found acceptable by an Inspector. It is, consequently, not unreasonable for the Council to have reached a different conclusion in respect of the appeal proposal.

8. With respect to determining similar applications in a similar manner the appellant refers to two schemes, one at Sheepcote Street/Broad Street/Oozells Way and the other to rear of Park Regis Birmingham, Broad Street. From the evidence these appear to be applications for planning permission as opposed to applications for prior approval relating to a permitted change of use. In addition, they appear to be for significantly larger schemes than the appeal

[1] Appeal Reference: APP/P4605/W/17/3178964

proposal. Whilst these schemes may have required the use of sealed unit windows, on the basis if the evidence, I do not find that they are similar to the appeal proposal or that the Council has failed to determine similar applications in a similar manner.

Application B (Albion Court Action Group)

9. The application for an award of costs was made verbally at the hearing on behalf of the Albion Court Action Group (ACAG). ACAG is an organisation representing businesses, organisations and individuals in the area surrounding the appeal site, who as a third party raised objections to the scheme and appeared at the hearing. The basis of the application is that ACAG was put to considerable expense due to the need to instruct an expert noise consultant to review the appeal submissions of the appellant. This review identified errors in the appellant's submissions which were subsequently amended and required further review. It was contended that the appellant had acted unreasonably by submitting inaccurate reports and that the Council had acted unreasonably in agreeing that the reports were good. It had, it was suggested, in effect fallen to the objectors to repeat the noise work and to correct it. It was contended that this is unreasonable as it is incumbent on the appellant to produce accurate reports in the first instance and the responsibility for identifying errors in any reports lay with the Council.

10. For the appellant it was responded that it is not unreasonable to make an error, the appellant responded to ACAG's criticism of the submission at prior approval stage in their appeal submission, and following further comments ACAG were given the opportunity to comment on further revisions prior to the hearing which was readily accepted and so the cost were not wasted. It was added that the appellant had not seen the original ACAG comments, including those on noise until January 2019 following the submission of the appeal and receipt of the questionnaire from the Council. These comments were responded to in the appellant's additional hearing statement following the change in procedure for determining the appeal of the appeal. The hearing was originally due to sit on 14 May but was adjourned at ACAG's request as they had not had access to all the evidence. A further submission by the appellant was a result of comments made by ACAG's consultant and the adjournment of the hearing provided an opportunity to carry out a summertime noise survey which had not previously been possible due to the timing of the original application and the original date of the hearing.

11. The Council responded that they had received the original noise comments from ACAG shortly before a decision was due to be made on the application. The Council's Environmental Health Officer had recommended refusal of the application and did not comment specifically on the ACAG report as it supported the Officer's position. Due to the timescales imposed on prior approval applications there was, in any event, little scope to revert to the appellant regarding these comments. It was added that the Environmental Health Officer will not normally undertake a detailed critique of consultants reports but will take a balanced view on whether the report is acceptable. There are likely to be errors or anomalies in many reports and if the Council is in a position to make comments, they will pass these on.

12. Whilst, in the case of an appeal determined by way of a public inquiry, interested parties that are recognised as Rule 6 Parties under the Town and

Country Planning (Inquiries Procedure) (England) Rules 2000 may have an award of costs made to them if other parties have behaved unreasonably, this ability to become a party joined to the appeal does not extend to appeals determined under the hearings procedure. Whilst ACAG was represented at the hearing and took part in the proceedings, it was not formally joined to the appeal as there is no facility for this under the Town and Country Planning (Hearings Procedure) (England) Rules 2000. Third parties can appear at hearings with the permission of the Inspector, however, this does not confer the same status as that of a Rule 6 Party to a public inquiry. The Planning Practice Guidance is clear that it is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances[2]. Whilst an award of costs may be considered where there are procedural grounds, ACAG's application is effectively predicated on the substantive merits of the case.

13. ACAG clearly oppose the appeal proposal and are entitled to make representations as part of the process. It was, however, its choice to instruct specialist advisers to support those representations. It is normal for parties in planning appeals and other proceedings to meet their own expenses. Whilst there is no doubt that there has been a cost implication to ACAG in making its representations due to the specialist technical nature of some of the matters involved, the decision to instruct a consultant was not as a result of the behaviour of the main parties but rather a matter of practical necessity to pursue representations in a specialist area. It needs to be demonstrated that unnecessary or wasted expense in the appeal process has been incurred as a direct result of unreasonable behaviour by another party. From the evidence before me and the responses of the appellant and the Council at the hearing, I do not find that the actions of either of the main parties was unreasonable, or amount to exceptional circumstances where an award of costs to a third party would be warranted.

Conclusion

14. I therefore find that, in both cases, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

John Dowsett

INSPECTOR

[2] Paragraph: 056 Reference ID: 16-056-20161210