



Costs Decision

Inquiry Held on 19 & 20 September and 7 November 2019

Site visit made on 20 September 2019

by Mrs H M Higenbottam BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 May 2020

Costs application in relation to Appeal Ref: APP/U5360/C/18/3208237 Land at Unit 2 Ravendale Industrial Estate, Timberwharf Road, London N16 6DB

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Avon Group of Companies for a full award of costs against the Council of the London Borough of Hackney.
 - The inquiry was in connection with an appeal against an enforcement notice alleging 'Without planning permission, the change of use from warehouse to self contained flats and associated external alterations, namely the addition of an external staircase to the Western elevation, single storey extension to the Western elevation and the installation of new windows, doors and roof-lights.'
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Decision

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

The submissions for Avon Group of Companies (the applicant)

2. The costs application was submitted in writing including a response to the Council's rebuttal response.

The response by London Borough of Hackney

3. The response was made in writing. The following additional points were made orally:
 - The fee for the planning application 2017/4202 was £195; and
 - The building was treated as having a B8 use at the time of the determination of the planning application because of what was stated in the planning application form.

Reasons

4. The Planning Practice Guidance (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.
5. The applicant considers that the two Prior Approval Notices (PAN) granted by the Council were implemented lawfully and that the external works were not development. If the external works were operational development, that

development was carried out after the commencement of the authorised change of use and cannot influence the lawfulness of that change.

6. The applicant, on becoming aware of the Council's view that the external works required planning permission, submitted retrospective planning applications (one application differed from the other in relation to ground floor glazing¹) for those external works. Six months later that application was refused on the sole ground that the works would compromise the ability of the premises to function for the asserted lawful use of employment. No appeals were lodged against these refusals.
7. The applicant considers that the Council acted unreasonably by:
 - Failing to act in a timely way or act proportionately. The Council could have granted permission for the retrospective planning application;
 - The Council delayed determination of the retrospective application and delayed disclosing its hand on enforcement until after the change of use had been implemented, the 25 new residential units had become occupied and an Article 4 direction withdrawing Class P rights had come into operation on 14 May 2018. The appellant considers that the Council acted in a disproportionate, negative, unnecessarily confrontational and devious way;
 - The Council failed to advise the applicant, following the July 2017 site visit, to submit a retrospective application to regularise the operational development;
 - The Council delayed threatening or taking enforcement action until the change of use had been implemented, the studio units occupied and the Article 4 direction had come into operation;
 - It was unreasonable for the Council to reference *Sage* when there were fundamental differences between the applicant's case and that in *Sage*;
 - If a full award of costs is not granted then a partial award is sought if the appeal on ground (c) is allowed on the basis of the unreasonable conduct of the Council in failing to recognise that the works were not development, did not render the PANs ineffective or were completed after the commencement of the authorised change of use as the case may be; and
 - If a full award of costs is not granted then a partial award is sought on the basis that the Council failed to advise the applicant that it had no objection to the evidence provided by the applicant on affordable housing. This application is limited to the costs of the attendance of the expert witness on the first day of the Inquiry.
8. The Council stated that in relation to the retrospective application reference 2017/4202, the Officer report was passed to the line manager on 15 January and, due to resourcing issues, it was not determined until 18 May 2018. In my view, there was no clear explanation provided by the Council as to why there was a delay of months between writing the Officer report and the determination of this planning application.

¹ References 2017/4202 and 2017/4205

9. The Council consider it was reasonable 'to allow' the appellant to attempt to regularise the development by submitting a retrospective application. I do not believe that this of itself demonstrated reasonable behaviour by the Council, it was clearly something which the applicant was allowed, by statute, to do.
10. The Council rely on the planning application form for the retrospective planning application recording the existing use as B8. However, the Council were fully aware, having visited the site, that the applicant was seeking to implement the PAN's. I consider it is disingenuous to not acknowledge that the Council was aware of what was happening on site at the time it determined the retrospective planning applications.
11. However, the retrospective applications are not part of the appeal before me. The applicant had the opportunity to appeal the retrospective applications either on the basis of non-determination or in relation to the refusals; it chose not to. The timely determination or otherwise of those applications does not result in the Council acting in an unreasonable way in relation to the Notice and the appeal before me. While in relation to the ground (a) appeal for the first floor of the building I have granted planning permission, the retrospective applications related to the building as a whole. I therefore find, that in the context of the appeal before me, the Council did not act unreasonably on this issue.
12. The Council states it undertook investigation and analysis of the lawfulness of the development as well as assessing the planning merits of the development. While I have disagreed with the Council on its assessment in relation to the implementation of the PAN for the ground floor units, I have agreed with them in relation to the PAN for the first floor units. I do not consider that its actions were unreasonable, simply that I have exercised my judgement in a different way than it did in relation to the ground floor units.
13. In relation to reference and reliance on *Sage* it is clear from my decision that I did not agree with the weight the Council gave its interpretation and relevance of this judgement on the facts of the appeal before me. It is a matter of interpretation on the circumstances of this particular case. I do not therefore find the Council's actions unreasonable in this regard.
14. As to the attendance on the first day of the Inquiry of the witness in relation to affordable housing, the Council state that it did give such advice and that this may be derived from the Council's submission to the Inquiry in relation to intended cross examination times. This records a '0' time for cross examination next to this witness and nothing next to the tenant witnesses. This, in the Council's view, clearly indicated that Counsel did not propose to cross examine the affordable housing witness.
15. The PPG specifically states that an example of unreasonable behaviour which may result in an award of costs includes not agreeing a statement of common ground (SoCG) in a timely manner or not agreeing factual matters common to witnesses of both principal parties. Moreover, during the preparation of appeal evidence a party should review its case and communicate with the other party, if sufficient evidence is provided, such as in this case, which removes an objection or issue. I consider that the PPG approach is that matters should be dealt with directly.

16. In my view, if the Council accepted the affordable housing evidence and did not wish to pursue the affordable housing point then it then this should have been included within the SoCG as a matter over which agreement had been reached. The SoCG was signed two days before the opening of the Inquiry on 17 September 2019. The SoCG includes no indication of an agreement of the affordable housing matters between the parties.
17. Moreover, reliance on a note on timings for the Inquiry for not requiring the witness on the first day is not a reasonable approach. It deals with the matter indirectly and not in a fair and open manner. I therefore find that the Council were unreasonable in not making it clear to the applicant that it agreed with the affordable housing evidence prior to the Inquiry opening: it was unreasonable to not explicitly state to the applicant that the witness was not required. As the Council failed to either include the agreement on the affordable housing evidence in the SoCG or explicitly state that the witness was not required, it led to unnecessary expense for the applicant in relation to ensuring the witness attended the first day of the Inquiry.
18. While I have found on many of the matters raised, that unreasonable behaviour has not been demonstrated, I do find in relation to the matter of the affordable housing witness that the Council behaved unreasonably because it failed to explicitly communicate its position to the applicant in relation to this evidence and witness. This resulted in the witness attending the first day of the Inquiry. 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

19. 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 Hackney shall pay to the Avon Group of Companies, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to the affordable housing witness attending the first day of the Inquiry; such costs to be assessed in the Senior Courts Costs Office if not agreed.
20. The applicant is now invited to submit to the Council of the London Borough of Hackney, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Hilda Higenbottam

Inspector