



Costs Decisions

Inquiry Held on 9 February and 16, 17, 18, 19 and 25 March 2021

Site visit made on 23 March 2021

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 17 May 2021

**Costs application in relation to Appeal Ref: APP/C5690/C/19/3242363
Our Lady and St Phillip Neri Roman Catholic School, 208 Sydenham Road,
London, SE26 5SE**

- 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 The Roman Catholic Archdiocese of Southwark for a partial and full award of costs against the Council of the London Borough of Lewisham.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the construction of a primary school not in accordance with conditions attached to planning permission DC/16/096041 granted 7 October 2016.
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**Costs application in relation to Appeal Ref: APP/C5690/W/20/3245112
Our Lady and St Phillip Neri Roman Catholic School, 208 Sydenham Road,
London, SE26 5SE**

- 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 The Roman Catholic Archdiocese of Southwark for a partial and full award of costs against the Council of the London Borough of Lewisham.
 - The inquiry was in connection with an appeal against the refusal of planning permission for development proposed without complying with conditions 2 and 8 attached to planning permission DC/16/096041.
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Decision

1. The application for an award of costs is refused.

The submissions for the Roman Catholic Archdiocese of Southwark

Full application

2. A single costs application was made in writing in relation to both appeals.
3. The applicant's submission in support of the application for the full award of costs is on the basis that the Council was unreasonable in refusing the s73 application, issuing the enforcement notice and seeking to vary the notice to include the scheme included in the Council's architect's proof of evidence. The applicant seeks the full award of costs on the basis that they were put to the unnecessary expense of the two appeals.
4. The applicant submits that the Council were unreasonable in refusing the s73 application as the pre-application discussions and indications from officers throughout the process, until immediately before the committee date, had led

them to believe that officers supported the application. Whilst accepting that the decision to refuse the application was taken by the committee, their submission is that officers should have informed the committee members about this history which would have led to a different decision and the appeals would not have been necessary. In addition, the applicant submits that it was unreasonable of the Council to issue the notice, as they had not properly taken into account whether it was expedient to do so, and that both options in the notice included inappropriate requirements (because the applicant's view is that Council has accepted that Option A was 'more than what would be necessary to remedy the harm' and that there might be insurmountable problems with the implementation of Option B). The applicant also submits that when the second reason for refusal regarding the noise levels inside of the building was withdrawn, the Council was unreasonable in not reconsidering both the s73 application and whether enforcement action was expedient.

Partial application

5. The applicant's submission is that in any event the Council was unreasonable in including an alternative scheme in its proofs of evidence and in seeking to vary the notice to include the scheme as additional requirements in the alternative. The applicant states that the alternative scheme did not fall within the original requirements of the notice and that they were put to wasted expense in producing rebuttal evidence and spending inquiry time in dealing with this particular issue.

The response by the Council of the London Borough of Lewisham

6. The Council's response is that the committee was entitled to come to the decision to refuse the application and to serve the notice and that it demonstrated through the course of the inquiry that there were arguable issues regarding the design of the building in the s73 scheme. The Council submitted that the withdrawal of the reason for refusal regarding noise did not necessitate the matter going back to committee as there was still harm caused by the proposal and the existing development which justified the decision and the service of the notice. In addition, Option A was what would be necessary to remedy the planning harm if Option B was not deliverable, and as such was reasonable.
7. The Council submitted that they had adhered to the procedural timescales throughout the appeal process, including in relation to the filing of the proofs of evidence, and that there was sufficient time for the applicant to respond fully to this evidence. The applicant would have needed to respond to the proofs in any event and not all of the rebuttal evidence submitted directly related to the new scheme proposed by the Council, notably the evidence submitted by the Director of Education at the Archdiocese or the technical changes made to the s73 scheme regarding the Wetherby render.

Reasons

8. Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs can only be awarded where a party has behaved unreasonably and that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

9. I do not find that the Council's behaviour in refusing the s73 application or in serving the notice was unreasonable. Evidence was presented during the inquiry regarding the harm caused by the existing development and regarding the proposed s73 scheme which led to the dismissal of that appeal, which whilst not the end of the matter, is indicative of the fact that the Council's decisions were reasonable. Irrespective of the earlier discussions with officers, and following the withdrawal of the second reason for refusal, the harm caused by the development and the proposed development was material. The Council, with the final decision taken by committee, acted within its powers and I do not find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated in relation to the full award of costs.
10. I have not seen any evidence to indicate that the Council deliberately tried to undermine the applicant's case by introducing the alternative scheme at the proof of evidence stage, and I accept the Council's submission that they did so as an attempt to show how the notice could be complied with, and more generally how the building could be completed in accordance with the development plan. I consider that the Council was trying to be constructive and was not behaving unreasonably in the circumstances.
11. The inquiry was adjourned and rebuttal evidence was required, specifically regarding the newly proposed scheme. However, the evidence of the Council's architect did not only address the new scheme and the applicant would have needed to address the other elements (regarding the s73 Scheme, the building as currently built and the Original Permission) in any event. In addition, not all of the rebuttal evidence submitted by the applicant related solely to the new scheme.
12. I have had regard to the costs decision submitted by the applicant, and whilst this relates to a cost order against an appellant in a s78 planning appeal case, it does have some relevance in respect of the reasonableness of behaviour in trying to evolve a materially different scheme during the course of an appeal. I ultimately found that the notice could not be varied to include the Council's new scheme because it would cause injustice but this in itself is not sufficient to show that the Council acted in an unreasonable manner, and in the absence of any other factors, I do not find this to be the case.
13. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Zoë Franks

INSPECTOR