



**Ministry of Housing,
Communities &
Local Government**

James Harris
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14 Regents Wharf
All Saints Street
London
N1 9RL

Our ref APP/C5690/W/18/3205926
Your ref:

Date: 22 January 2020

Dear Sir

**LOCAL GOVERNMENT ACT 1972, SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990, SECTIONS 78 and 320**

**MADE BY MB HOMES LEWISHAM LTD
LAND AT FORMER CAR PARKS, TESCO STORE, CONINGTON ROAD,
LEWISHAM, LONDON SE13 7LH
APPLICATION REF: DC/17/101621**

APPLICATION FOR A PARTIAL AWARD OF COSTS

1. I am directed by the Secretary of State to refer to the enclosed letter notifying you of his decision on the above named appeal.
2. This letter deals with MB Homes Lewisham Ltd application for a partial award of costs against the Greater London Authority (GLA). The application as submitted and the response of the GLA are recorded in the Inspector's Costs Report (CR), a copy of which is enclosed.
3. In planning inquiries, the parties are normally expected to meet their own expenses, and costs are awarded only on grounds of unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process. The application for costs has been considered in the light of the Planning Practice Guidance, the Inspector's Costs Report, the parties' submissions on costs, the inquiry papers and all the relevant circumstances.

Andrew Lynch, Decision Officer
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4. The Inspector's conclusions and recommendation with respect to the application are stated at paragraphs CR27-37. The Inspector recommended that a partial award of costs is justified on the basis that the GLA's behaviour in further pursuing its grounds of objection without any credible evidence, following the withdrawal of the Council of the London Borough of Lewisham (the Council) was unreasonable behaviour that led to unnecessary and wasted expense.
5. Having considered all the available evidence, and having particular regard to the Planning Practice Guidance, the Secretary of State agrees with the Inspector's conclusions in his report and accepts his recommendations. Accordingly, he has decided that a partial award of costs, as specified by the Inspector at paragraphs CR36-37 is warranted on grounds of unreasonable behaviour on the part of the GLA.
6. Accordingly, the Secretary of State, in exercise of his powers under section 250(5) of the Local Government Act 1972 and sections 78 and 320 of the Town and Country Planning Act 1990, HEREBY ORDERS that the Greater London Authority shall pay to MB Homes Lewisham Ltd its partial costs of the inquiry proceedings, limited solely to the unnecessary or wasted expense incurred in respect of the costs of the appeal proceedings related to dealing with the issue of affordable housing after the Council decided not to represent the Greater London Authority, such costs to be taxed in default of agreement as to the amount thereof.
7. You are invited to submit to the GLA details of those costs, with a view to reaching agreement on the amount. Guidance on how the amount is to be settled where the parties cannot agree on a sum is at paragraph 44 of the Planning Practice Guidance on appeals, at <http://tinyurl.com/ja46o7n>

Right to challenge the decision

8. This decision on your application for an award of costs can be challenged under section 288 of the Town and Country Planning Act 1990 if permission of the High Court is granted. The procedure to follow is identical to that for challenging the substantive decision on this case and any such application must be made within six weeks from the day after the date of the Costs decision.
9. A copy of this letter has been sent to the GLA.

Yours faithfully,

Andrew Lynch

Andrew Lynch
Authorised by the Secretary of State to sign in that behalf



Costs Report to the Secretary of State for Housing, Communities and Local Government

by Paul Jackson BArch(Hons) RIBA
an Inspector appointed by the Secretary of State

Date: 1 August 2019

Town and Country Planning Act 1990

Local Government Act 1972

The Council of the London Borough of Lewisham

Appeal by

MB Homes Lewisham Ltd

Inquiry opened on 14 May 2019

Former Car Parks, Tesco Store, Conington Road, Lewisham, London SE13 7LH

File Ref: APP/C5690/W/18/3205926

File Ref: APP/C5690/W/18/3205926
Former Car Parks, Tesco Store, Conington Road, Lewisham, London
SE13 7LH

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by MB Homes Lewisham Ltd for a partial award of costs against the Greater London Authority (GLA).
- The inquiry was in connection with an appeal against the refusal of the Council of the London Borough of Lewisham (LBL) to grant planning permission for construction of three buildings, measuring 8, 14 and 34 storeys in height, to provide 365 residential dwellings (use class C3) and 554 square metres (sqm) gross of commercial/ community/ office/ leisure space (Use Class A1/A2/A3/B1/D1/D2) with associated access, servicing, energy centre, car and cycle parking, landscaping and public realm works.

Summary of Recommendation: The application for a partial award of costs be granted.

Preliminary matters

Background

1. On day 2 of the Inquiry, following cross-examination of the Council's construction costs witness Mr Powling, the advocate representing the Council and the Greater London Authority (GLA) advised that due to a conflict of interest, the GLA would no longer be represented. The GLA however wished to continue with their objections as an unrepresented principal party. Later in the afternoon, following cross-examination by the appellant of Ms Seymour for the GLA, the Council formally withdrew its objections to the proposal on viability grounds. The Council took no further part in the Inquiry.

The subsequent costs application

2. Planning Practice Guidance (PPG) indicates¹ that *'if the application relates to behaviour at a hearing or inquiry, the applicant should tell the Inspector before the hearing is adjourned to the site, or before the inquiry is closed, that they are going to make a costs application. The Inspector will then hear the application, the response by the other party, and the applicant will have the final word. The decision on the award of costs will be made after the hearing or inquiry'*.
3. The GLA was advised informally and in open Inquiry on day 2 that a costs application was a very strong possibility. The GLA's representative present on day 3 asked whether a costs application was to be made and was advised that this would become clear at the end of the Inquiry. The costs application was made on day 4. An adjournment of about 45 minutes was allowed for this to be considered and a further adjournment offered for any response to be made. The GLA's representative was unable to offer a verbal response.
4. On 24 May, the GLA submitted a response in writing. PPG further advises that at hearings and inquiries, the party against whom an application is made will have the opportunity to reply, either at the event or in writing. In the interests of fairness, the written response was copied to the appellant for any final

¹ at paragraph Reference ID: 16-035-20161210

comments. I have taken all the submissions into account in considering the recommendation.

The Submissions for MB Homes Lewisham Ltd

5. Where the operation of a direction to refuse is issued, the GLA is to be treated as a principal party. Without the GLA direction, the London Borough of Lewisham (LBL) would have granted a planning permission for a now identical scheme. This appeal only arises thus as a result of the change of the resolution to grant to reflect the terms of the GLA's direction.
6. In its letter to the Inspectorate indicating its intention to attend, the GLA made it clear that was prosecuting its direction in terms and was expecting LBL to do the same. Therefore for all practical legal and policy purposes, the GLA must be treated as a main party prosecuting the terms of its direction at this appeal. Without that direction LBL would not have opposed this scheme and this inquiry would not have been necessary.
7. Their conduct therefore falls to be considered in accordance with the provisions for principal parties.
8. Its conduct was unreasonable in substantive terms in relation to its directed main reason for refusal. Its conduct during the inquiry was also unreasonable. Both levels of unreasonableness resulted in the inquiry and the appellant having to incur significant unnecessary expense in relation to the affordable housing issue.
9. In substantive terms, the GLA produced no evidence which met or came close to the requirements of the PPG on the issue of construction costs to support its reason for refusal.
10. Its 'evidence' failed to meet the threshold properly to be called "evidence" It failed to engage with the agreed evidence of others that the construction costs were fair and reasonable and during the proceedings failed to read understand or engage with evidence which clearly established that its evidence was incorrect and unreasonable.
11. In terms of the double count issue, the GLA persisted with its case irrespective of evidence suggesting that it was wrong and in an unreasonable fashion after the only other relevant party advised by Leading Counsel had accepted that the point was simply not properly arguable. It chose not to read and understand the clear evidence, notwithstanding it had insisted on the reason for refusal and that it be a party at the inquiry.
12. These matters are important because the GLA itself accepted that with these matters taken into account it would not have made a direction at all. This inquiry would not have taken place, because LBL had resolved to grant permission.
13. For these reasons, there ought to be a partial award of costs limited to the costs associated with the affordable housing issue.

The response from the GLA

14. The appellant's intention to make an application for costs was only notified in the course of the morning of the last day. The affordable housing issue was a main issue in the inquiry which was defended by the local planning authority and addressed in the evidence of its witnesses. It was only after cross-examination of

the authority's witnesses that they withdrew their objection on affordable housing grounds. The appellant's preparation for and addressing of that issue in its evidence was in fact primarily focused on the Council's objection on affordable housing grounds. Until the Friday before the inquiry, all parties were preparing on the basis that the GLA would be appearing as an unrepresented interested party who would be speaking to their own written representations. It follows, therefore, that the GLA was not responsible for the appellant incurring the costs of responding to the "affordable housing issue" which was maintained as an issue by the local planning until after the inquiry was under way. As stated in para. 16-030 of the PPG, costs may only be awarded where a party's behaviour has "directly caused another party to incur unnecessary or wasted expense.

15. The introduction to the appellant's closing submissions states that the GLA maintained its position despite the Council's withdrawal of its objection on affordable housing grounds. But that is no different from the GLA's position before it was represented by the Council. The GLA had its own presentation to make through Ms Seymour and Mr Brown who were in attendance. Para. 7 of the Introduction makes the point that the GLA did not challenge the appellant's evidence. But the GLA had not prepared for the inquiry on the footing that it would play the adversarial role of an advocate. Except for the short time when the GLA's evidence was going to be presented as part of the local authority's case, the GLA was simply going to appear as an interested party and make a statement at the appropriate time.
16. The GLA as a body may understand the inquiry process but it simply reverted to the course it had originally decided to take. There was a direction for refusal on affordable housing grounds on the appellant's subsequent application but the local planning authority prepared and called its own evidence on that ground in relation to the appeal application (as well as objecting initially to that application on design grounds which is why the appeal was originally made).
17. The inquiry clearly took an unexpected turn when that objection was withdrawn but that does not logically make the GLA responsible for all the costs "associated with the affordable housing issue". The same point applies to the appellant's suggestion that "without [the GLA's] direction there would have been no inquiry". As a matter of fact, the local planning authority considered, prepared for and called its own evidence on the basis of an objection on affordable housing grounds.
18. On this basis, the worst that could be said is that the GLA maintained its objection on affordable housing grounds in the face of the authority's withdrawal. An advocate in Ms Seymour's position might have foreseen the possible costs consequences of this. But Ms Seymour by that stage did not have an advocate acting for her. Again, however, the GLA maintaining its original position in the inquiry does not logically translate into responsibility for all the costs "associated with the affordable housing issue".
19. The appellant acknowledges that costs awards against third parties are "exceptional" but seeks to say that because of the direction (actually made in relation to the subsequent planning application) the GLA is to be treated as a

- "main party" in the appeal. But that cannot be correct under the terms of the guidance that the GLA will be treated as a "principal party" when it has not exercised a direction to refuse permission in relation to the appeal in question, as referred to in para. 10-0550 of the PPG.
20. The fact of the matter is, as set out in the GLA's letter of 5 April 2019 objecting to the appeal application, that the GLA raised an objection on affordable housing grounds. But, again, this issue of affordable housing as a point of principle had already been taken up by and was addressed in the case and evidence of the local planning authority in the appeal.
 21. This factual background cannot change the GLA's status from that of an interested party (as referred to and accepted by the appellant in the email chain - Mr Butterworth to Leanne Palmer on 13 May 2019 at 17:43) to that of a "main" or "principal" party as asserted. The same applies to the fact that the GLA was briefly jointly represented by Queen's Counsel for the local planning authority. That fact did not convert the status of the GLA to that of a "main" or "principal" party.
 22. Similarly, the GLA did not act unreasonably "in substantive terms" in relation to the direction of refusal of the subsequent application as stated. Again, the Council promoted and maintained their own reason for refusal on that ground until they withdrew it.
 23. The GLA does not accept that its conduct in maintaining its stance was unreasonable. In any event, the inquiry was up and running by the time the Council withdrew and the GLA's conduct did not unreasonably prolong proceedings so that the appellant was caused to incur unnecessary expense as a result - and certainly not the appellant's costs of the whole "affordable housing issue".
 24. The GLA's maintaining its stance was not unreasonable and in any event did not result in the appellant incurring expense in the ongoing inquiry unnecessarily.
 25. Likewise, in relation to the assertion that there would have been no direction (in relation to the subsequent application) if the dispute on the evidence had been taken into account, does not change the fact that the local planning authority called evidence of their own to substantiate their objection on affordable housing grounds and that it was the examination of that evidence in the inquiry which led to their withdrawal of their objection on affordable housing grounds.
 26. In summary, even if (which the GLA does not accept) its behaviour was regarded as unreasonable, that did not cause the appellant unnecessarily to incur the costs 'associated with the affordable housing issue' in relation to the inquiry and, in any event, the GLA's conduct in the inquiry did not result in the appellant incurring additional expense in the ongoing inquiry unnecessarily.

Conclusions

27. The PPG 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.

28. There is no dispute that the GLA wished to be represented by Counsel at the Inquiry. The GLA was the instigator of the refusal by Lewisham and provided 2 professional witnesses who had prepared a large volume of written evidence. I consequently give very little weight to the idea that the GLA could not themselves be responsible for potentially incurring costs. Nothing suggests that the GLA simply intended to appear as an interested party and 'make a statement'.
29. It became clear very quickly that the Council's evidence was not going to convincingly support the contention that there was a viability case for a much higher level of affordable housing. At that point, at 1145 on day 2, the withdrawal of the Council's case, and Counsel for the GLA, meant that the onus for proving the viability case would be entirely in the GLA's hands. The GLA persisted with its case, unrepresented. In cross-examination, the GLA witnesses, in putting forward their case, could provide no more than assertion and generalised assumptions and admitted they had not carried out any detailed examination of the appellant's submissions. Indeed the professional witnesses for the GLA acknowledged that much of the appellants' detailed evidence had not been read.
30. If the GLA had not prepared for the Inquiry on the footing that it would play the adversarial role of an advocate, then, upon withdrawal of legal representation, a clear choice had to be made as to whether it would be appropriate to carry on. The GLA representatives were left in no doubt as the likely consequences of continuing and were immediately reminded by the Inspector of the existence of the costs procedure that had already been outlined for the benefit of all at the start of the Inquiry. In considering its options, it is beyond doubt that, even if the GLA did not have the benefit of advice from the advocate they had appointed only 5 days earlier, appropriate professional advice could have been obtained that afternoon or overnight.
31. I give no weight to the idea that because the GLA issued a direction in relation to a different later application, then they should not bear the consequences of unreasonable behaviour at the appeal for this identical development. If that argument was going to be advanced, then the appropriate time was at the very beginning when the subject of costs was introduced. It is highly relevant that the GLA wrote to the Inspectorate on 5 April 2019 explaining why the direction should also apply to the appeal scheme.
32. The situation was made worse by the GLA's refusal, in terms, to ask any questions of the appellant's witnesses which might have cast more light on the contrary conclusions reached by the GLA in evidence. There was sufficient time for this to be done between days 2, 3 and 4. The GLA declined to make any closing remarks which might have helped their case.
33. The PPG states that '*Where the Mayor of London or any other statutory consultee exercises a power to direct a planning authority to refuse planning permission, this party will be treated as a principal party at the appeal, and may be liable for an award of costs if they behave unreasonably or have an award of costs made to them*'. It further states that costs may be awarded if there is a failure to produce evidence to substantiate each reason for refusal on appeal; and vague, generalised or inaccurate assertions are made about a proposal's impact, which are unsupported by any objective analysis.

34. One of the main aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case. I conclude that the GLA's behaviour in further pursuing its grounds of objection without any credible evidence, following the withdrawal of the Council, was unreasonable behaviour that led to unnecessary and wasted expense.
35. An award of costs is not being sought from the Council, yet the Council's case in terms of evidence on values and costs, prepared following the GLA's direction to refuse, quickly fell. I have given careful consideration to whether the Council could reasonably justify their approach up to the point of withdrawal. On balance, I do not find their behaviour led to any wasted expense. The submission of proofs and the subsequent rebuttals had revealed much useful information, in particular on fees. Moreover, the Land Registry sales figures for all the units in Portrait 2 were helpful in clarifying the overall position on values. For these reasons, it is not suggested that costs are awarded for the appellant's time spent preparing before the appeal or the period spent at Inquiry prior to withdrawal of the Council's case.

Recommendation

36. I recommend that the application for a partial award of costs be granted. 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 recommended that the Greater London Council should pay to MB Homes Lewisham Ltd the costs of the appeal proceedings described in the heading of this decision related to dealing with the issue of affordable housing after the Council decided not to represent the GLA; such costs to be assessed in the Senior Courts Costs Office if not agreed.
37. The applicant should be invited to submit to Greater London Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount

Paul Jackson

INSPECTOR