



Costs Decision

Inquiry Held on 9 to 11, 16 to 18 & 30 November, 7 & 13 December 2021 and 7 January 2022

Site visit made on 11 January 2022

by Beverley Wilders BA (Hons) PgDurp MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 April 2022

Costs application in relation to Appeal Ref: APP/A5270/W/21/3275781 54-58 Stanley Gardens, Acton W3 7SZ

- 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 Mr I Hutchinson (Dylon 2 Limited) for a full award of costs against the Council of the London Borough of Ealing.
 - The inquiry was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for demolition of the existing building and redevelopment by erection of a ground and part four, part 5, part 6, part 7 upper floors for a mixed residential (Class C3) comprising 76 units (44 x 1bed; 26 x 2bed and 6 x 3bed) and commercial (Class B1(a)) uses comprising 696m², together with ancillary parking space for 10 cars, cycle and bin stores and landscaped communal court at first floor level and landscaped communal roof terraces.
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Decision

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

Reasons

2. Paragraph 030 of the National Planning Practice Guidance (NPPG) advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
3. Paragraphs 046 to 049 set out the circumstances when the behaviour of a local planning authority might lead to an award of costs. These can either be procedural, relating to the appeal process or substantive, relating to the planning merits of the appeal.
4. Examples of unreasonable behaviour by a local planning authority includes failing to determine an application within the time limits and to explain their reasons for not reaching a decision; withdrawal of any reason for refusal; preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations; failure to produce evidence to substantiate each reason for refusal on appeal; vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis and not reviewing their case promptly following the lodging of an appeal against refusal

of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.

5. The appellant's case is essentially that the Council failed to determine the application within the statutory timescale and has not offered any reasons in evidence for its failure to do so; that it failed to acknowledge that it lacked a 5 year housing land supply (5yrHLS) and the consequential implications of that in a timely manner; that in considering the agent of change principle the Council failed to have regard to the extent to which the existing approved residential uses in the vicinity of the appeal site already constrained the range of potential future uses on neighbouring sites including 10 Stanley Gardens; that the Council failed to accept the application of vacant building credit (VBC) until mid-way through the Inquiry despite it being forewarned about the implications of this by letter in August 2021; that the Council's case in relation to First Homes was inconsistent with how it had considered the issue at the Filmworks development and its whole case on affordable housing was manifestly unreasonable and crumbled once it was subject to scrutiny and finally that the Council's case on highways was always unreasonable and was ultimately not defended.

Failure to determine

6. As can be seen from my decision, I have dismissed the appeal as I consider that some of the Council's objections to the proposal are justified. Under these circumstances and having regard to paragraph 048 of the NPPG, I do not consider that the Council's failure to determine the application within the time limits amounts to unreasonable behaviour which has directly caused the appellant to incur unnecessary or wasted expense in the appeal process. The Council issued a decision notice dated 3 August 2021, after the appeal had been lodged, setting out its putative reasons for refusal and these formed the basis of its case at appeal. Similarly, my dismissal of the appeal means that the Council's behaviour has not prevented or delayed development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

Five Year Housing Land Supply

7. With regard to 5yrHLS, the Council states in response to the appellant's costs application that it did and does acknowledge that it cannot demonstrate a 5yrHLS and that the tilted balance applies. However, this position is not borne out by the evidence before the Inquiry. As can be seen from my decision, whether or not the Council can demonstrate a 5yrHLS and consequently whether the presumption in favour of sustainable development applies is one of the main issues. All of the main issues were discussed and agreed by the main parties at the case management conference held prior to the Inquiry demonstrating that at that point (September 2021), the Council's position was not as is stated now.
8. The evidence of the Council in relation to 5yrHLS is primarily set out in its Statement of Case and in Mr Banks's proof of evidence with Mr Cuthbert's proof of evidence also referring to this issue. Nowhere in this evidence does the Council categorically state that it accepts that it cannot demonstrate a 5yrHLS or that that the tilted balance applies with reference being made to the "potential implications of our present inability to be able to confirm the existence of a five-year land supply" and "the potential trigger of the

presumption and the tilted balance process” (para 5.5 of Mr Banks’s POE). Further, the Statement of Common Ground signed on 1 September 2021 states that whether the Council can demonstrate a 5yrHLS and whether the presumption in favour of sustainable development applies are matters in dispute (paras 10.2 & 10.3). The first point at which the Council appears to have accepted that the tilted balance applies was when Mr Banks gave evidence on the first day of the Inquiry, prior to that, the Council’s position was far from clear.

9. The Council’s evidence refers to various sources of information regarding its supply and delivery position but does not state what it considers its 5yrHLS to be, noting that it has not produced an annual housing supply document since 2015. Under these circumstances and noting the Council’s far from clear position in relation to 5yrHLS prior to the Inquiry opening, the appellant commissioned housing supply evidence and I received proofs of evidence from Mr Butterworth and heard evidence from him at the Inquiry. The extent of any housing supply shortfall is a relevant consideration in the determination of the appeal.
10. I note the Council’s view that it was the appellant’s choice to produce the housing supply evidence that it did. However, it was appropriate for the appellant to commission supply evidence given the importance of the issue and the lack of evidence from the Council. I consider that prior to Inquiry, the Council’s position in relation to 5yrHLS and whether the tilted balance applies was far from clear and that its failure to acknowledge its lack of 5yrHLS prior to the opening of the Inquiry directly caused the appellant to incur unnecessary or wasted expense in the appeal process in relation to this issue.

Agent of Change

11. The Council states that the agent of change principles apply regardless of the existing surrounding developments and that the appellant failed to demonstrate sufficiently how the proposed development would not hinder the future development and intensification of neighbouring sites, only considering the existing baseline of noise, light, air quality etc and not the potential baseline. It further states that the owners of neighbouring sites to the north intend to completely re-develop these sites.
12. At the Inquiry, Mr Banks accepted that in reaching a conclusion regarding the agent of change principle, he had not had regard to existing residential uses in the immediate surrounding area. However, as stated above, irrespective of this the Council’s concerns remain about the effect of the proposal on existing and future industrial uses within the Locally Significant Industrial Site (LSIS) and the evidence in relation to this produced by the appellant.
13. Therefore, having regard to this and despite finding in favour of the appellant in relation to this issue, I do not consider that the Council’s admission during the Inquiry in relation to existing residential uses amounted to unreasonable behaviour as it was only one aspect of the Council’s case in relation to this issue. Consequently it did not directly cause the appellant to incur unnecessary or wasted expense in the appeal process in relation to this issue.

VBC and Affordable Housing

14. Notwithstanding the written evidence regarding VBC, at the Inquiry the Council's housing witness accepted that VBC does in fact apply. Though I note the Council's comment in respect of the witness being intimidated by the Inquiry process and that other Council witnesses did not agree with her position, she was nevertheless representing the Council in relation to this issue. As a consequence of the witness conceding this point, the Council withdrew its putative reason for refusal relating to affordable housing and the Inquiry did not hear evidence from either of the viability witnesses who had prepared proofs of evidence.
15. The Council's failure to substantiate and late withdrawal of its putative reason for refusal relating to affordable housing amounts to unreasonable behaviour and this caused the appellant to incur unnecessary and wasted expense in the appeal process in relation to this issue, in terms of the evidence it produced on the application of VBC and the implications of this on the amount of affordable housing being provided.
16. As can be seen from my decision letter, the application of VBC to the proposal means that the amount of affordable housing being proposed exceeds what is necessary to comply with the relevant affordable housing policies. Consequently, there was no need for me to consider the viability evidence in order to assess whether more affordable housing could be provided as part of the proposal.
17. However, the Council points out that even if VBC is applied, unless a proposal meets all of the criteria listed in part C of London Plan (LP) Policy H5, then detailed supporting viability evidence is required to be submitted as part of the application. The proposal does not meet all of the criteria in that it is not consistent with the relevant tenure split set out in LP Policy H6 and in any event paragraph 4.5.15 of the LP states that schemes claiming the vacant building credit must follow the viability tested route. Therefore, in order to comply with LP housing policies, the proposal must be supported by viability evidence. Under these circumstances and notwithstanding the unreasonable behaviour of the Council in relation to VBC and the late withdrawal of the affordable housing reason for refusal, I consider that the preparation of viability evidence by the appellant does not amount to unnecessary or wasted expense.
18. With regard to the Council's position in relation to First Homes, the appellant's affordable housing witness accepted that the proposed affordable housing offer is not policy compliant in terms of tenure split. In written evidence and at the Inquiry the Council explained its position in terms of tenure and its objection to a scheme solely comprising First Homes. Although it became apparent during the Inquiry that the Council has approved another scheme at The Filmworks which includes a significant number of First Homes, this did not alter the Council's position in relation to the tenure split on offer as part of the proposal. Although I give weight to the affordable housing offer in my decision despite it not being wholly policy compliant, I do not consider that the Council's continued objection to solely First Homes to be unreasonable, given the tenure mix requirements of LP Policy H5 or that there is evidence that it sought to intentionally mislead the Inquiry in relation to this matter by not providing details of the Filmworks scheme following a freedom of information request.

19. To conclude on this issue, as set out above, the Council's failure to substantiate its position in relation to VBC at the Inquiry and its late withdrawal of the putative reason for refusal relating to affordable housing amounts to unreasonable behaviour which resulted in unnecessary and wasted expense for the appellant in providing evidence in relation to the application of VBC and the implications of this on the amount of affordable housing being provided by the proposal.

Highways

20. Though not a putative reason for refusal, highways issues were a matter of disagreement between the parties as to whether the impact of the proposal justified a number of highways related financial contributions. Both parties presented written highways evidence to the Inquiry, though due to illness the Council's witness was unable to give evidence in person and the Council subsequently chose not to defend its position in relation to this matter.
21. The Council argues that it was the appellant's choice to provide evidence on this matter even though it was not a putative reason for refusal. Be that as it may, the Council's request for financial contributions relating to highways meant that the appellant had to provide evidence in relation to this issue. How they chose to present that evidence was a matter for them. Though it is unfortunate that the Council's witness was ill during the Inquiry, the Council had the option to secure a replacement witness, to seek an adjournment or to seek to rely on its written evidence on this matter. Instead it chose to remove its highway objection to the proposal during the Inquiry. I consider that this was unreasonable behaviour and that it directly caused the appellant to incur unnecessary or wasted expense in the appeal process in relation to this issue.

Conclusion

22. For the reasons set out above I find that unreasonable behaviour resulting in unnecessary or wasted expense as described in the NPPG has been demonstrated in relation to the issue of 5yrHLS, VBC and highways. Accordingly a partial award of costs is justified.

Costs Order

23. 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 Council of the London Borough of Ealing shall pay to Mr I Hutchinson (Dylon 2 Limited), the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to the issue of 5yrHLS, VBC and highways; such costs to be assessed in the Senior Courts Costs Office if not agreed.
24. The applicant is now invited to submit to the London Borough of Ealing, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Beverley Wilders

INSPECTOR