



Costs Decision

Site visit made on 7 December 2021

by R Hitchcock BSc(Hons) DipCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 December 2021

Costs application in relation to Appeal Ref: APP/X5990/W/21/3280572 64-65 Long Acre, London WC2E 9SX

- 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 Technosite Ltd and Good Invest Ltd for a full award of costs against City of Westminster Council.
 - The appeal was against the refusal of planning permission for the demolition of existing third floor structure; new and replacement fenestration throughout the application site; glass roof over the internal lightwell; two-storey infill extension within 64 Long Acre; revised air-conditioning plant; and other associated alterations.
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Decision

1. The application for costs is allowed in part in the terms set out below.

Reasons

2. Paragraph 30 of the Government's Planning Practice Guidance (PPG) advises that, irrespective of the outcome of an appeal, costs may 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.
3. Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals.
4. The Council's delegated report provides a commentary on the assessment of the individual elements of the planning application. As matters of planning judgement, the Council was entitled to find as it did in respect of the 3 elements of concern – the extension, the canopy and altered rear window openings, having regard to the relevant policies in the development plan. These elements would materially affect the external appearance of the building.
5. However, having concluded that the proposals would adversely affect the character and appearance of the building, I find there is little detailed assessment of the resultant effect on the significance of the Covent Garden Conservation Area (the CA). Although it is often the case that one conclusion follows the other in relation to the respective matters of character or appearance, there is some distinction in the mechanics of those exercises as they relate to individual buildings and Conservation Areas.
6. As discussed in *Burroughs Day v Bristol City Council* [1996] 1 PLR 78, which was referred to by the applicant, the materiality of the effect of development is

dependent on the circumstances in which the changes are observed. Whilst the alterations to the buildings would appear material to nearby observers, substantially limited to those in nearby upper floor residences, their observable effect on the much wider area of the CA was a different proposition.

7. In the substantial absence of any qualified assessment as to the effects on the CA, other than that the concerning elements would be visible from those private properties, I find that the Council's assessment was lacking. It also failed to refer to the implications of the referenced caselaw, as a material consideration, and whether it found it appropriate to apply its findings or not in the circumstances of the case.
8. The Council's report did not originally identify a public benefit in the improvements on the public face of the building. Nor did it appear to factor the potential for the proposal to replace the necessity for screening and reduction in rooftop units required in permission Ref 18/04254/FULL, as highlighted in the supporting statement accompanying the planning application. However, as matters of planning judgement both in terms of the historic heritage and overall planning assessment, this was for the Council to determine and attribute weight.
9. Despite providing some clarification in regard to the front windows for the purpose of the appeal, I find the Council's overall approach to the assessment of the effects on the heritage asset to be vague, generalised and without supporting objective analysis. It therefore amounts to unreasonable behaviour as identified in the PPG.
10. The applicant is critical of the Council's degree of engagement during the application. From the evidence before me, it appears that there was dialogue and that the Council sought additional information in relation to noise and light issues from the applicant but failed to provide initial notification of its concerns in relation to the design effects of the proposals. This would have been an opportune time to engage to a greater level in seeking to resolve concerns relating to the effects on the character and appearance.
11. However, I acknowledge that at that time, the Council considered that the significant majority of the proposals to be in conflict with the development plan. As the applicant had not sought pre-application discussions prior to the submission of the planning application, as advocated in the National Planning Policy Framework (the Framework), changes to the 3 more fundamental elements of the proposed development would potentially be tantamount to a new and distinct proposal given the Council's conclusions. In the circumstances, I find a request to withdraw the application to enable further discussions was not unreasonable.
12. The applicant did seek to address the Council's concerns by submitting amendments to the rear window materials and alter some more visible rear openings. In demonstrating that a large part of the Council's concern in relation to windows could have been addressed, it was open to the Council to consider that the matter could have been resolved through the use of planning condition/s, as it had done in the previous permission for the site. However, as some concern remained in relation to the shape of the openings on Elevation 4, which were affected by the position of the canopy, I find it was not unreasonable to retain reference to the windows in the Decision Notice.

13. The applicant contends that the detail of the other contentious elements of the development could have been controlled through the use of planning conditions. Although I have accepted the minor amendments to the originally submitted scheme for the purposes of the appeal, it does not necessarily follow that the alterations to the canopy and extension could have been dealt with through planning conditions. The Council would not have been able to ascertain whether or not the extent to which those elements could have been altered would have allowed an agreeable solution. Had it done so, matters such as structural integrity or other performance requirements, may have resulted in a condition that would have nullified the benefit of any permission. This would have failed the tests for conditions described in Paragraph 56 of the Framework and the advice in the PPG.
14. The applicant's case relied in part on earlier decisions made by the Council. Having considered those arguments, I find that they did not provide determinative precedent decisions. Although the Council had recognised that the rear elevations of the buildings were much altered and added little to the CA, the development in the earlier case was considered acceptable in design terms. It was therefore distinct from the circumstances of this case. Although a development at 63 Long Acre had some similar elements to the proposal they did not result in the same issues as identified by the Council. It was not therefore a matter of significant weight in the determination of the case I have considered.
15. For the above reasons, I conclude that the Council failed to meet the guidance set out in the PPG in relation to the proposal's impact on the CA. This leads me to the conclusion that it has acted unreasonably in the particular circumstances of the case. This has subsequently caused the applicant some wasted expense in the appeal proceedings. A partial award of costs is therefore justified.

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 City of Westminster Council shall pay to Technosite Ltd and Good Invest Ltd the costs of the appeal proceedings described in the heading of this decision insofar as they relate to the matters of the effects of the development on the Covent Garden Conservation Area.
17. The applicant is now invited to submit to the Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

R Hitchcock

INSPECTOR