



Costs Decisions

Inquiry Held on 1 - 4 and 7 September 2020

Site visit made on 8 September 2020

by Andrew Dawe BSc(Hons) MSc MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 October 2020

Costs application (1) in relation to Appeal A: APP/H5960/W/19/3235607 150a-170 Penwith Road and 2-8 Thornsett Road, London SW18 4QA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Style and Space Contractors Ltd for a full award of costs against the Council of the London Borough of Wandsworth.
 - The inquiry was in connection with an appeal against the refusal of planning permission for demolition of existing buildings to enable development of a part 3 and 4 storey building to accommodate employment floorspace (Use Class B1a/B1c and B8) and retail floorspace (Use Class A1).
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Costs application (2) in relation to Appeal B: APP/H5960/W/19/3235608 150a-170 Penwith Road and 2-8 Thornsett Road, London SW18 4QA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Style and Space Contractors Ltd for a full award of costs against the Council of the London Borough of Wandsworth.
 - The inquiry was in connection with an appeal against the refusal of planning permission for demolition of existing buildings to enable development of a part 3 and 4 storey building to accommodate employment floorspace (Use Class B1a/B1c and B8), retail floorspace (Use Class A1) and 17 residential dwellings including 47% affordable housing (Use Class C3).
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Costs application (3) in relation to Appeal A: APP/H5960/W/19/3235607 150a-170 Penwith Road and 2-8 Thornsett Road, London SW18 4QA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Style and Space Contractors Ltd for a partial award of costs against the Council of the London Borough of Wandsworth.
 - The inquiry was in connection with an appeal against the refusal of planning permission for demolition of existing buildings to enable development of a part 3 and 4 storey building to accommodate employment floorspace (Use Class B1a/B1c and B8) and retail floorspace (Use Class A1).
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Costs application (4) in relation to Appeal B: APP/H5960/W/19/3235608 150a-170 Penwith Road and 2-8 Thornsett Road, London SW18 4QA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Style and Space Contractors Ltd for a partial award of costs against the Council of the London Borough of Wandsworth.

- The inquiry was in connection with an appeal against the refusal of planning permission for demolition of existing buildings to enable development of a part 3 and 4 storey building to accommodate employment floorspace (Use Class B1a/B1c and B8), retail floorspace (Use Class A1) and 17 residential dwellings including 47% affordable housing (Use Class C3).
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Decisions

1. The applications for a full award of costs (applications 1 and 2) are refused.
2. The applications for a partial award of costs (applications 3 and 4) are allowed in the terms set out below.

Procedural Matter

3. I have taken into account the Government's Planning Practice Guidance (PPG), in reaching my decision.

The submissions for Style and Space Contractors Ltd

Full award of costs applications (applications 1 and 2)

4. These applications relate to Appeals A and B.
5. The full applications arise out of the fact that – as will be evident from the Appellant's closing submissions – the Council has approached its decision in this case with total myopia. The Council's case is that both appeals are contrary to the adopted local plan EID policy EI6 and that this policy "does not endow (sic) the decision-maker with any discretion to disapply the prescriptive policy requirement in the present context" (see Hutchings/Davidson proof of evidence para 3.31). Thus, the Council has treated policy EI6 as itself determinative of whether planning permission should be granted.
6. During the presentation of its case (in particular during the cross-examination (XX) of Mr Field) the Council maintained that the correct approach under s.38(6) PCPA 2004 is that the determination should be in accordance with the development plan unless material considerations indicate otherwise. This is of course trite law. But as is evident from the Officer's Report (OR) to committee, the author of which was Ms Kelly, the OR not only failed to identify the material considerations but failed to indicate the weight which should be attached to them. How were members able to exercise that important balancing judgment if they were unaware of the material considerations, still less were not advised as to the weight which should be given to them? They were clearly advised in the OR that the proposed developments were contrary to the development plan but not about the weighing issues.
7. This is strong evidence that the Council failed to approach its decision making in accordance with the statutory provisions, an approach which was clearly unreasonable.
8. Further, the Council's behaviour was unreasonable because it wrongly believed that it had no discretion but to refuse planning permission in light of the terms of Local Plan EID policy EI6, and that the terms of this policy permitted no discretion.

9. Such a conclusion flies in the face of S.70(2) TCPA 1990 and S.38(6) PCPA 2004. The Council acted contrary to and did not follow well-established case law (for example *Tesco Stores Limited v City of Dundee* [2012] UKSC 13 and the Councils reference to *BDW Trading Ltd v SSCLG* [2017]), as well as National Planning Policy Framework (the Framework) policy (Para 2), that applications for planning permission be determined in accordance with the development plan unless material considerations indicate otherwise. The Council failed to balance in its assessment the fact that development of the site for the form of development dictated by policy was unviable and would not take place.
10. The issue of viability was an important material consideration – and as Ms Kelly accepted in XX, para 120 of the Framework was engaged. This indicates that the applications should both have been supported where the proposed uses would contribute to meeting an unmet need for development in the area. The fact that the Site was not an allocation but that policy EI6 had designated its uses is nothing to the point, and a red-herring. Given, as the Council now accepts, the development of policy compliant uses was unviable such that there was no reasonable prospect of such “policy compliant” development coming forward in the Plan period, this should have led the Council to support the other proposed uses for which there is a demonstrable need. The failure of the Council to apply that advice in the determination of the applications was outstandingly unreasonable. Members were not advised of this in the OR and didn’t apply their minds to it.
11. The fact that the Council’s witnesses were unable to accept that the Site was an under-used brownfield site, in a highly sustainable location, the development of which should be encouraged and welcomed in accordance with para 118 of the Framework, is a further example of the clearly unreasonable decision by the Council to refuse both applications. Government advice in para 118, especially paras (c) and (d), is clear about the importance of making effective use of land. That this site lies within such a sustainable location merely emphasised the need to approach this application with the flexibility shown by the Council in the Banham development in Thornsett Road.
12. Further, the Council acted inconsistently in failing to approach the decisions with the degree of flexibility it showed in determining the Banham development application.
13. All of this, individually and cumulatively, amounted to unreasonable behaviour. The appeals should not have been necessary.

Partial award of costs applications (applications 3 and 4)

14. These applications for costs relate to both Appeals A and B.
15. Notwithstanding that no reason for refusal was raised based on the failure of the retail and office elements of the development to pass the sequential test, in her evidence Ms Kelly maintained that the sequential test was not passed because Earlsfield was not a town centre for the purposes of the Framework – see for example her paras 8.54 and 8.55. She described the Appellant’s sequential exercise as “a fundamentally flawed analysis” (para 8.48).
16. It was Ms Kelly’s analysis which was fundamentally flawed. But she did not agree this until after proofs of evidence were exchanged. Mr Field was obliged

to engage with this point and eventually the Council accepted that its position was wrong – and entered into a Supplementary Statement of Common Ground (SSoCG).

17. It was unreasonable for the Council to raise a new issue – effectively a new ground for refusal – based on a false analysis. The Appellant should be entitled to recover its costs of dealing with this point through the SSoCG.

Follow up comments following the Council's response to the costs applications

18. Firstly, in respect of the Council's point about the Appellant failing to identify any provisions within the PPG concerning costs on appeals, the Appellant followed up verbally with what it considered to be relevant examples of unreasonable behaviour referred to in the PPG, namely: 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; and not determining similar cases in a consistent manner, with the Banham development in Thornsett Road in mind.
19. In response to para 28 below, relating to the Council considering that its approach to material considerations was not unreasonable, the officer stated there to be clear policy conflict but did not identify other material considerations and weight. This is therefore unreasonable under s.38(6).
20. It is unclear as to what the Council are getting at in relation to para 30 below and is ignoring the issue of viability because the policies are over-riding.
21. An example of unreasonable behaviour in the PPG is the introduction of fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen. The Council, with reference to para 8.46 of Ms Kelly's proof of evidence, wanted to stop the Appellant from having the benefit of office and retail uses. The reason why Ms Kelly sought to attack the Appellant's assessment of the site as edge of centre was so she could prevent the Appellant from relying on and pointing to the benefits of the appeal proposals in providing sequentially acceptable retail and office development.
22. The issue of the work undertaken by the Appellant in response is a matter for the taxing judge in due course.

The response by London Borough of Wandsworth

23. For the reasons set out below, the Council invites the Inspector to dismiss the Appellant's costs applications on the basis that they fail to demonstrate that the Council has acted unreasonably and, in any event, that the appellant has not incurred unnecessary costs as a consequence of the conduct alleged to be unreasonable in the applications.
24. Notably, the Appellant fails to identify any provisions within the PPG (Appeals) concerning costs on appeals.

Full award of costs applications (applications 1 and 2)

25. The Council denies that it approached its decisions or the conduct of its case on appeal with "total myopia", or unreasonably in any respect. It is correct to observe that the Council's case, quite properly, contends that both appeals are

- contrary to the adopted local plan. The Council relies upon but does not repeat its closing submissions in support of the submission that, at all material times, it has acted reasonably.
26. The Appellant's reliance upon paragraph 3.31 of Mr Hutchings' proof of evidence demonstrates that it has misunderstood and misrepresented the Council's case. Manifestly, that part of Mr Hutchings' evidence concerns the proper interpretation of Policy EI 6 only and does not of itself demonstrate that the Council asserts, or has ever asserted that the provisions of that policy are determinative of whether planning permission should be granted.
27. As the Appellant accepts, in the presentation of its case, the Council maintained that the correct approach under section 38(6) of the 2004 Act is that the determination should be in accordance with the development plan unless material considerations indicate otherwise. That approach was entirely consistent with the Council's statement of case submitted in accordance with Rule 6 of the Inspector's Inquiries Procedure Rules.
28. Whilst it is correct, as Ms Kelly accepted under XX, that the Report to Committee she prepared at the application stage did not identify the material considerations specifically or the weight to be given to the other considerations, in the circumstances, that approach was not unreasonable in all the circumstances, not least due to the (then) applicant's failure to engage with the recently adopted LPEID policies (see, e.g., Leading Counsel's Opinion criticising the Report [CD41]). Members had sight of (precis) criticisms showing a flaw in the application.
29. The Council invites the Inspector to find that, having regard to the particular circumstances as they existed at the time of determining the applications, the Report prepared by officers was adequate and proportionate and did not, in any sense, materially mislead Members. Specifically, the Report did not state that the Council believed, nor did it assert that the LPA had no discretion but to refuse planning permission in light of the terms of Local Plan EID policy EI6. In any event, Members of the Committee were entitled to have regard to their experience of determining applications for planning permission, including the mandatory training in respect of the LPA's statutory duties when determining planning applications.
30. Given the primary purpose of Policies EI 1, EI 3, and EI 6, to protect existing industrial land and premises in the longer term, the applicant's reliance on the issue of viability in support of a fundamentally flawed approach to the interpretation of relevant provisions of the development plan, justified the Council's approach at the application stage, which it has defended reasonably on appeal.
31. In response to the Appellant's detailed allegations of unreasonable conduct, which are denied, the Council relies upon the written and oral evidence adduced at the Inquiry and addressed in the Council's closing submissions. With regard to the point about "the appeals should not have been necessary", it would be necessary for the Inspector to find that on the merits that the Council ought to have granted planning permission at the application stage - in other words, that it was not reasonably open to the Council to refuse to grant planning permission. In the absence of that finding, the Appellant's full applications must fail.

32. For these reasons, the Council submits that the Appellant has failed to demonstrate that the Council's approach to the determination of the applications amounted to unreasonable behaviour.

Partial award of costs applications (applications 3 and 4)

33. The Council contends that the matters relied upon by the Appellant do not constitute unreasonable conduct and, in any event, those matters did not result in the appellant incurring unnecessary costs.
34. Whilst it is accepted, as Ms Kelly conceded under XX, that the Council's evidential case was flawed in the manner described, following exchange of evidence, the Council conceded its error and accepted that the matter could be addressed without any detriment to the Appellant in a SSoCG. A fair reading of the Council's written evidence demonstrates that the reference to the Appellant's submitted sequential assessment did not amount to the Council inviting the Inspector to dismiss the appeal on that basis.
35. It was reasonable in all the circumstances for the Council to correct its error as it did and, as the parties prepared a SSoCG that addressed multiple other issues, the appellant was not put to any or any material inconvenience and did not incur unnecessary expense.

Conclusions

36. For all these reasons the Council invites the Inspector to dismiss the Appellant's applications for costs.

Reasons

37. The PPG advises that, irrespective of the outcome of the appeal, costs may only 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.

Partial award of costs applications (applications 3 and 4)

38. The matter of the site being in an edge of centre location was not a determining factor in itself, not least because of the site's designation as a LSIA and its prescriptive associated uses, and it is clearly not the basis upon which, on its own, the Council considers the appeals should be dismissed. Nevertheless, it was a material consideration that the Council had noted in its OR and addressed in its appeal submissions, having regard to the consideration of any benefits to be weighed in the planning balance.
39. That the Council underplayed the site's location in Ms Kelly's proof of evidence due to an error in representing the status of Earlsfield centre, caused the Appellant to reasonably engage with this point and undertake work to address it in a SSoCG.
40. I conclude on applications 3 and 4 that, for the above reasons, the Council did behave unreasonably in making the error referred to above and that, therefore, the applicant's costs in addressing that error were unnecessarily incurred and wasted. For this reason, a partial award of costs is justified.

Full award of costs applications (applications 1 and 2)

41. In respect of the claim of a failure by the Council to take account of other material considerations, the Council's OR in paragraph 2.14 does set out other considerations raised by the applicant in its planning application submissions, including in relation to the existing quantum and quality of employment floorspace on the site; that there would be full replacement and significantly more floorspace proposed; compatibility of uses in a residential area; the location for retail just outside the local centre; and reliance on the redevelopment of the site, itself dependant on viability, in achieving the intent of employment policy. Furthermore, although not considering and analysing each in detail in terms of weighting before coming to its conclusion, the OR did nonetheless refer to the other material considerations put forward not outweighing the adherence to the prescriptive uses set out in the site designation policy concerned.
42. As I have also found in my appeal decision, policy EI6 of the LPEID does not assume re-development of the site in the LPEID period. It is also the case that there is a suite of LPEID policies, including EI6, which together seek to achieve the borough's strategic objective set out in policy EI1 to encourage sustainable economic growth, consistent with paragraphs 80 and 81 of the Framework which relate to building a strong, competitive economy.
43. That paragraph 3.31 of Mr Hutchings' proof of evidence refers to the prescriptive nature of policy EI6 does not in itself infer that other material considerations should not be taken into account. Furthermore, the Council, in its Statement of Case and then in Ms Kelly's proof of evidence, first stated the intent to, and then set out in detail, its consideration of the other considerations before weighing these in a planning balance.
44. In respect of the matter of determining similar cases in a consistent manner, the circumstances surrounding the Banham development at 20 Thornsett Road, including in relation to the re-location of that business and the benefits of bringing a vacant site back into use, were to some extent different to those of the appeal proposals, albeit relating to the same LSIA. It was reasonable for the Council to determine the applications on their own merits.
45. I conclude on applications 1 and 2 that, for the above reasons and notwithstanding my conclusions and decision in relation to applications 3 and 4, the Council did not otherwise behave unreasonably in its determination of the planning applications and in maintaining its objection to the proposals. As such, the applicant's costs in pursuing the appeals, other than those referred to separately in connection with applications 3 and 4, were not unnecessarily incurred or wasted. For this reason, a full award of costs is not justified, nor is a partial award justified other than in respect of applications 3 and 4.

Costs Order

46. 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 Wandsworth shall pay to Style and Space Contractors Ltd the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of costs applications 3

and 4; such costs to be assessed in the Senior Courts Costs Office if not agreed.

47. Style and Space Contractors Ltd are now invited to submit to the Council of the London Borough of Wandsworth, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.