



Costs Decision

Site visit made on 1 September 2022

by J Bowyer BSc(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 October 2022

Costs application in relation to Appeal Ref: APP/X5990/W/20/3246031 9 Southwick Place, London W2 2TN

- 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 Mr M Singh for a full award of costs against the City of Westminster Council.
 - The appeal was against the failure of the local planning authority to give notice within the prescribed period of a decision on an application for planning permission for formation of roof garden across existing roofs at second floor level without complying with a condition attached to planning permission Ref 17/07044/FULL, dated 10 May 2018.
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) states that costs may be awarded where a party has behaved unreasonably and where the unreasonable behaviour has directly caused unnecessary or wasted expense in the appeal process.
3. It 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 or failing to determine planning applications or by unreasonably defending appeals. Some of the examples given of such behaviour include 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; acting contrary to, or not following, well-established case law; and not reviewing their case promptly following the lodging of an appeal.
4. The appeal relates to an application made under section 73 of the Town and Country Planning Act 1990 ('the Act') for a minor material amendment to planning permission granted on appeal under application reference 17/07044/FULL ('the Original Permission')¹ for the formation of a roof garden. It proposes to vary condition 2 of the Original Permission in order to substitute revised plans which would increase the area of the roof garden. There would also be changes to the layout of the roof garden, including to the arrangement of rooflights, and the addition of furniture including countertop and cupboards, planters and trellis.
5. The Council did not validate or determine the application. Its view is that the proposal cannot be considered within the scope of an application under section 73 of the Act, asserting, in essence, that the proposal would amount to a

¹ Appeal reference APP/X5990/D/18/3192708

material change to the Original Permission development and that it would require change to the development description.

6. The Council highlights that the appeal proposal would not be identical to the Original Permission development. However, one of the uses of a section 73 application is to seek amendments to a permitted development where there is a relevant condition that can be varied. The PPG further sets out that a minor material amendment is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which has been approved. In providing for amendments, it therefore seems clear to me that changes may be made from an approved development under section 73 of the Act, and I can see no reason that it would be unlawful in principle to approve development in this case which is not identical to the Original Permission development.
7. That said, considering whether the scale and/or nature of the proposal would result in a development substantially different from the one which has been approved would then require a judgement to be made. The Council has also referred to clarification on the use of section 73 of the Act provided by the judgement of the Court of Appeal in *Finney v Welsh Ministers* [2019] EWCA Civ 1868 dated 5 November 2019 ('Finney'). In *Finney*, it was held that section 73 may not be used to obtain a varied planning permission where the change sought would require a variation to the terms of the description of development as the 'operative' part of a permission. I agree with the Council that the judgement in *Finney* is relevant. Nevertheless, it is also necessary to consider the specific circumstances of the proposal in applying this judgement.
8. As my appeal decision records, the development proposed in this case would remain a roof garden across the existing roofs at second floor level in accordance with the description of development approved by the Original Permission. Although there would be changes to the roof garden, the Council has not offered convincing reasons why these changes would give rise to any inherent conflict or contradiction with the terms of the description of development approved by the Original Permission. I have found that they would not.
9. Moreover, the Original Permission development indicated several structures within the roof garden, including planters, a built-in seat with storage and water feature which were not referred to within the description of development. It seems to me that the additional features now proposed would be of similar nature, and entirely consistent with the use of the development as a roof garden, and the Council has not offered any compelling explanation to justify why direct reference to features as part of the roof garden would now be necessary within the development description. In my judgement, there would be no firm basis to do so, and the Council has failed to substantiate its assertion otherwise.
10. Nor has the Council provided convincing evidence to support its suggestion that the changes proposed would result in development materially different to that approved under the Original Permission. In the absence of such evidence and noting that the revisions would not alter the essential nature of the development proposed as a roof garden, I have found no reason to conclude as part of my appeal decision that the modifications would be of a scale or

substance that would result in development substantially or fundamentally different from that approved under the Original Permission.

11. While the Council has referred to the Finney judgement, I find that it has not provided sound evidence to demonstrate how the proposal would in this case require a variation to the terms of the operative part of the Original Permission. Furthermore, it has not made clear how the appeal would materially change the nature of the development proposed, nor shown that it would give rise to a conflict between what was permitted by the Original Permission and the development now proposed. Accordingly and on the basis of the evidence before me, I find that there were no substantive reasons to justify non-validation of the application. In light of my conclusion that the appeal should be allowed, I further find that the Council has unreasonably prevented development which should clearly have been permitted.
12. The Council advised the applicant of its view that the application could not be validated promptly after submission, and I note that there was subsequent dialogue between the parties until the appeal was lodged. However, that does not alter my view that the stance taken by the Council was unsound and unreasonable. This stance resulted in an appeal which should not have been necessary. The Council has therefore behaved unreasonably, and the applicant has incurred unnecessary and wasted expense in contesting the appeal.

Conclusion

13. For these reasons, I find that unreasonable behaviour by the Council resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated. The application for a full award of costs is therefore allowed.

Costs Order

14. 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 Mr M Singh the costs of the appeal proceedings described in the heading of this decision.
15. The applicant is now invited to submit to the City of Westminster 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

J Bowyer

INSPECTOR