The Planning Inspectorate

Costs Decisions

Inquiry held on 17 May 2023

Site visit made on 17 May 2023

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 July 2023

Costs applications in relation to Appeals Ref: APP/U5930/C/21/3280591 (Appeal A) and Ref: APP/U5930/C/21/3280597 (Appeal B)
Land at Chingford Mill Pumping Station, 35 Lower Hall Lane, Chingford, London E4 8JG

- The applications are made under the Town and Country Planning Act 1990, sections 174, 320, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The applications are made by the Council of the London Borough of Waltham Forest for full or partial awards of costs against Seasons Property Limited.
- The appeals were in connection with enforcement notices alleging (1) the material change in use of the Pumping Station to self-contained flats; the material change in use of the Turbine House into a self-contained dwelling; and demolition of an existing dwelling and erection of 5 two storey dwellings (Appeal A); and (2) the material change in use of the land to a mixed use of a contractor's storage yard and laying of hardstanding and erection of fencing associated with the mixed use; the importation, deposit and disposal through land raising of mixed inert waste; the importation, deposit, sorting, salvage, storage and export of assorted metals; and the importation and storage of builders, household and commercial waste (Appeal B). The Inquiry was in connection with Appeal A only.

Decisions

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

2. The application for an award of costs in respect of Appeal B is refused.

The submissions for the Council

3. The respondent acted unreasonably throughout both appeals by:

   - Failing to submit a statement of case or maintain a consistent position in either appeal. The appeal on ground (f) in Appeal A and the entire Appeal B were withdrawn without justification, resulting in wasted expense. Time had to be spent on ground (f) due to its interaction with ground (a).

   - Introducing evidence relating to financial viability at a very late stage. The respondent's wish to present this evidence provided justification for Appeal A continuing to be the subject of an Inquiry. However, the submitted evidence was without substance or merit and the respondent failed to call a witness to substantiate it, only indicating it would not be doing so at an extremely late stage. This resulted in wasted expense.

- Failing to provide evidence to substantiate its case, including evidence addressing flood risk, resulting in wasted expense.
- Relying on misleading and erroneous evidence in relation to ground (d) in Appeal A, only withdrawing that ground of appeal when the applicant pointed out the misleading and erroneous content. The Inquiry had been arranged to hear evidence on ground (d) in Appeal A and time had to be spent reviewing the relevant evidence. This resulted in unnecessary and wasted expense.
- Failing to respond to a Planning Contravention Notice (PCN) and then mounting a hopeless case in the appeal on ground (a) in Appeal A. That ground was not pursued for what had been carried out when the notice was issued, but for something that did not exist. This was contrary to established case law and resulted in unnecessary and wasted expense.

The response by Seasons Property Limited

4. Appeal A is unusual in that both parties' positions have evolved, partly due to the wording of the notice. Changes were made to move matters forward.

   - The nature of the respondent's case was set out in a rule 6 statement, albeit provided late, and an accompanying position statement. Those documents were sent to the applicant under cover of an email which expressed a wish to reach agreement so that the Inquiry could be avoided or reduced in extent, but the applicant did not respond accordingly.
   - The appeal on ground (d) was withdrawn long before the Inquiry opened. Similarities between the officer report recommending the issue of the notice and the applicant's statement of case show that very little work was carried out in the appeal in this regard. No time was spent on ground (f).
   - The late introduction of financial viability as an issue is immaterial to the expense incurred in respect of it. The applicant had a week's notice that the respondent's witness could not attend and could therefore have decided not to call its own witness.
   - Flood risk has been addressed through the agreement of a relevant planning condition, therefore there has been no excessive expenditure.
   - The appeal on ground (d) was withdrawn on Counsel's advice following consideration of relevant Google Earth images. The respondent is unaware of any misleading evidence; it sought an explanation of this from the applicant but there was no response.
   - A development including 8 flats within the Pumping Station can be granted planning permission. It is not unreasonable for the respondent to pursue it.

5. Appeal B was only made on ground (g) and therefore very limited expense would have been incurred in respect of it.

Reasons

6. Parties in planning appeals normally meet their own expenses. However, the 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.

7. There is no requirement for advance notice of an application for an award of costs, only that it is made as soon as possible and in time. For an appeal the subject of an Inquiry, the application must be made before the Inquiry closes. An application in respect of a withdrawn appeal must be made no later than 4 weeks after receiving notification of the withdrawal from the Planning Inspectorate and that was the case with Appeal B.

Appeal A

8. The submission of financial viability evidence came at a relatively late stage in the process and required the applicant to obtain professional advice before it could comment on the matter. The respondent gave notice that its witness could not attend a week before the Inquiry opened. In these circumstances, there was no undue delay in the application for costs being made.

9. Even if there had been a delay in making the application, that would have no bearing on whether the respondent had acted unreasonably and, if so, whether the applicant had incurred unnecessary or wasted expense as a result.

10. The PPG advises that an appellant who fails to co-operate in responding to a PCN, delays providing information or fails to adhere to deadlines in the appeal process may have acted unreasonably and be liable to an award of costs. It further advises that the same may be true where an appeal is withdrawn without good reason.

11. The applicant issued the PCN on 5 March 2019 and, while the respondent's interim responses indicate an intention to co co-operate, no substantial response to the questions set out in the PCN followed.

12. It appears that the PCN's main objective was to establish whether the work then being carried out by the respondent constituted implementation of a planning permission granted in September 2009. It is not clear what the applicant did to establish the facts in the absence of a response to the PCN. However, it is reasonable to assume that, had there been a response, it would have been necessary for the applicant to verify it by direct observation.

13. In view of the facts that subsequently emerged, it does not appear likely that the appeal could have been avoided or reduced in scope if there had been a response to the PCN. Consequently, while the failure to respond to the PCN may have been unreasonable behaviour, it has not been demonstrated that it directly led to unnecessary or wasted expense in the appeal process.

14. The grounds of appeal set out in the respondent's appeal form refer to the previous grant of planning permission for a 14-dwelling scheme in the context of the appeal on ground (a). It is further stated, "The scheme went ahead in accordance with this permission albeit it is accepted that some matters/ obligations have not come forward and will be addressed via the [deemed planning application]."

15. This does not reveal that a 24-dwelling scheme, involving a different configuration of the Pumping Station, had been carried out instead. It is not clear whether the person completing the form knew what had happened, or exactly what the respondent intended to pursue through the deemed planning application (DPA) at that stage.

16. The opportunity for the respondent to clarify and expand upon these matters through submission of a statement of case was not taken, neither were any final comments made on the applicant's statement.

17. The appeal was originally programmed to be the subject of an Inquiry because of the need to test evidence on ground (d). Differing accounts have been provided as to why the appeal on that ground was withdrawn. The respondent's grounds of appeal refer to evidence of the commencement of work on one part of the development, the 5 two storey dwellings, not the substantial completion of any works. Evidence of immunity from enforcement action, such as records of building works or when dwellings were first occupied, was not produced.

18. It was unreasonable of the respondent to appeal on ground (d) when the matters being claimed could not be substantiated through records it would reasonably be expected to hold. Consequently, the applicant incurred unnecessary expenditure in the appeal on ground (d).

19. Comparison of the officer report recommending enforcement action and the applicant's statement of case shows that some text was repeated, specifically in paragraphs 6.33, 6.35 and 6.36 of the latter. This may reduce, but cannot eliminate, the unnecessary expense that was incurred.

20. Turning to the appeal on ground (f), the respondent's grounds of appeal do not state any lesser steps that would resolve the breach of planning control and which might have suggested the requirements of the notice were excessive. The respondent's argument at that stage rested on the fact that the 14-dwelling scheme had been permitted, even though the 24-dwelling scheme had been carried out instead.

21. The applicant's response to this ground of appeal was mainly concerned with whether the planning permission for the 14-dwelling scheme had been lawfully implemented. That would have been relevant to an appeal on ground (c)[1], had one been made, but does not seem to address anything the respondent had raised in the appeal on ground (f).

22. For these reasons, it is not clear that unreasonable behaviour resulting in unnecessary or wasted expense occurred in respect of ground (f).

23. Notwithstanding my conclusion on the appeal on ground (a), the respondent's case that the 14-dwelling scheme constitutes part of the matters alleged in the notice was worthy of consideration for 2 main reasons.

24. The first reason was that the notice did not specify the number of flats that had been formed as part of the unauthorised change of use of the Pumping Station. The second was that the fee for the DPA set out in the notice bears no relation to what was payable for the 24-dwelling scheme that had been carried out.

25. Had the notice been clearer and more precise in those respects, pursuit of the 14-dwelling scheme might have been unreasonable. However, case law indicates that the nature and extent of the building works that would be necessary to realise the proposed 14-dwelling scheme must be considered. Whether or not they allow the proposal to be part of the matters alleged in the

[1] That (the matters stated in the notice which give rise to the alleged breach of planning control) if they occurred, do not constitute a breach of planning control.

notice is a matter of planning judgment. In that context, it was not unreasonable of the respondent to advance a case for approval of the 14-dwelling scheme.

26. The issue of financial viability relates to the policy requirement for affordable housing, either as a component of the development or facilitated elsewhere by means of a financial contribution. The requirement for such a contribution is made explicit in the notice, so any financial viability implications of that should have been stated in the respondent's grounds of appeal but were not.

27. The respondent did not submit a statement of case, so the opportunity to identify the issue at that stage was lost. The first sign of the respondent's intention was the reference to an un-named expert witness to give evidence on 'viability' in its Inquiry timetable form.

28. There is no requirement for Inquiry timetable forms to be copied to other parties, so it appears the applicant was unaware of the respondent's intention until it was raised in the case management conference. Because the appeal on ground (d) had been withdrawn, the need for an Inquiry was under review. However, it was decided to continue with an Inquiry, largely so that the expected financial viability evidence could be tested.

29. The submission of the respondent's financial viability assessment (FVA) required the applicant to engage consultancy advice and its own expert witness on the matter. FVAs are usually produced to support an argument that the normal policy requirement for affordable housing would jeopardise a greater public benefit of bringing forward new housing. A FVA in respect of housing that has already been delivered is novel and the only relevant expert witness appearing at the Inquiry could not think of a precedent for it.

30. The terms of engagement for the FVA confirm its author was commissioned to appraise a proposed development, not what had been carried out. As a result, the FVA fails to recognise that a significant proportion of project costs, including land acquisition, construction, finance, and professional fees had already been incurred. As a result, the FVA is fundamentally weakened through its use of estimates when actual costs could, and should, have been provided. The respondent's financial viability witness did not appear at the Inquiry, so the reason for this is unexplained. However, the available facts lead me to conclude that the FVA is too far removed from the facts to be reliable.

31. For these reasons the late identification of financial viability, the use of estimated costs in the FVA and the failure to call a witness to justify the respondent's approach amount to unreasonable behaviour. It has resulted in unnecessary expense on the part of the applicant, including reviewing the FVA and calling a witness on financial viability at the Inquiry. I do not accept the respondent's argument that the applicant could have chosen not to call its witness. It was reasonable for the evidence in the FVA to be challenged by calling an expert witness and it was important for that challenge to be tested.

32. Even if the use of estimates in place of actual costs could be justified, there remains a significant question about whether developer profit can be a material planning consideration after the event. Profit is not guaranteed; it serves as an incentive for a developer to assume the risks involved in a project. Its value as a planning consideration is the greater probability that development that is otherwise acceptable, and thereby in the public interest, will be forthcoming. If

development has already occurred, any such public interest has been served and it is not clear what else, if anything, might be held to outweigh the realisation of affordable housing in accordance with development plan policy.

33. The appeal site is within Flood Zones 2 and 3. National and local planning policies expect development proposals in such areas to be supported by flood risk assessments, but none has been provided. However, I was advised the site is identified for housing in a development plan document and paragraph 166 of the National Planning Policy Framework indicates that the sequential test need not be repeated in those circumstances.

34. The paragraph also indicates that the exception test may not be necessary in every instance. It may need to be reapplied "if relevant aspects of the proposal had not been considered when the test was applied at the plan-making stage, or if more recent information about existing or potential flood risk should be taken into account."

35. Planning permission was granted for a 14-dwelling scheme in 2009. Although limited information has been provided, it is reasonable to assume that an appropriate flood risk assessment had been carried out then. It is equally reasonable to assume that assessment was still valid, or was repeated, when it was later decided to include the site in the development plan document. Furthermore, there is no evidence that relevant aspects of the proposal were not considered at the plan-making stage, or that more recent information about flood risk existed.

36. In these circumstances, the respondent did not act unreasonably in respect of flood risk. It is not clear from the application what other specific evidence the respondent may have failed to provide.

Appeal B

37. The appeal was made on ground (g) only and the applicant set out its position in fewer than 120 words in a combined statement of case for both appeals. No further representations were made. Wasted expenditure has therefore not been demonstrated.

Conclusion

38. For the reasons set out above I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated in respect of Appeal A. This relates to the appeal on ground (d) and the appeal on ground (a), insofar as it relates to financial viability, including all costs incurred in calling an expert witness on the matter. A partial award of costs, limited to those matters is justified.

39. For the other reasons set out above I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated in respect of Appeal B.

Costs Order

40. 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 Seasons Property Limited shall pay to the Council of the London Borough of

Waltham Forest the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in the appeal on ground (d) and on financial viability in Appeal A; such costs to be assessed in the Senior Courts Costs Office if not agreed.

41. The applicant is now invited to submit to Seasons Property Limited, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Mark Harbottle

INSPECTOR