



Costs Decision

Site visit made on 8 November 2021

by David Wyborn BSc(Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 December 2021

Costs application in relation to Appeal Ref: APP/E0345/W/21/3277248 The Faculty, 23-27 London Road, Reading RG1 5BJ

- 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 Reading Borough Council for a partial award of costs against The Faculty Ltd.
 - The appeal was against the refusal of planning permission for the change of use of The Faculty from 16 serviced apartments (Use Class C1) to 15 residential flats (Use Class C3).
-

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 Guidance explains that costs can only be awarded in relation to unnecessary or wasted expense at the appeal, although the behaviour and actions at the time of the planning application can be taken into account in the Inspector's consideration of whether or not costs should be awarded.
4. The Council seek a partial award of costs on the basis of, it is argued, that insufficient information was submitted on viability at the application stage and that when this information was submitted at the appeal stage this led to additional and unnecessary work, including the appointment of consultants. Additionally, the Council seek an award of costs in respect of the legal and monitoring fee work it undertook at the appeal stage.
5. The appellant has responded to all these points in the written submissions and I have taken all these arguments into account. This includes that they consider that sufficient information was submitted at the application stage with clear explanations why the scheme was not viable to provide affordable housing. It is explained that the Financial Viability Assessment included at the appeal stage was submitted to protect the appellant's position.
6. The appellant raises concerns with the Council missing deadlines for the submission of information and that the Council's consultants were instructed late in the process, such that they were not able to make detailed comments and provided little real evidence for their position.

7. Although agreement on a commuted sum was agreed with the Council, the appellant considers that the Council then did not greatly assist with the completion of a legal agreement and sought charges which had not been mentioned earlier and which were disproportionate for the amount of work that was required. The appellant made offers to cover what they considered to be reasonable legal fees of the Council but they were not accepted and ultimately the legal agreement was not completed.
8. Examining the affordable housing issue, the Planning, Design and Access Statement at the initial application submission stage argued that because, in summary, the scheme was reverting to the original permission with the same number of residential units it would not be appropriate for the Council to seek an affordable housing contribution.
9. It appears that discussions ensued on the proposal and the appellant supplied some financial information and part of this is summarised in the Planning Report. However, Policy H3 of the Reading Borough Local Plan (2019) applies to the development and this requires as a starting point an affordable housing contribution and the policy explains the onus will be on the developer/landowner to clearly demonstrate the circumstances justifying a lower affordable housing contribution. Background to the provision of affordable housing was supported at that time by the Affordable Housing – Supplementary Planning Document (adopted July 2013) (the 2013 SPD)¹ which includes the approach to the information that is required to be submitted in respect of viability assessments. This is broadly consistent with the advice in the Guidance regarding the approach to viability.
10. There is clearly a dispute between the parties as to whether sufficient information was submitted at the application stage to determine whether the scheme could deliver an affordable housing contribution. The Planning Report explains that the Council had sought a viability assessment. While the subsequent information provided by the appellant set out some specific information, on the evidence available to me, the level of detail in that additional information did not form a formal viability assessment of an appropriate standard as detailed in the advice in the 2013 SPD and the Guidance.
11. At the appeal stage a Financial Viability Assessment was submitted that met with the approach to best practice. The Guidance indicates that an appellant may be at risk of an award of costs in relation to only supplying relevant information at appeal when it was requested, but not provided, at the application stage. I consider that the submission of the detailed Viability Assessment at the appeal stage, when it was sought by the Council at the application stage, constitutes unreasonable behaviour. It was key information to the determination of one of the main issues and would have assisted the Council in assessing the application had it been submitted earlier.
12. This viability information was not before the Council at the application stage and understandably it sought professional and specialist advice on the details at the appeal stage. I do not consider that this should be judged as simply seeking internal advice that the Council would normally be expected to absorb because of the nature and extent of the new evidence provided at the appeal

¹ This is referenced in the reason for refusal. After the decision was made the Council adopted the Reading Borough Council Affordable Housing Supplementary Planning Document (March 2021).

stage. However, it does appear that the Council instructed their consultants just before a meeting with the appellant and their viability consultants, and that the detailed input of the Council's consultants appears to have been reasonably limited. Nevertheless, it did allow a discussion to take place between the consultants for both main parties and this led to an agreement, without prejudice, on an affordable housing contribution.

13. I consider that if the Viability Assessment had been submitted at the application stage this discussion would have taken place earlier and the costs of the Council's consultant's would, it appears from the comments of the Council, likely to have been paid by the appellant at that stage in a standard way. Furthermore, it seems to me that agreement, or at least a much greater narrowing of the disagreement, on the need for an affordable housing contribution could have been reached at the application stage and this work and discussions would not have been necessary to be undertaken during the appeal process.
14. Even if the costs of the Council's consultants could not have been recovered at the application stage, with the Viability Assessment being submitted at the appeal stage, this still led to the Council through their consultants in costs at the appeal stage. This, in my view, because of the timing of the submission of the viability information, led the Council to undertake unnecessary expense in the appeal process which would have been avoided if the viability evidence had been submitted as requested.
15. In terms of the legal agreement, it appears that the appellant amended a template for an agreement that the Council had used previously to provide an affordable housing contribution and that the Council considered this appropriate. The information indicates that this was altered by the appellant to a Unilateral Undertaking. There is frustration on both sides that this agreement could not be progressed and this is expressed in the written costs submissions. However, the Council appear to have undertaken only initial and a fairly limited extent of detailed legal work on the agreement because its fees were not agreed to be paid in the way that it required. Consequently, no material level of unnecessary or wasted expense was incurred by the Council in the appeal process in respect of the legal work. Accordingly, I do not find that this situation meets the tests necessary to demonstrate unreasonable behaviour and wasted or unnecessary expense in the appeal process.
16. In the light of the above analysis, I find that the submission of the Viability Assessment at the appeal stage constitutes unreasonable behaviour for the reasons explained and this then led to unnecessary expense in the appeal process. This additional and unnecessary expense is limited, in my judgement, to the work undertaken by the Council's viability consultants as the planning officer time was required to be part of sensible on-going case management associated with the review and processing of a case following the lodging of an appeal. A partial award of costs is therefore justified in the limited circumstances outlined above.

Conclusion

17. In the light of the above analysis, I have found that, in the circumstances described above, 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.

Costs Order

18. 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 Faculty Ltd shall pay to Reading Borough Council, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in the appeal process by the Council's viability consultants, such costs to be assessed in the Senior Courts Costs Office if not agreed.
19. The applicant is now invited to submit to The Faculty Ltd, 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