



Costs Decision

Site visit made on 21 March 2022

by Rachael Pipkin BA (Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 May 2022

Costs application in relation to Appeal Ref: APP/J0350/W/21/3276198 17 to 31 Elmscott Lane, Slough SL1 5QS

- 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 Joe Mirenpass Limited for a full award of costs against Slough Borough Council.
 - The appeal was against the refusal of planning permission for development described as 'Revised Outline planning application with all matters reserved for the demolition of existing retail/residential buildings. Construction of three storey plus mansard building, over basement, consisting of associated parking at basement level, retail/storage at ground floor level and the formation of 9 no. three bedroom flats, 19 no. two-bedroom flats and 56 no. one-bedroom flats, including 20% affordable housing on site, at first, second, and mansard floor levels. Associated landscaping and realigned access to Elmscott Lane.'
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Decision

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

Procedural Matter

2. An application for costs was also made by Slough Borough Council against Joe Mirenpass Limited. This application is the subject of a separate Decision.

Reasons

3. Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.
4. The PPG advises that 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 planning applications or appeals. The PPG sets out under paragraph 49¹ several examples of the types of behaviour that may amount to unreasonable behaviour. The applicant considers that the Council, in refusing the scheme, has demonstrated many of these.
5. The PPG also advises that local planning authorities are at risk of an award of costs on procedural grounds. Examples of this including not reviewing their

¹ Paragraph: 049 Reference ID: 16-049-20140306

case promptly following the lodging of an appeal against refusal of planning permission as part of sensible on-going case management. The applicant considers that had the Council done so, then reasons 2, 3 and 4 would have been recognised as no longer sustainable.

6. The appeal scheme was a revised scheme. It followed an earlier scheme, dismissed on appeal², for a larger development. The applicant asserts that the Council failed to attach weight to that earlier appeal decision where certain matters had already been found acceptable by an Inspector. The applicant has submitted an Opinion of Counsel in relation to this matter which he asserts the Council ignored.
7. The Council refused the appeal scheme on the basis of harm to character and appearance, harm to occupants of 33 Elmshott Lane (No 33), housing mix, insufficient affordable housing, and failure to secure contributions towards local infrastructure. The appeal scheme was not acceptable for a number of reasons which had previously been identified as shortcomings in the earlier scheme. Simply reducing the size of the building, changing the housing mix and quantum of development on site would not automatically make the scheme acceptable. Finding the scheme unacceptable on similar grounds to the earlier scheme does not mean that the Council ignored the findings of the previous Inspector. There is nothing unreasonable in this.
8. In respect of the reason for refusal relating to the loss of amenity to neighbouring residents at No 33, the applicant asserts that the previous Inspector had made it clear that the relationship of the proposal with No 33 could not be used as a reason for refusal of the previous scheme. On that basis, it could not therefore be a reason for refusal for what is a reduced scheme. However, I do not read that earlier decision as saying there would not be harm to the amenities of occupants of No 33. Indeed, harm to the living conditions of occupiers of No 33 was included in the planning balance. The Council has not therefore introduced a new reason for refusal.
9. It has been alleged that the Council deliberately concealed relevant evidence from the previous Inspector in relation to the grant of permission for a new 3-storey building some 4m away from similar windows on the opposite flank wall of the pair of properties to which No 33 is part. However, I have no evidence that there was any deliberate withholding of information in relation to the earlier appeal. The schemes are not directly comparable either in terms of the size of the proposed buildings, the orientation of the windows and their existing relationship with neighbouring development. The Council was therefore under no obligation to share this information. I do not find that the Council has behaved unreasonably in this regard.
10. I appreciate that the applicant considers that a refusal on the lack of provision of infrastructure may be considered a new reason for refusal given this was not a matter upheld in the previous appeal. However, it was reasonable for the Council to have refused the scheme on this basis in the absence of a legal agreement to secure such provision, which is what they did.
11. A draft Unilateral Undertaking (UU) under section 106 of the Town and Country Planning Act 1990 (as amended) was submitted as part of the appeal. The applicant asserts that the draft Heads of Terms for the section 106 agreement

² APP/J0350/W/19/3224244

(S106 agreement) could have been agreed thereby addressing the fourth reason for refusal but the Council did not engage in this.

12. I agree that matters in relation to contributions to local infrastructure could potentially have been resolved thereby reducing the points of dispute at appeal. However, submitting a S106 agreement does not necessarily mean that those concerns would have been addressed. Furthermore, there were more fundamental concerns in relation to the provision of affordable housing, which will be seen from my decision, I have found to be inadequate. Even if the UU was accepted in respect of local infrastructure, in failing to secure an appropriate contribution to affordable housing, an appeal would not have been avoided.
13. As part of the appeal, the applicant altered the provision of affordable housing. However, since this had not been consulted upon, it could not be taken into account. Moreover, it was open to the applicant to either make this provision as part of his application, knowing what the policy requirement was, or to provide robust justification for the level of provision in the form of viability information. He selected not to do so. In the absence of this, I do not agree that the matters in relation to affordable housing could have been resolved thereby avoiding an appeal. As such the Council's approach on these matters was not unreasonable.
14. The applicant sought a deferral to enable certain matters to be resolved in relation to the planning obligations, housing mix, affordable housing and the effect on No 33. In writing to the Council, the applicant also commented on the requirement for a planning balance and the lack of a 5 year housing land supply (5YHLS). It is the applicant's view that several matters in dispute in the appeal could have easily been resolved prior to a decision being made but the Council ignored the applicant's request.
15. The applicant also sought deferral by the Committee which was rejected. He considers that the Council acted unreasonably in that it was inconsistent in this regard, having allowed another scheme at Aspire 2 Site, Corner of Church Street and Herschel Street³ to be deferred to allow time for the development to provide more information and to work with the Council to resolve matters.
16. The Council has however identified that it had some fundamental concerns with the appeal scheme. I do not know what its concerns were with the Aspire 2 scheme and whether they were comparable to the Council's level of concern in this case. I therefore cannot conclude that the Council has been inconsistent.
17. I am told Members debated matters already found acceptable by the previous Inspector. However, there is nothing in the Council's reasons for refusal that introduce matters upon which the previous Inspector found to be acceptable. On this basis, I do not find that the goal posts had been shifted to criticise elements that were previously considered acceptable, as asserted in the applicant's legal opinion.
18. The Council did not consider it was obliged to work with the applicant to resolve issues prior to determination of the application owing to the number of issues it regarded as being so significant as to not be able to overcome them. Whilst noting the Council's position, it seems to me that a number of matters

³ Council Ref: P/01508/042

- may have been addressed, notably in relation to infrastructure provision, housing mix and potentially affordable housing, had the Council engaged earlier on in the process. There is, however, nothing before me to suggest that the Council would find the effect on character and appearance acceptable.
19. In this regard, I therefore consider that the issues on appeal may have been narrowed although I do not consider an appeal would have been avoided. Nevertheless, not working with the Council to address as many issues as possible and not in accordance with the duties set out under paragraph 38 of the National Planning Policy Framework (the Framework) to work proactively with applicants to secure developments that will improve the economic, social and environmental conditions of the area does amount to unreasonable behaviour.
20. On the other hand, it seems to me that had the applicant sought pre-application advice then a number of these areas of dispute may also have been resolved prior to the application being submitted. However, the applicant chose not to do so. Whilst this does not mean that the applicant had not approached the planning process in the correct manner, it seems to me that given the size of the scheme, it would have been prudent to have done so. Indeed, given the conclusions of the previous Inspector in relation to a costs application for that earlier appeal on the site, where no pre-application advice was sought, it is surprising that yet again this was not done for a scheme of the size proposed here. I also appreciate that having pre-application discussions would not necessarily avoid an appeal.
21. The applicant has argued that given recent criticism of the Council and its failures, seeking pre-application advice would not be worthwhile. In support of this position, he has drawn my attention to a recent Costs Decision in relation to an appeal at 4-10A Alexandra Road, Slough⁴ where the Inspector concluded that the Council had acted contrary to well-established caselaw. However, although costs were awarded against the Council on that occasion that was in relation to a different scheme and different set of circumstances and on the basis of different evidence. It does not, in my view, translate into any kind of failure to provide pre-application advice or for that to be not sought in this case.
22. Overall, I find that both parties could have engaged more effectively in the application process, both pre and during. However, given that pre-application advice was not sought and that the scheme did not fully address the matters from the previous scheme, I consider that on balance the Council's behaviour in proceeding to determine the scheme was not unreasonable.
23. The costs regime allows for the behaviour and actions at the time of the planning application to be taken into account in assessing whether costs should be awarded or not in certain circumstances. However, there were issues with the appeal proposal which were made known to the appellant. Had the applicant sought pre-application advice following the dismissal of the previous appeal, this may have been avoided. Simply basing a claim for costs on the fact that the parties do not agree on the degree of harm, is not the intention of the costs regime. I therefore do not find that the Council's behaviour during the application process has been unreasonable.

⁴ APP/J0350/W/19/3243603

24. The applicant considers that the Council has not presented full and detailed evidence to support its case. It has also ignored precedents. In this respect, the applicant referred to a number of higher density schemes approved by the Council within the Borough where no family or larger housing units have been provided. In its assessment of the appeal scheme, the Council has been inconsistent in its decision making, failed to produce evidence to substantiate its reason for refusal on appeal and made vague, generalised or inaccurate assertions about a proposal's impact, unsupported by any objective analysis.
25. I have found that the location would be suitable for larger sized units for the reasons set out in my decision. However, I concur with the applicant that the Council has not explained why it has allowed schemes with no larger sized units in some locations but not at the appeal site. The absence of evidence in this regard does amount to unreasonable behaviour.
26. The applicant has referred to the Council's lack of reference to Crossrail and its contribution to the sustainability of the site. However, there is nothing within the Council's submissions to suggest that the Council does not recognise the sustainability of the location.
27. The applicant has been critical of the Council's approach in assessing the scheme and its interpretation of the housing requirements set out within the Strategic Housing Market Assessment (SHMA) February 2016. However, it will be seen from my decision that the SHMA evidence has been presented in a number of different ways. The Council has not rigidly adhered to the requirement in its decision but has sought an appropriate housing mix to support mixed and sustainable communities. This is not unreasonable.
28. I note the applicant's assertion that since the Council made no comment on grounds 7 and 8 in relation to the first reason for refusal, it no longer can sustain this reason. However, there is nothing before me to suggest that is the case. The Council has set out its reasons within both its officer report and its statement of case. I accept that within the Alexandra Road costs decision, the Inspector concluded that since the Council had not commented further that implied that it had no objection. However, the circumstances are different in this appeal. It is evident that the Alexandra Road Inspector was referring to a revised scheme whereas in the appeal before me, the scheme had not been revised and therefore the submissions including the original officer's report remain relevant to the consideration of such matters and could be relied on the Council.
29. The Council failed to refer to the lack of a 5YHLS and the application of paragraph 11 of the Framework. Had they done so, the applicant considers the appeal could have been avoided. The officer report made minimal reference to these matters. Given that the Council was found to have behaved unreasonably by the previous Inspector in not providing information on its housing land supply position, the limited information yet again on this matter is a little odd.
30. I agree with the applicant that in not undertaking a full balancing exercise in accordance with the provisions of paragraph 11, amounts to vague, generalised assertions about the proposal's impacts. This is certainly a shortcoming of the Council's approach. However, there is nothing before me to suggest that the applicant has incurred unnecessary expense in defending his position in this regard as he has not challenged the Council's position, merely stated it.

31. Drawing together my assessment, I have found that in most respects the Council has behaved reasonably in its determination of the planning application which has resulted in this appeal. However, within its assessment I have found the Council has not fully substantiated its reason for refusal, notably in regards to the housing mix and requirement for larger sized units compared to other schemes. It seems to me that the applicant would have spent time gathering evidence to support its position and incurred some limited costs in this regard. With regards to the 5YHLS, whilst the Council has behaved unreasonably in not setting out the details of its planning balance, there is no evidence that this has either led to the appeal or incurred additional work for the applicant.
32. Whilst I consider that the applicant may not have been put to large amounts of additional expense in countering the Council's position, extra costs were incurred in preparing evidence to defend those aspects of the appeal and an award in these specific respects is appropriate.

Conclusion

33. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

34. 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 Slough Borough Council shall pay to Joe Mirenpass Limited, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in contesting part of the second reason for refusal.
35. The applicant is now invited to submit to Slough Borough 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.

Rachael Pipkin

INSPECTOR