



Costs Decision

Site visit made on 23 January 2023

by A Parkin BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 February 2023

Costs application in relation to Appeal Ref: APP/A5840/W/22/3291275 Barry Parade, Barry Road, London SE22 0JA

- 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 the Council of the London Borough of Southwark for a full award of costs against Mr Jack Bispham of Panther Securities PLC.
 - The appeal was against the refusal of planning permission for demolition of existing single storey buildings, construction of a new mixed use development (including change of use), on predominantly 4 floors comprising 1 no A2 unit with the balance of the commercial space designated as A1 use, with 13 flats for private sale/rent above.
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Decision

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

Reasons

2. The Government's Planning Practice Guidance (PPG) advises that costs may 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.
3. The Council is seeking a full award of costs against the appellant on procedural and substantive grounds, in relation to the late submission of the s106 planning obligation, which they also consider addresses what had been the substantive matters of dispute between the parties.
4. The start date for the appeal was 1 March 2022 and notice was given that a certified copy of any planning obligation must be submitted no later than 7 weeks from the start date. Government guidance on planning appeals¹ also clearly states that obligations should be submitted within 7 weeks of the start date of the appeal.
5. The signed s106 planning obligation is dated 21 June 2022, which is more than 7 weeks from the start date. PPG states that *delay in providing information or other failure to adhere to deadlines*² may be procedural grounds for an award of costs. The appellant has not addressed the late submission of the planning obligation and so has not disputed it.
6. The planning application for the appeal development was made in the summer of 2018, with negotiations occurring up to the Council's decision to refuse planning permission in the autumn of 2021.

¹ Section N.2 of the Procedural Guide: Planning Appeals – England (December 2022)

² Appeals - Paragraph: 052 Reference ID: 16-052-20140306 Revision date: 06 03 2014

7. On 29 January 2020, the Council resolved to approve the proposal subject to conditions and a suitable legal agreement, following the submission of an Addendum to the Officer report. Amongst other things, the Addendum specified that the legal agreement would be updated to include a viability review.
8. Following the meeting, the appellant questioned whether the inclusion of a viability review in the planning obligation was necessary given the proposal would provide the required numbers and types of affordable housing to comply with the development plan policies referenced in the Officer report.
9. In response, and over an extended period of time, the Council referred to the Mayor's Homes for Londoners – Affordable Housing and Viability supplementary planning guidance 2017 (the SPG), and to policies within the emerging draft London Plan, subsequently adopted as the London Plan 2021³, to substantiate its position in this regard.
10. The Council's officer report of 29 January 2020 includes a Planning Policy section. However, it does not include reference to the SPG or to policies in the emerging draft London Plan⁴. Furthermore, the Addendum does not update the Policy section of the Officer report.
11. The minutes of the meeting of 29 January 2020 are not detailed and do not demonstrate that the policy position for the viability review mechanism was addressed by the Committee. There is, therefore, no substantive evidence that the policy basis for a viability review mechanism subsequently relied upon by the Council, was considered at this meeting.
12. There is also no explanation for why the Council's Director of Planning did not follow the Committee's instruction to refuse planning permission when a planning obligation was not agreed by 31 March 2020, and instead allowed negotiations to continue for well over a year from this date. This is somewhat unconventional behaviour and I can only assume that it accorded with the Council's constitutional arrangements for decision taking.
13. Planning permission for the proposal was eventually refused on 18 September 2021. The reason for refusal on the Decision Notice was the same wording as agreed by the Council on 29 January 2020. However, none of the development plan policies or the SPD listed on the Decision Notice require a viability review mechanism to be included in a planning obligation, which was the primary dispute between the parties.
14. It is unclear, given the Council's extensive reference to the SPG in discussions with the appellant, why the SPG is not listed on the Decision Notice. Similarly, it is also unclear why the relevant policies in the then adopted London Plan 2021, which were also referenced by the Council in its discussions about the viability review mechanism, are not listed on the Decision Notice.
15. Nevertheless, I am satisfied that following the meeting of 29 January 2020 and prior to the refusal of planning permission on 18 September 2021, the Council explained to the appellant what they considered to be the basis for the inclusion of a viability review mechanism, including with reference to the SPG and to the emerging and then adopted London Plan 2021.

³ The Spatial Development Strategy for Greater London March 2021

⁴ No details of relevant policies contained in the emerging draft London Plan, from January 2020 to adoption in March 2021, have been provided

16. With regard to s38(6) of the Planning and Compulsory Purchase Act 2004, I am also satisfied that prior to the adoption of the London Plan in March 2021, the SPG could have been a material consideration in the Council's considerations sufficient to inform its decision.
17. However, this material consideration would not have caused the Council to determine the proposal otherwise than in accordance with the development plan, which at the time that planning permission was refused, and for over five months previously, included the adopted London Plan 2021.
18. Policy H5 (threshold approach to applications) of the London Plan 2021 is in the evidence before me and like the SPG, includes a threshold approach to affordable housing for major developments. Policy H5 requires a viability review for both a policy compliant level and type of affordable housing, such as the appeal proposal, or a non-policy compliant level and type of affordable housing.
19. I am satisfied that the appellant has behaved unreasonably in refusing to acknowledge the requirement for a viability review mechanism in the planning obligation until after the appeal was made, despite this being explained to them by the Council and, by submitting a planning obligation late without an adequate explanation.
20. However, the Council has also behaved unreasonably in failing to articulate the policy basis for requiring a viability review mechanism in the planning obligation, in its resolution of 29 January 2020 and its refusal of planning permission of 18 September 2021.
21. Both parties have behaved unreasonably and this behaviour has resulted in them both incurring unnecessary or wasted expense in the appeal process, as described in PPG. However, I am satisfied that culpability for this is broadly equally shared. Consequently, an award of costs against the appellant is not justified.

Other Matters

22. The appellant has not made a formal application for costs. In their Statement of Case, the appellant makes reference to the refusal of planning permission by the Council on 18 September 2021, without prior notification. The appellant considers this to be unreasonable behaviour on the part of the Council justifying an award of costs against them.
23. However, no formal application for costs was submitted with the appeal and at Section H(b) of the signed Appeal Form the appellant states they have not made an application for costs.
24. In any event, given the considerable length of time that negotiations had been taking place after the deadline set by Members in their resolution of 29 January 2020, I do not consider this to be unreasonable behaviour by the Council. It does not alter my reasoning, as set out above.

Conclusion

25. For the reasons given above, I conclude an award of costs is refused.

Andrew Parkin

INSPECTOR