



Costs Decision

Site visit made on 9 August 2019

by Christopher Miell MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd December 2019

Costs application in relation to Appeal Ref: APP/E5900/W/19/3228094 Land Rear of 129 Cadogan Terrace, London E9 5HP

- 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 Mr R Tomkins (RCT Construction) for a full award of costs against the Council of the London Borough of Tower Hamlets.
 - The appeal was against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for the erection of a new dwellinghouse.
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Decision

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

Reasons

2. The Planning Practice Guidance (the 'PPG') advises that, irrespective of the outcome of the appeal, 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.
3. The statutory period for the Council's determination of the application ended on 21 December 2018. However, the parties formally agreed an extension of time to the statutory period until 31 January 2019. The appeal was submitted on 4 May 2019.
4. Whilst the Council did not determine the planning application, they expressed their initial concerns about the proposal in an email to the applicant's agent, dated 16 January 2019. The concerns related to (i) the proposal's impact upon the Victoria Park Conservation Area; (ii) the proposal's impact upon the living conditions of the neighbouring occupiers; and (iii) access issues for fire appliances.
5. The Council's Statement indicates that there would have been four reasons as to why the Council would have refused planning permission for the proposal. These reasons essentially formed the basis of the main issues, which I have identified in the appeal decision. In the interest of completeness, they can be summarised as follows (i) the proposal's impact upon the Victoria Park Conservation Area; (ii) the proposal's impact upon the living conditions of the neighbouring occupiers; (iii) the effect of the development upon the Site of Local Importance for Nature Conservation; and (iv) whether there are mechanisms in place to ensure that the proposal is a car free development.

6. The appellant submits that the Council has acted unreasonably on three grounds. The first ground for costs is made on the basis that the Council was unreasonable in failing to determine the application and failing to give a date by which it would be determined, such that the applicant was put to the cost of lodging an appeal against non-determination.
7. The second ground for costs is made on the basis that the Council introduced fresh and substantial evidence at the appeal stage, which delayed the determination of the appeal and resulted in the appellant incurring extra expense in preparing additional documents to rebut the Council's objections.
8. The third ground for costs is made on the basis that the Council failed to substantiate the first, second and third indicative reasons for refusal, as set out within the Council's Statement, with the appellant arguing that the Council's reasoning relied upon vague, generalised and inaccurate assertions about the proposal's impact.

Non-determination

9. Paragraph 47 of the PPG sets out examples of unreasonable behaviour which may give rise to a procedural award of costs. This includes the Council failing to adhere to deadlines.
10. Paragraph 48 of the PPG states that if it is clear that the local planning authority will fail to determine an application within the time limits, it should give the applicant a proper explanation. In any appeal against non-determination, the local planning authority should explain their reasons for not reaching a decision within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period.
11. The evidence before me does not suggest that the main parties agreed to a further extension of time beyond 31 January 2019. In addition, the Council's response to the cost application has put forward no explanation to demonstrate why the application was not determined on or before 31 January 2019. However, the Council's email from 16 January 2019 makes it explicitly clear that the planning application was going to be refused.
12. Given the above, even if the application had been determined within the relevant period, the evidence suggests that the applicant would have still had to pursue an appeal. Whilst I understand the sense of frustration which the delays may have caused, the Council communicated their initial concerns with the applicant in a clear manner. In this context, it would not be reasonable to conclude that the Council had behaved unreasonably in respect of matters leading up to the appeal. There were some initial delays in determining the planning application, but an extension was agreed, and the appellant was subsequently aware of the Council's substantive concerns and decided to lodge an appeal.

Fresh and substantial evidence

13. Paragraph 47 of the PPG sets out examples of unreasonable behaviour which may give rise to a procedural award of costs. This includes introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.

14. The Council's Statement indicates that reasons for refusal relating to the effect of the development upon the Site of Local Importance for Nature Conservation and car free development would have been imposed by the Council, had they determined the planning application. However, these concerns were not expressed to the applicant, as part of the email dated 16 January 2019, which explained that planning permission was going to be refused.
15. The Council's response to the cost application states that the concerns raised via email on 16 January 2019 were the most pertinent issues raised by the application and they were not formal reasons for refusal. In addition, they argue that their appeal documentation was submitted on time and, therefore, the Council have not delayed proceedings.
16. The applicant submitted an ecology report with the planning application. The report dates from November 2016 and at paragraph 3.2, it states '*the results presented in section 4 below remain valid for a period of twelve months from the date of the survey, after which time they should not be relied upon and further advice should be sought*'. Given that the application was submitted in December 2018, the report was out of date at the point of submission.
17. Given the appeal site's location within a designated Site of Local Importance for Nature Conservation, in pursuing the appeal, I find that it was in any event incumbent upon the applicant to submit an updated ecology report irrespective of the issues raised by the Council. To this regard, I find that the Council did not behave unreasonably.
18. Turning to the indicative reason for refusal relating to the applicant's failure to enter into a section 106 legal agreement to secure a car free development. Before the extended target date, the Council expressed fundamental concerns about the proposal and concluded the proposed development would conflict with several development plan policies. The email correspondence was not a formal decision and, therefore, I find that it was not necessary at that time for the Council to go into detail about the requirement for a planning obligation, the submission of which would have not altered the outcome of the planning application had it been determined by the Council.
19. Therefore, whilst I understand that the applicant feels aggrieved by the Council's introduction of an additional indicative reason for refusal at the appeal stage, I find that the Council did not act unreasonably in this regard. Furthermore, it was in any event incumbent upon the applicant to submit a section 106 legal agreement with the appeal to deal with the requirements of Policy DM22 of the Tower Hamlets Local Plan Managing Development Document 2013.

Objective reasoning and analysis

20. Paragraph 49 of the PPG states that examples of unreasonable behaviour by local planning authorities includes a failure to produce evidence to substantiate each reason for refusal on appeal; and vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis.
21. It will be seen from my appeal decision that I disagree with the Council and their assessment of the proposal, which is set out within the Council's Statement that was provided during the appeal. Whilst I have not agreed with

the Council's views about the proposed development, that in itself does not mean that the Council acted unreasonably.

22. The Council's Statement demonstrates that the Council objectively assessed the proposal and had due regard to the relevant development plan policies, in respect of the four reasons as to why the Council would have refused planning permission for the proposal. Therefore, I cannot agree that the Council has relied upon vague, generalised or inaccurate assertions about the proposal's impact.
23. Notwithstanding the above, the Council's email from 16 January 2019 raised concerns about emergency access to the site by fire appliances. It is reasonable that the applicant read this email as meaning that this would be one of the Council's likely reasons for refusal and it is on that basis that the applicant reasonably disputed this matter as part of the appeal. This concern was not carried forward by the Council as part of the appeal. Consequently, I conclude that the Council have acted unreasonably in this regard, and that the applicant has been put to wasted time and expense.

Conclusion

24. For the above reason, I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs is justified.

Costs Order

25. 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 Tower Hamlets shall pay to Mr R Tomkins (RCT Construction), the costs of the appeal proceedings limited to those costs incurred in respect of preparing for and responding to matters relating to emergency access to the site by fire appliances, such costs to be assessed in the Senior Courts Costs Centre if not agreed.
26. The applicant is now invited to submit to the Council of the London Borough of Tower Hamlets, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Christopher Miell

INSPECTOR