The Planning Inspectorate

Costs Decisions

Inquiry opened on 1 December 2020

Site visit made on 15 December 2020

by Tom Gilbert-Wooldridge BA (Hons) MTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 10th March 2021

Costs Application (1) in relation to Appeal A: APP/X5210/W/19/3243781 and Appeal B: APP/X5210/Y/19/3243782
135-149 Shaftesbury Avenue, London WC2H 8AH

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6; the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 89, and Schedule 3; and the Local Government Act 1972, section 250(5).
- The application is made by Capital Start Limited for a partial or full award of costs against the Council of the London Borough of Camden.
- The inquiry was in connection with two appeals against the refusal of planning permission and listed building consent for the comprehensive refurbishment of the existing Grade II listed building and the provision of a new two storey roof extension and new basement level, providing a new four-screen cinema (Class D2) and spa (sui generis) at basement levels, a restaurant/bar (Class A3/A4) at ground floor level, a 94-bed hotel (Class C1) at part ground and first to sixth floors and associated terrace and bar (Class A4) at roof level, together with associated public realm and highways improvements.

Costs Application (2) in relation to Appeal A: APP/X5210/W/19/3243781 and Appeal B: APP/X5210/Y/19/3243782
135-149 Shaftesbury Avenue, London WC2H 8AH

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- The application is made by the Council of the London Borough of Camden for a partial or full award of costs against Capital Start Limited.
- The inquiry was in connection with two appeals against the refusal of planning permission and listed building consent for the comprehensive refurbishment of the existing Grade II listed building and the provision of a new two storey roof extension and new basement level, providing a new four-screen cinema (Class D2) and spa (sui generis) at basement levels, a restaurant/bar (Class A3/A4) at ground floor level, a 94-bed hotel (Class C1) at part ground and first to sixth floors and associated terrace and bar (Class A4) at roof level, together with associated public realm and highways improvements.

Decision Costs Application (1)

1. The appellant's application for an award of costs against the Council is partially allowed in the terms set out below.

Decision Costs Application (2)

2. The Council's application for an award of costs against the appellant is refused.

Preliminary Matters

3. The Planning Practice Guidance (PPG) advises that irrespective of the outcome of an appeal, 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. The PPG states that awards against a local planning authority or an appellant may be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal.

4. The applications were both submitted in writing on the final day of the inquiry. Both parties responded to the applications in writing and also made final comments on those responses in writing.

(1) The appellant's application for an award of costs against the Council

5. The appellant submits that the Council has acted unreasonably on a number of substantive and procedural grounds.

6. The **first substantive ground** relates to the first reason for refusal in both appeals and the Council's position on heritage matters. As will be apparent from my appeal decisions, the Council did not exaggerate the degree of harm to the affected heritage assets particularly the listed building. The Council was not required to take the same position on harm as Historic England (HE) or the heritage consultant appointed to advise them during the application process. The Council adequately presented its case and evidenced the level of harm it had identified.

7. Considerable importance and weight should be given to the desirability of preserving a listed building. This applies whether the conclusion on the heritage balance is one of overall harm or overall public benefit. Therefore, given that the Council's conclusion on the heritage balance was overall harm, it was not necessary to give considerable weight to the public benefits.

8. It was common ground that a roof extension of this form and height, if sympathetically executed, could be incorporated without significant harm to the listed building. However, this did not remove any consideration of form or height from the debate as the question of sympathetic execution remained. As my decisions indicate, it was not wrong to say that the combination of height, mass, form and materials in this proposal would result in significant harm.

9. The question of whether the new cinema would be ancillary to the hotel is based on whether one looks at the cinema in quantitative terms (e.g. economic or floorspace contribution) or functional terms (e.g. supporting or secondary function). The latter was a more compelling approach in this instance and I found that the cinema would not be ancillary as it would operate separately for the general public. However, the Council was not wrong to consider the former approach and it was a matter of planning judgment. Moreover, I concurred with the Council and others on the negative effect arising from the change of use in terms of how one would experience the listed building.

10. Finally, the Council was not wrong to find harm to the significance of both conservation areas. The Council set out its case and provided sufficient evidence to justify its position. While I came to a different position regarding the contribution of the site to significance and the extent of harm, I still found there would be harm.

11. On all of the above points relating to the first substantive ground, no unreasonable behaviour has been demonstrated and so no unnecessary or wasted expense can be attributed to this ground.

12. The **second substantive ground** relates to the second reason for refusal in Appeal A regarding the provision of cultural and leisure facilities. It is correct that Policy C3 of the Camden Local Plan (CLP) does not state the maximum reasonable amount of replacement cultural or leisure facility should be provided. However, the policy does guard against the loss of a facility and its unsuitable re-provision. It requires proposals to show there is no longer a demand for the existing facility and to consider the changes in the mix of uses arising from any loss. In this case, alternative cultural or leisure uses could not be ruled out, while the mix of uses would diminish the cinema use. Therefore, it was not unreasonable to find that the proposal was not providing a sufficient or maximum amount of replacement facility. Thus, no unnecessary or wasted expense can be attributed to this ground.

13. It is feasible that if the first and/or second reason for refusal had been withdrawn, the other reasons for refusal in Appeal A may not have been sufficient to withhold planning permission. The Council cooperated with the appellant to resolve the third reason via a condition and indicated that the remaining reasons could be overcome by a Section 106 agreement (S106). However, given the Council's later concerns regarding the S106 and the objections of other main parties on living conditions and Phoenix Garden, it is far from certain that the remaining reasons would have been insufficient. Therefore, no unreasonable behaviour can be applied on this ground.

14. The **first procedural ground** contends that the Council introduced new grounds at a late stage beyond the reasons for refusal, incurring additional time and expense in the process. This relates to arguments made on the loss of internal fabric and legibility of plan form. It is evident that these arguments were not part of original decisions or the Council's statement of case. They only came to light following a site visit to the building after the appeal had begun with one of the Council's recently appointed witnesses who specialises in historic theatre buildings.

15. The Council could have made its case about fabric and legibility at an earlier point even if the survival of the fly grid was only discovered at a later date. The arguments added to inquiry time and additional expense for the appellant. However, they were important matters to my decisions relating to the listed building and its preservation that needed to be raised. Therefore, no unreasonable behaviour leading to unnecessary or wasted expense has occurred on this ground.

16. The **second procedural ground** contends that by failing to serve rebuttal proofs the Council prolonged the inquiry through the making of hitherto unknown rebuttal points during evidence in chief (EIC). Rebuttal proofs are not a requirement of the inquiry process although they can save time. EIC should focus on a witness' own evidence. Based on my notes, the Council's witnesses spent a significant amount of EIC time responding to points made in the proofs and rebuttals of the appellant's witnesses. However, it is not apparent that it led to a significant lengthening of the inquiry or the appellant having to significantly lengthen its cross-examination of the Council's witnesses or the EIC of its own witnesses.

17. In most cases, these responses did not produce new points from the Council and the appellant did not produce additional material to address these responses. The one exception relates to points made by the Council's theatre witness in EIC on architectural features. This led to the appellant tabling HE's listing selection guide for culture and entertainment buildings and a written exchange of opinions regarding this document. However, this proved necessary to better understand the parties' positions on architectural features and the listing criteria for theatres. Therefore, no unreasonable behaviour leading to unnecessary or wasted expense has occurred on this ground.

18. The **third procedural ground** focuses on the Council contacting HE about the list description without notifying the appellant. This took place in late March 2020 with further correspondence over the spring and summer and again in early December 2020. With the production of additional information on the building and the discovery of additional fabric, seeking to update the list description was not unreasonable. Other main parties including the appellant had considered seeking an update. Owners are notified once HE progresses an application. However, the significance of the listed building was a central issue to these appeals and the content of the list description was very relevant even before the inquiry opened (as indicated by the letter from the Council to HE dated 31 March 2020). Given that the appeal process was underway by the time contact was made with HE on the list description, it was unreasonable for the Council not to have informed the appellant until day 4 of the inquiry over 8 months from the initial contact.

19. The appellant had to consider the HE correspondence disclosed by the Council as an inquiry document (ID27). That in itself was not unnecessary or wasted expense as it would have had to do that even if the Council had been open about the correspondence from the start. However, the correspondence disclosed by the Council was incomplete. The appellant contacted HE directly for the full extent (including emails from April 2020 and a copy of the application form to amend the description). This is unlikely to have amounted to significant time or expense, but nevertheless it represents unnecessary expense in the appeal process. Therefore, a partial award of costs limited to this very specific point is justified.

20. In conclusion, on most of its grounds, the appellant has not demonstrated any unreasonable behaviour by the Council which has led to unnecessary or wasted expense in the appeal process. However, in relation only to the appellant contacting HE for full disclosure of correspondence on the potential list description update, the application is partially allowed.

Costs Order for Costs Application (1)

21. In exercise of the powers under section 250(5) of the Local Government Act 1972, Schedule 6 of the Town and Country Planning Act 1990 as amended, and Schedule 3 of the Planning (Listed Buildings and Conservation Areas) Act 1990, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the Council of the London Borough of Camden shall pay to Capital Start Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred by the appellant contacting Historic England for full disclosure of correspondence between the Council and Historic England regarding the updating of the list description; such costs to be assessed in the Senior Courts Costs Office if not agreed.

22. Capital Start Ltd is now invited to submit to the Council of the London Borough of Camden, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

(2) The Council's application for an award of costs against the appellant

23. The Council submits that the appellant has acted unreasonably on a number of substantive and procedural grounds relating to two main areas. Firstly, viability and the position in relation to optimum viable use (OVU), and secondly, the issue of heritage fabric and appraisal.

24. In terms of **substantive grounds relating to viability/OVU**, the Council contends that the appellant unreasonably changed its position at a late stage by no longer claiming that the proposal represented the OVU. The Council also contends that due to the clear lack of compliance with the development plan as a result of not being the OVU, the appeals should have been withdrawn. Finally, in substantive grounds, the Council contends that the OVU arguments were wrong in law and policy.

25. The appellant's changed position was only known once proofs had been exchanged, but it was then maintained throughout the entirety of the inquiry. In short, the appellant's position was that the public benefits outweighed the harm to the heritage assets regardless of whether the proposal constituted the OVU. The appellant acknowledged that OVU was capable of being a material consideration in this appeal but that it did not represent a basis for which the appeals could be dismissed.

26. The Council chose to continue pursuing its case regarding OVU. In my appeal decisions, I concluded that the OVU made no difference to the overall heritage balance that weighed against the proposal. The appellant's changed position may have come as a surprise, but to my mind it was sufficiently clear.

27. The absence of the proposal being the OVU did not mean that the appeals should have been withdrawn. It is conceivable that my appeal decisions could have found limited harm to the heritage assets and concurred that the appellant's cited public benefits were enough to outweigh the harm. Neither national policy nor the development plan state that the consideration of harms versus public benefits must include whether or not the OVU is or can be secured. The various legal judgments referred to me state that alternative uses should be considered but they do not prescribe how this should be done.

28. With regards to the provision of cultural and leisure facilities, CLP Policy C3 refers to whether the premises can support alternative cultural or leisure uses. The policy does not require the proposal or the alternatives to represent the OVU in order to achieve compliance.

29. Therefore, no unreasonable behaviour has occurred on substantive grounds in terms of the appellant's changed position to viability/OVU, the compliance with the development plan, or having regard to law and policy.

30. In terms of **procedural grounds relating to viability/OVU**, the Council contends that the appellant unreasonably withdrew its viability expert at a late stage. Having done this, the Council also contends that it was unreasonable for the appellant not to withdraw the written evidence of the same expert. The Council also contends that evidence was concealed, and that significant costs were incurred through external consultants preparing viability evidence.

31. It is the decision for any main party at an appeal as to whether a witness and/or their written evidence should be withdrawn. Consistent with the appellant's other witnesses, the proof of evidence from the viability witness made no claims to the proposal representing the OVU. Given the appellant's changed position on OVU and its case regarding the heritage balance, the witness and his evidence was of little value. The Council was entitled to continue to call its viability witness and the appellant was entitled to ask questions of clarification and cross-examination of that witness as appropriate. Therefore, no unreasonable behaviour occurred in terms of the appellant's viability witness.

32. Turning to the alleged concealment of evidence, the leases between the appellant and Odeon have always been publicly available and were provided to the Council as part of the application process. While the appellant's witnesses were seemingly unaware of the details behind some of the covenants, there is little proof of any concealment of evidence. As for the purchase offer, while it may have been helpful for the offer to have been appraised between the parties, it is not unusual that the details were withheld due to commercial sensitivity. It was for the appellant to decide whether it should disclose the details, but there is little indication of any deliberate concealment. Therefore, no unreasonable behaviour occurred in terms of the evidence relating to the leases or the purchase offer.

33. With regards to the Council's external consultants, it is clear that the Council's proofs of evidence were produced on the basis that the appellant was arguing the proposal represented the OVU. The proofs of the Council's viability and theatre witnesses were used to argue that the proposal was not the OVU. The appellant should have notified the Council sooner that OVU no longer formed part of its case, rather than leaving it until the exchange of proofs. This may have reduced or avoided altogether the need for the Council to prepare evidence in relation to OVU. However, it is uncertain that the Council would have dropped its OVU arguments even if it had been notified earlier. It may still have prepared evidence on this matter. The Council continued to pursue OVU arguments throughout the inquiry even after the appellant's position had changed. Therefore, it has not been demonstrated that this unreasonable behaviour led to wasted or unnecessary expense in the appeal process.

34. In terms of **substantive and procedural grounds relating to heritage fabric**, the Council contends that the fly grid fabric should have been discovered earlier and properly appraised by the appellant. The Council also contends that the appellant should have cooperated with the Council to produce proportionate and targeted investigation of fabric and should have shared evidence rather than concealing it.

35. It is unfortunate that the fly grid fabric was not discovered until a site visit after the appeal had commenced, particularly when the proposal involved a roof extension and considerable demolition works. However, once discovered, it was appraised by the relevant witnesses in their proofs of evidence and during the inquiry itself. It was an important feature and the evidence before me was sufficient for me to reach a finding on its removal. Therefore, no unreasonable behaviour leading to wasted or unnecessary expense has been demonstrated.

36. It was for the parties alone to decide whether further investigation of fabric was necessary. The lack of cooperation and agreement on this matter was

unfortunate, notwithstanding health and safety and building access issues that were exacerbated due to the Covid-19 pandemic. However, the evidence before me was sufficient to come to a view on the building's significance and to make a decision regarding the effects of the proposal. Therefore, no unreasonable behaviour leading to wasted or unnecessary expense has been demonstrated.

37. The parties exchanged views and information on heritage fabric in the weeks and months following the discovery of the fly grid. This includes the appellant's additional information on internal fabric report of April 2020 and the Council's response to that report in May 2020. A further site visit was carried out in July 2020. A heritage statement of common ground was agreed in October 2020. While it would appear that the Council's May 2020 request for the asbestos survey and other plans/photographs went unanswered, there is little indication that this added to time or expense. Therefore, no unreasonable behaviour leading to wasted or unnecessary expense has been demonstrated in terms of the sharing of evidence.

38. In conclusion, the Council has not demonstrated any unreasonable behaviour by the appellant which has led to unnecessary or wasted expense in the appeal process. Therefore, I determine that the Council's costs application should be refused.

Tom Gilbert-Wooldridge

INSPECTOR