



Costs Decision

Hearing Held on 3 and 4 December 2019

Site visit made on 4 December 2019

by Beverley Wilders BA (Hons) PgDurp MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 July 2020

Costs application in relation to Appeal Ref: APP/N5660/W/19/3226764 Rear of 300-302 Norwood Road, London SE27 9AF

- 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 Carl Homerstone (Juno Asset Management Ltd) for a full award of costs against the Council of the London Borough of Lambeth.
 - The hearing was in connection with an appeal against the refusal of planning permission for site redevelopment to provide Class C3 dwellings, Class D1 community space and Class B1 office space, together with bin and cycle storage, access, circulation and parking, amenity space and other ancillary works (outline).
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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 before the hearing. The Council's rebuttal was submitted in writing after the close of the hearing and the appellant was given the opportunity to comment on it.

Reasons

3. Paragraph 030 of the National Planning Practice Guidance (NPPG) 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.
4. Paragraphs 046 to 049 set out the circumstances when the behaviour of a local planning authority might lead to an award of costs. These can either be procedural, relating to the appeal process or substantive, relating to the planning merits of the appeal.
5. Examples of unreasonable behaviour by a local planning authority include delay in providing information or other failure to adhere to deadlines; not agreeing a statement of common ground in a timely manner; introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense or preparatory work that would not otherwise have arisen; prolonging the proceedings by introducing a new reason for refusal; withdrawal of any reason of refusal; preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failure to produce evidence to

- substantiate each reason for refusal on appeal; vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by objective analysis; refusing planning permission on a planning ground capable of being dealt with by conditions; not determining similar cases in a consistent manner and not reviewing their case promptly following the lodging of an appeal against refusal of planning permission, as part of sensible on-going case management.
6. The appellant's case is essentially that the appeal ought never to have been necessary because all matters could properly have been resolved before refusal by planning condition, including those reasons withdrawn by the Council in its statement of case. Additionally, it is stated that the Council's late agreement to the Statements of Common Ground (SOCG) also amounts to unreasonable behaviour. The appellant states that the Council sought to introduce a new reason for refusal at a late stage by broadening the scope of reason for refusal 5 beyond daylight and sunlight impact and that at the appeal stage it sought to refer to other documents as well as its adopted SPG MD038. The appellant further states that the Council has failed to determine similar cases in a consistent manner citing the nearby Laundry Site that also forms part of Site 18 and asserts that the Council is seeking to override the terms of the statutory development plan with informal guidance. Finally, that it failed to review the case promptly following the submission of the appeal and the resolution to grant planning permission at the Laundry Site.
 7. As explained in my appeal decision, the Council stated in its statement that it no longer wished to pursue 3 of the reasons for refusal (2, 3 and 7) and that it would not pursue the reason relating to affordable housing subject to the appellant agreeing to provide affordable housing units that exceed all policy requirements. This position was confirmed in the SOCG.
 8. With regard to reason for refusal 2 relating to highways matters, it appears from the evidence that although additional information was submitted by the appellant on 18 March 2019, prior to the determination of the application, that the matter was not fully resolved. The Council states that following the refusal of the application and the submission of the appeal, further information was submitted in May 2019 and it was only then that the Council was satisfied that its concerns regarding highways matters had been resolved and that matters could be adequately controlled by the imposition of various conditions. However, whilst I am satisfied that the Council did not behave unreasonably in refusing the application on highways grounds, it appears that the Council failed to review the case promptly in May 2019 and withdraw reason for refusal 2 then rather than stating that it did not wish to pursue it in October 2019. This delay may have led to the appellant incurring unnecessary and wasted expense in the interim period, though the appellant has not explicitly stated at this stage how any additional expense was incurred.
 9. Reasons for refusal 3 and 7 relate to the failure to provide sufficient information in relation to energy efficiency, sustainability and noise. I note from the evidence that the consultation response from the Council's environmental health department requested that a noise survey be submitted prior to the determination of the application. It appears that no such survey was submitted and that this resulted in reason for refusal 7. The Council's Officer Report raises similar concerns regarding a lack of information to demonstrate that the proposal is acceptable in terms of sustainability and

energy performance having regard to adopted development plan policies. Notwithstanding the reasons for refusal and the comments from the Council's environmental health department, in its statement of case the Council states that it no longer wishes to pursue these reasons for refusal as it now considers that its concerns can be addressed by suitably worded conditions.

10. Though I note the Council's view that it has shown flexibility in now agreeing that its concerns regarding energy efficiency, sustainability and noise can be dealt with by the imposition of conditions, it has not provided any explanation as to why it changed its approach in relation to these issues. I consider that in withdrawing reasons for refusal 3 and 7 at a late stage in the appeal proceedings without reference to any new evidence or change in circumstances, the Council has behaved unreasonably and that this behaviour has directly resulted in the appellant incurring unnecessary and wasted expense. By refusing the proposal on these grounds the Council required the appellant to deal with these issues in his statement of case which, based on the evidence, appears to have not been necessary.
11. The Council's agreement to not pursue reason for refusal 1 relating to affordable housing is subject to the appellant providing such housing in excess of the Council's policy requirements and to the heads of terms of the unilateral undertaking (UU) securing the required housing mix. The Council states that the reason for refusal was imposed as the terms of the UU submitted on 18 March 2019 was not consistent with the accommodation schedule submitted with the application. However, it appears from the Officer report that at the time of determining the application, the Council was satisfied that the amount of affordable housing being provided was in excess of the policy requirement.
12. A draft UU was submitted in connection with the appeal in April 2019. It refers to a 4 bedroom unit, though no such unit was listed in the schedule of accommodation or shown on the submitted plans. The signed UU submitted in December 2019 corrects the affordable housing mix and removes reference to a 4 bedroom unit. It therefore appears from the evidence that the Council's concerns regarding affordable housing were not addressed by the appellant until December 2019 despite the appellant being aware of them when the application was determined in March 2019. Consequently, and in the absence of a properly drafted UU in relation to affordable housing, I do not consider that the Council behaved unreasonably in attaching reason for refusal 1 or that it could have been avoided by the imposition of conditions.
13. With regard to the remaining reasons for refusal, these relate to the loss of D1 floorspace; daylight/sunlight impact on land rear of 294-298 Norwood Road and site layout and access. As can be seen from my decision letter, I consider that the proposal would result in a loss of D1 floorspace and that this issue could not be overcome by the imposition of a condition. Whilst I reach a different view to the Council in respect of daylight/sunlight impact and site layout and pedestrian access and whilst I consider that some aspects of these issues could be addressed by condition or be dealt with at reserved matters stage, I do not consider that all of the Council's concerns could have been addressed in this way. Therefore, notwithstanding that I reach a different conclusion to the Council on these issues, I do not consider that it acted unreasonably in attaching reasons 4, 5 and 6.

14. A draft SOCG was submitted with the appeal in April 2019. Signed copies of the two parts that comprised the SOCG were submitted on 29 November 2019, 4 days after an extended deadline of 25 November 2019 and 4 days before the start of the hearing. The Council states that the delays experienced were, in part, as a result of the document format and tracking that the appellant chose to adopt. Although it is clear that the appellant proactively sought to ensure that the SOCG was submitted by the required deadline and that this was missed due to the need for the Council's agreement, a signed SOCG was nevertheless submitted a few days before the hearing meaning that I was aware of the areas of agreement and disagreement prior to the event. Consequently, and though there was non-compliance with the hearing procedures, I do not consider that the slight delay beyond the agreed deadline amounted to unreasonable behaviour by the Council.
15. As drafted, reason for refusal 5 relates specifically to the impact on the daylight and sunlight received to the plot to the rear of 294-298 Norwood Road and the potential prejudicing of any future development on the adjoining site. However, the Council's statement of case in respect of reason for refusal 5 referred to the impact on the comprehensive redevelopment of Site 18 and made no specific reference to daylight and sunlight or to No 294-298. These concerns were also specified within the SOCG. Although when questioned on this point at the hearing, the Council confirmed that it did not wish to amend its original concerns in respect of reason 5 notwithstanding what was said in its statement and in the SOCG, by amending its concerns in the statement beyond those specified in the wording of the reason for refusal, the Council behaved unreasonably. This behaviour then required the appellant to address the Council's broader concerns prior to the hearing and this would have incurred wasted and unnecessary expense.
16. As stated within my decision letter, it became clear during the hearing that none of the existing D1 floorspace figures relied upon by the parties were correct, albeit that the Council's Development Brief Document for MD038 (Site 18) stated a figure of 440 square metres which was subsequently relied upon by the appellant. Whilst I note that the same figure was stated on the planning application form and that the Council validated the application on that basis, I do not consider that the Council was then bound to accept that figure if it had evidence to the contrary. The Council's Officer Report set out the reasons for the Council's concerns in respect of the loss of D1 floorspace, referring to a previous planning permission (Ref 02/03407/FUL). Under the circumstances I do not consider that the Council behaved unreasonably in not accepting the figure stated in the Development Brief Document.
17. Following the refusal of planning permission, the Council resolved to grant planning permission for the re-development of another site within Site 18 known as the Laundry Site. Details of this proposal were submitted by the appellant prior to the hearing and much discussion took place regarding it at the event itself with the appellant considering that a degree of flexibility was shown by the Council in approving the Laundry Site scheme and that this same flexibility was not applied to the proposal. Although I note from the evidence that there are some parallels between the appeal proposal and the Laundry Site in that both proposals involve the re-development of sites within Site 18 and that similar issues were at play, there were also a number of differences including the nature of existing uses, the mix and layout of development, site position, characteristics and topography. Consequently, based on the evidence

before me, I do not consider that the Council has failed to determine similar cases in a consistent manner.

18. I have already considered whether there was sufficient justification for the withdrawn reasons for refusal. With regard to the remaining reasons for refusal (reasons 4, 5 and 6), the Council's justification for them in response the appeal and as set out in its statement of case was very brief. However, the Council's Officer Report was more extensive and further evidence was provided by the Council at the hearing. Although, as can be seen from my decision, I disagree with the Council's conclusions in relation to these reasons, I am nevertheless satisfied that the Council has adequately substantiated its retained reasons for refusal.
19. Finally, in refusing the application and defending the decision at appeal the appellant asserts that the Council placed undue reliance on The Manual for Delivery (April 2017) (MFD) document which is not adopted. However, I note that the Council has consistently accepted and stated that the MFD is not an adopted document but that it is instead a guidance document which it considers to be a material planning consideration. The MFD was not referred to in any of the reasons for refusal nor was it extensively referred to in either the Council's Officer Report or its statement of case. Although reference was made by the Council to the need to deliver a comprehensive development proposal for Site 18 in its response to reason 5 in its statement, as set out earlier, the Council subsequently clarified its position in relation to this reason at the hearing, relying instead on the original wording of it. From the evidence before me, I am satisfied that the Council did not place undue reliance on the MFD when it refused the application and defended its decision at appeal.
20. For the reasons set out above, I find that unreasonable behaviour resulting in unnecessary expense described in the NPPG has been demonstrated in relation to the timing of the withdrawal of reasons for refusal 2,3 and 7 and in relation to the Council's amended and broader approach to reason for refusal 5 as set out in its statement of case and in the SOCG. However, I do not consider that unreasonable behaviour by the Council has been demonstrated in relation to the other matters cited by the appellant. Accordingly, a partial award of costs is justified.

Costs Order

21. 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 London Borough of Lambeth shall pay to Mr Carl Homerstone (Juno Asset Management Ltd), the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to the timing of the withdrawal of reasons for refusal 2,3 and 7 and in relation to the Council's amended and broader approach to reason for refusal 5 as set out in its statement of case and in the SOCG; such costs to be assessed in the Senior Courts Costs Office if not agreed.
22. The applicant is now invited to submit to the London Borough of Lambeth, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Beverley Wilders

INSPECTOR