



Costs Decisions

Inquiry held on 20 and 21 April 2021

Site visits made on 8 April and on 26 April 2021

by Peter Rose BA MRTPI DMS MCMl

an Inspector appointed by the Secretary of State

Decision date: 16 August 2021

Costs applications in relation to Appeal Ref: APP/A5270/W/20/3264195 92-100 Warwick Road, Ealing W5 5PT

- The applications are 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 applications are made by Walker Warwick Limited for a full or partial award of costs against the Council of the London Borough of Ealing.
 - The Inquiry was in connection with an appeal against a failure to give notice within the prescribed period of a decision on an application for planning permission. The development proposed is 'demolition of existing buildings and redevelopment to provide a mixed-use development extending to 5 storeys in part comprising 20 residential apartments and 5 mews houses (Class C3); 95 sqm of commercial floorspace (flexible Class A1, A2, D1 or B1 use), together with associated landscaping, cycle and refuse storage, parking and new access arrangements from Warwick Road'.
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Decisions

1. The applications for full and partial awards of costs are refused.

The submissions for Walker Warwick Limited

2. The application for a full award is that the appellant has lost the opportunity to fight the appeal and deal with the Council's case on the basis that no contribution for affordable housing can be justified. The appellant seeks a full costs award if it is unable to succeed with its appeal based on the events following the Inquiry.
3. The basis for a partial award is that the appellant has wasted a huge amount of time and money dealing with an issue post-Inquiry relating to the final terms of its undertaking and which the Council has misunderstood and/or failed to properly inform itself.

The response by the Council

4. The Council understood that the appellant's unilateral undertaking would adopt the components/terms set out within the agreed Statement of Common Ground. Instead, the appellant's completed undertaking was not in accordance with those arrangements and evidence considered at the Inquiry. It instead required the Council to respond to new terms and matters not raised at the event.

Reasons

Full award

5. This application is contingent upon a dismissal of the associated planning appeal. For the reasons set out in my accompanying decision, the appeal has been allowed and the circumstances of the full application do not arise.

Partial award

6. The Planning Practice Guidance (the Guidance) identifies various examples of unreasonable behaviour by a local planning authority, and these include providing information that is shown to be inaccurate.¹
7. Review mechanisms were presented to the Inquiry and these were identified as signed and agreed within the 'Compromised Area of Common Ground Affordable Housing Financial Viability' (Table 3.0).²
8. Nevertheless, accompanying correspondence from the appellant to the Council indicates that the detailed wording of the heads of terms was still to be the subject of continuing discussions between the parties.
9. The evidence shows that, on the first day of the Inquiry, a further draft of the undertaking was submitted to both the Council's advocate and its planning case officer. This was inclusive of amended definitions and wording and serves to indicate intended continuing discussions. Further, references made by the Council's advocate in discussion of the draft terms on the second day of the Inquiry do appear to have been consistent with those then latest terms. These included passing references to definitions of the target return, to substantial implementation, and to the substantial implementation target date.
10. The decision by the Council to oppose the scheme post-Inquiry due to details of the undertaking also contrasted markedly with its closing statement. The Council submitted that this was not a case where the authority was asking itself whether benefits are or are not outweighed by adverse impacts, and that it did not see there to be adverse consequences in light of current policy imperatives. It advised this was not a case where a balance needed to be struck, and that there was no reason not to allow the appeal. Rather, it submitted that amended provision for the reviews, to be addressed through the subsequent discussion, would instead be highly desirable.
11. Aside from the particular details in dispute, the form and content of the final undertaking were otherwise generally consistent with the terms listed in Table 3.0. Even so, the principle of some detailed changes to the final version was not unannounced, I have assessed those changes to be reasonable, and they were intended to be reflective of an on-going dialogue previously identified by the appellant.
12. Post-Inquiry, the Council has remained broadly committed to the headline particulars of Table 3 whilst, for reasons explained and demonstrated in very necessary and appropriate detail by the appellant, those terms have required significant adjustment, and with submission of accompanying justification.

¹ Paragraph: 047 Reference ID: 16-047-20140306

² See Statement of Common Ground signed and dated 16 April 2021

13. The terms of the unilateral undertaking are a matter for the appellant to progress and finalise. Those terms are complex, and the final undertaking involves significant later detail and supporting evidence.
14. It is clear that considerable effort has been made by the appellant post-Inquiry to conclude the undertaking's content and, significantly, to justify its terms for consideration as part of the planning decision. This included liaison with the Greater London Authority and appointment of a second viability consultant to respond to the Council's concerns, and supporting evidence was submitted from both.
15. Despite the position taken post-Inquiry by the Council, and requests for further dialogues between respective specialist consultants, the appellant's work has not been wasted, but has been necessary in demonstrating and justifying the planning merits of its own evolved position towards affordable housing. Those submissions made an essential contribution to my accompanying decision.
16. Although not raised in the same terms at the Inquiry, the Council is entitled, in principle, to take issue with detailed aspects of the subsequent changes to the undertaking as matters of planning merit, and those concerns were considered as part of the accompanying appeal decision and in the context of the appellant's various submissions.
17. Whilst there is no basis to the Council's own application for a partial award of costs, and notwithstanding the accuracy of the Council's contrasting understanding of matters post-Inquiry, on balance, I do not find unreasonable behaviour on the part of the authority resulting in unnecessary or wasted expense.

Conclusion

18. I therefore find that unreasonable behaviour on the part of the Council resulting in unnecessary or wasted expense incurred by the appeal, as indicated in the Guidance, has not been demonstrated. I conclude that the submission for a full award does not apply, and that a partial award of costs is not justified in this instance.

Peter Rose
INSPECTOR