



Costs Decision

Site visit made on 9 August 2021

by David Wyborn BSc(Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 October 2021

Costs application in relation to Appeal Ref: APP/H5390/W/21/3272166 5-7 Hammersmith Grove, 1-11 Glenthorne Road, 3 and 3A Hammersmith Grove, and 12 - 18 Beadon Road, London W6 0LH

- 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 Romulus Construction Limited for a full award of costs against the Council of the London Borough of Hammersmith & Fulham.
 - The appeal was against the refusal planning permission for vary condition 2 of planning permission Ref 2017/02717/FUL for the demolition of all existing buildings on the site and redevelopment to provide a building of between 8 and 14 storeys in height plus two basement levels, comprising of 466 sqm GEA retail/commercial space (Class A1, A2 or A3) at ground floor level to the south and west of the building; office entrance, reception and ancillary office/gallery space to the east and north of the building at ground floor level fronting Hammersmith Grove and Glenthorne Road; service area to west accessed from Beadon Road including 1 accessible parking space; Class B1 office space from first to thirteenth floors (23,878 sqm GEA); plant enclosure at roof level; 15 car parking spaces, gym, plant, cycle storage and ancillary retail/office space in the two basement levels.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

Reasons

2. The Planning Practice Guidance (the Guidance) advises, regardless of the outcome, costs may be awarded against a party who has behaved unreasonably and caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
3. The applicant seeks a full award of costs and the reasons are set out in the submissions. These are, briefly, because it is argued that the first two reasons for refusal are based on fundamental misconceptions and the third reason is and always was capable of being dealt with by condition.
4. I have taken into account all the Council's submissions, including the original Planning Report and letter of 28 July 2021, in justification of the Council's decision.
5. The Guidance gives examples of when a Local Planning Authority may be at risk of an award of costs against it and these include, in summary, failure to produce evidence to substantiate each reason for refusal on appeal and refusing planning permission on a planning ground capable of being dealt with by conditions.

6. In this case, the Council refused planning permission for three reasons and each reason needs to be justified.
7. In respect of the first reason, the Council made the case that the landscaping would be substantially different to the long term landscaping for the site, would be temporary in nature and that Phase 1 would only be a small area of the overall site. In terms of the soft landscaping the provision of this within planters does give weight to the case that this element of the scheme would be temporary. The Council explain that excavation and other works to deliver the double basement would most likely result in some, if not all, of the Phase 1 landscaping being affected. This has some logical basis given the extent of below ground works reasonably close to the Phase 1 landscaping. For the reasons set out in the decision, however, I consider that the balance falls in favour of the appellant on this issue. The majority of the Phase 1 hard landscaping would be permanent and would be consistent with the overall approved scheme. This conclusion is sufficient to allow the consideration of the scheme in two phases and to fall within the scope of s73 of the Town and Country Planning Act 1990 (as amended).
8. Nevertheless, this conclusion on the likely permanence of the landscaping is a matter of judgement based on the information available. If the balance had been in favour of the Council on this issue then I accept that the proposal to phase the works would not have fallen within the scope of s73. The Council provided sufficient, albeit brief, analysis to reasonably question the permanence of the Phase 1 works, including correctly concluding on the temporary nature of the soft landscaping. This was an adequate case to support its assertion with regard to the applicability of s73 within the first reason for refusal. This did not amount to unreasonable behaviour.
9. The second reason for refusal argues that the proposal is unacceptable in that it may delay the delivery of the office element of the development beyond the four year period and thereby undermine the regeneration objectives for Hammersmith Town Centre. However, as I have explained in the decision, the original permission did not require the completion of the office development once implemented.
10. The Council's case in this respect was vague and weak, and it did not adequately address the issue that the commencement of development within the four year period is not the same as ensuring that the development would be delivered. In my view, the Council did not provide satisfactory or convincing evidence of sufficient merit to substantiate this reason for refusal. This constitutes unreasonable behaviour.
11. The third reason for refusal concerned the considered unacceptable risks to humans, controlled waters and the wider environment which could result from the proposal. The concerns with potential contamination of the site as a whole was addressed in the original permission with suitably worded conditions. In response to the appeal proposal the Planning Report explains that the Council's Land Contamination Team raised no objection subject to the transfer of the contaminated land conditions from the original permission and for them to be reworded to apply to each phase.
12. I appreciate that the applicant argued that the land contamination conditions would not be necessary for Phase 1 of the development. However, it is dependent on the Council to analyse whether conditions would be necessary

and reasonable to address the considered harm and therefore would be able to make the development acceptable in that regard. The Planning Report did not engage in detail with the advice of the Land Contamination Team to reword the previous conditions to apply to both phases and the application was subsequently refused for this reason. The Guidance explains that refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs. This was a case where conditions could address this planning concern and had done so previously with the earlier permission. The Council should have been able to conclude this was the case in the Planning Report and the refusal of the application for this reason amounts to unreasonable behaviour.

13. Drawing all these matters together, the Council provided a sufficient case to question the merits of the landscaping to Phase 1 and this ultimately was largely a matter of judgement based on the information available. Consequently, its view on the applicability of the use of s73 to provide a phased development was not without some merit and the refusal of the application in terms of the first reason for refusal does not amount to unreasonable behaviour.
14. The approach of the Council in respect of the second and third reasons for refusal was unreasonable for the reasons explained. This led the applicant to have to set out evidence to address these matters at the appeal stage and this led to unnecessary and wasted expense in the appeal process.

Conclusion

15. In the light of the above analysis, I have found that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs is justified in relation to the second and third reasons for refusal.

Costs Order

16. 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 Hammersmith and Fulham shall pay to Romulus Construction Limited, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the appeal process in addressing the Council's second and third reasons for refusal, such costs to be assessed in the Senior Courts Costs Office if not agreed.
17. The applicant is now invited to submit to the London Borough of Hammersmith and Fulham, to whom a copy of this decision has been sent, details of those costs with a view to reaching an agreement as to the amount.

David Wyborn

INSPECTOR