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## Costs Decision

Site visit made on 14 June 2023

**by Rory MacLeod BA (Hons) MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 01 August 2023**

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### **Costs application in relation to Appeal Ref: APP/H5390/W/21/3288332 12 Wellesley Avenue, London W6 0UP**

- 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 Latifia Investments Limited for a full award of costs against the London Borough of Hammersmith and Fulham.
  - The appeal was against the refusal of planning permission for demolition of existing car repair workshop (Use Class B2), construction of a new office building (Use Class E) including basement, ground and first floors and associated alterations to the existing garage forecourt, including erection of a boundary wall.
  - This decision supersedes that issued on 31 August 2022. That decision on the appeal was quashed by Order of the High Court dated 21 November 2022.
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### **Decision**

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

### **Reasons**

2. 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.
3. The applicant contends that the Council has behaved unreasonably in relation to procedural issues through the unnecessary refusal of the appeal proposal following on from previous appeal decisions at the site, and in relation to substantive issues through a refusal reason that lacks any basis in the development plan.
4. The Council counters that the reason for refusal of the appeal proposal was not introduced part way through the appeal process, that the determination of the appeal application was not unduly delayed, that the reason is clearly explained in the delegated report and that their appeal statements elaborate on how the draft Affordable Workspace Supplementary Planning Document (SPD) informed the Council's judgement on the matter. Following the quashing of the original appeal decisions, the Council has maintained its position in relation to the costs application, notwithstanding the findings of the quashed main decision in relation to any need to provide affordable workspace, and has emphasised changes to the adopted version of the Affordable Workspace SPD.
5. The planning merits of the appeal proposal cannot be considered in isolation from the appeal decisions on previous proposals for similar developments at the appeal site in 2019 and in 2021. The Council's refusal reason was clearly not introduced during the processing of the current appeal but needs to be understood in the context of the longer dialogue on the proposal.

6. The Council's adopted local plan, the Hammersmith & Fulham Local Plan (2018) (HFLP) had not changed during the time for determining all three appeal proposals. Policy E1 of the HFLP setting out requirements for flexible and affordable workspace had been in place throughout this time, yet it was only in relation to the current appeal that the Council contended that its provisions for affordable workspace are triggered.
7. The appeal application was refused permission over 7 months from the date of its submission. The evidence before me indicates that discussions on the applicability of affordable workspace and other matters took place during the latter stages of processing the application. Whilst delays in determination beyond a statutory target date are regrettable, they can be useful in providing opportunity for dialogue on matters arising. In this case it was during this period that the Council formulated its reasoning for refusing permission. The appellant refers to additional costs arising at this time through the appointment of Counsel to consider the legality of the Council's approach. However, the award of costs relates to alleged wasted or unnecessary expense in the appeal rather than application process.
8. The single reason for refusing the appeal proposal is clearly set out in the Council's decision notice, but it will be apparent from the main decision that I have not found the planning policy justification for the decision in the delegated report to be convincing. But even if I had accepted the flexible approach to an affordable workspace requirement advocated by the Council in relation to HFLP Policy E1, there is no evidence before me that this had been advanced during determination of the previous proposals. Moreover, Policy E2 of the London Plan set a threshold below which provision of a proportion of flexible workspace would not ordinarily apply. The London Plan would have been in draft form during the previous appeals but had been formally adopted in 2021 and so formed part of the development plan for the appeal proposal.
9. The Council's appeal submissions make copious references to its Affordable Workspace SPD, and state this "*informed the LPA's judgement on the matter*", although the SPD is not referred to on its decision notice. At the time of the application, a draft had been produced for review internally, but the SPD was only published for public consultation in November 2021, a month after refusal of the appeal proposal. At paragraph 5.10 the draft SPD states that "*Discounted Rents and Floorspace will be required on new commercial developments over 1,000 sqm (gross)*".
10. This explicit reference to a threshold could have triggered a requirement for provision of affordable workspace had it been included in adopted policy, but the appeal site is in the exempted Ravenscourt Park area; furthermore, the threshold was dropped in the adopted version of the SPD which the Council affirms is less prescriptive. The weight to be afforded to the SPD in its draft or adopted versions is limited. The SPD can only be guidance to the application of policy and not policy itself. Its relevance to the appeal proposal is undermined by the lack of a clear policy reference to the need for affordable workspace at the appeal site. The Council's request for details on the proposal's benchmark land value, grade finish and anticipated rent details to inform judgement on whether flexible and affordable space can be sustained, does not have a foundation in relevant policies. The information was not necessary for the application's determination.

11. My findings are that the appellant has incurred wasted expense because having regard to the preceding planning appeal history at the site, the entire appeal could have been avoided. The appellant has incurred unnecessary expense because time and effort were expended on the appeal that it should not have had to pursue in relation to prevalent development plan policies and material considerations. This amounts to unreasonable behaviour by the Council.
12. PPG refers to examples of unreasonable substantive behaviour at Paragraph ID: 16-049-20140306. These 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"* and *"Failure to produce evidence to substantiate each reason for refusal on appeal"*. There was only one refusal reason. The Council considered the proposal to be acceptable in relation to other issues.
13. I note that the applicant submitted a further planning application in November 2022 to allow the Council to positively determine the scheme in light of the appeal decision and subsequent High Court judgement. There is no evidence before me that the Council did so; rather it has reaffirmed its contentions in later appeal submissions. No doubt the appellant would have incurred some costs in preparation of this discretionary additional application, but an award of costs can only be made in relation to the appeal process.
14. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred, and a full award of costs is therefore warranted.

### **Costs Order**

15. 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 Council of the London Borough of Hammersmith and Fulham shall pay to Latifia Investments Limited, the costs of the appeal proceedings described in the heading of this decision. Such costs are to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to the Council of the London Borough of Hammersmith and Fulham, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*Rory MacLeod*

INSPECTOR