Costs Decision

Hearing Held on 14 September 2021, 2 & 3 March 2022

Site visit made on 4 March 2022

by D Szymanski BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4th July 2022

Costs application in relation to Appeal Ref: APP/C5690/W/20/3254911
Willow Tree Riding Establishment, Ronver Road, London SE12 0NL

- 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 Austringer Estates Ltd for a partial award of costs against the Council of the London Borough of Lewisham and the Baring Trust.
- The hearing was in connection with an appeal against the refusal of planning permission for the development described as Full application for the demolition of existing buildings, provision of replacement equestrian facilities, landscaping, and associated access.

Decision

1. The application for an award of costs is refused.

The submissions for Austringer Estates Ltd

2. Austringer Estates Ltd (herein the applicant) made submissions in advance of and two partial costs applications following the closure of the hearing. The applicant's submission before the hearing alleges that the Council withheld consultation responses in respect of highways and tree removal resulting in it not being able to respond to concerns raised before the committee report was published. It is alleged that the committee report also contained inaccuracies which may have negatively influenced members.

3. The applicant is of the view that the Council was unreasonable in raising flood risk as an issue. It is suggested that by not agreeing their approach on this matter, the Council contested it, and so prolonged proceedings. It was the Council's error that resulted in a second adjournment to the hearing, necessitating the applicant to provide rebuttals to the late responses received after that adjournment.

4. The applicant is of the view that the Baring Trust acted unreasonably because it submitted late specialist evidence in respect of ecology and heritage without good explanation, that resulted in the need for an adjournment to the hearing. This has caused both the Council and the applicant associated costs in dealing with these matters. Being professionally represented the Trust would have been aware of the implications of its approach to its evidence.

The response by the Council

5. The Council is of the view that it did not behave unreasonably in withholding consultation responses from the applicant as they required refinement. The Council also does not consider the committee report to be inaccurate, particularly having regard to some of the applicant's submissions in respect of tree removal, or that the committee report negatively influenced members. The applicant had the opportunity to address the concerns before the committee meeting. The committee members were informed of the applicant's views, and these were addressed by officers through the addendum report.

6. The Council states that it reached common ground with the applicant in respect of flood risk, which is reflected in the condition in the Statement of Common Ground. Ultimately it did not raise an objection in respect of flood risk at the hearing. It considers the applicant's responses to the late representations as a consequence of the late publicity duplicated what it had already prepared for the Hearing. Therefore, the applicant should bear the cost of providing duplicated evidence.

The response by the Baring Trust

7. The Baring Trust is of the view that having regard to the short timescale in which it was notified of the hearing, it prepared its ecological submissions to support its previous representations, in a timely manner. Moreover, ecological matters were likely to be raised at the hearing in any event, particularly noting some conflicting ecological evidence from the applicant. Heritage matters had already been raised in the Council's report, and were referenced in policies in the draft London Plan and the Grove Park Neighbourhood Plan. The Trust was responding to the late evidence in respect of heritage and ecology. The circumstances set out by the applicant are not exceptional, as referenced in paragraph 16-056-20161210 of the Planning Practice Guidance (PPG).

Reasons

The Council

8. Paragraph 16-030-20140306 of the 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 or wasted expense in the appeal process. Paragraphs 16-046-20140306 and 16-049-20140306 of the PPG set out examples of unreasonable behaviour. This includes not providing reasonably requested information, when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed, and not agreeing common ground or common factual matters to both parties.

9. The Council delayed providing some consultation responses, not making them available for some time, including the Highways and Tree Officer responses. This is not a proactive or positive approach to determining the application, and I regard it as unreasonable behaviour. However, despite this, the applicant had the opportunity to provide responses to these matters before the committee meeting and attend the meeting should it wished to have done so. Similarly, it also had the opportunity to provide observations on matters it felt were inaccurate in the committee report.

10. An addendum to the committee report was published to explain the applicant's concerns and the rebuttal letter of 21 February 2020, and the Council officer's response to them. While there were some errors and inaccuracies in the committee report, some other points raised by the applicant including some of importance to determining this appeal, were matters of planning judgement, or fact and degree, based upon evidence provided. This includes the extent of any lawful use, some effects upon Metropolitan Open Land, and the living conditions of No 77 Ronver Road.

11. Members had the opportunity to come to their own views on matters having regard to the applicant's submission and the addendum report. I see no substantive evidence that would lead me to conclude that members were negatively influenced by the initial committee report.

12. The applicant had the opportunity to address highway and arboricultural matters with substantive evidence before the committee meeting, as well as through the appeal process in accordance with the appeal timetable. Highway matters were not fully addressed until the submission of the Transport Rebuttal dated April 2021. Arboriculture-related matters required further late evidence to be submitted during an adjournment. Such evidence would have to have been provided in any event. Therefore, neither the withholding of consultation responses, or the contents of the committee report resulted in the appeal or a missed opportunity to narrow the issues. Therefore, unnecessary or wasted expense is not demonstrated in respect of these matters.

13. From representations submitted in response to the planning application and appeal, including the Council's internal flood risk advice, there were multiple concerns raised in respect of flooding matters. The Council's advisers' concerns are primarily in respect of inadequacy of information in respect of drainage. Notwithstanding this, the Council agreed a planning condition in the Statement of Common Ground. The applicant does not dispute this. The Council also did not raise any objection verbally to flood risk at the Hearing.

14. I raised flood risk as an issue for further discussion in my letter of 17 August 2021, as there were matters I considered needed to be addressed, in particular, in respect of how the sequential test had been applied. Therefore, I would have expected the applicant would have provided further submissions, irrespective of the Council's position. I am of the view therefore, that unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process is not demonstrated.

15. Despite constructive agreement between the main parties at the Hearing, the Council's failure to undertake the correct notifications to a large proportion of those who had made representations to the appeal of its resumption, is unreasonable behaviour. However, the representations submitted after the third day, raise matters that duplicate those previously submitted in writing or as discussed verbally at the hearing. The applicant's covering email response dated 23 March 2022 concludes as much. While the applicant's ecologist and heritage adviser have provided short responses, they acknowledge there is nothing of substance that would lead them to change their submissions. In my view these specialist responses were not necessary.

The Baring Trust

16. Paragraph 16-056-20161210 states that it is not anticipated that awards of costs will be made in favour of, or against, other interested parties, other than in exceptional circumstances. An application may be made in favour of, or against, an interested party on procedural grounds, for example where an unnecessary adjournment of a hearing is caused by unreasonable conduct.

17. The Baring Trust's late submission dated 6 September 2021 in respect of ecology expanded upon the grounds it set out in objecting to the planning application and appeal. The further submission was more specific and targeted in relation to the applicant's evidence. It did not however, in my view introduce new issues. It would have been possible for the Trust to attend the Hearing and raise the same issues verbally. Moreover, I raised biodiversity as an issue which required further questioning, in my letter of 17 August 2021.

18. Having regard to the issues requiring clarification, particularly in respect of the survey information and the late evidence in the Biodiversity Impact Assessment, the applicant was likely to require an ecological witness to adequately answer my questions, irrespective of whether the Baring Trust made a submission. Therefore, unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process is not demonstrated in respect of the ecological submissions.

19. The applicant's submitted a Statement on Heritage on 4 February 2022 may have been pre-empting the Baring Trust's suggestion on day one that it intended to raise heritage as an issue for discussion. As it was, the Trust's submission was effectively a response to the applicant's Statement on Heritage. Therefore, I do not regard unreasonable behaviour is demonstrated.

Conclusion

20. For the reasons set out above, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Dan Szymanski

INSPECTOR