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## Costs Decision

Inquiry held on 4 to 7 and 13 and 14 July 2023

Site visit made on 13 July 2023

**by O S Woodward BA (Hons) MA MRTPI**

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

**Decision date: 12<sup>th</sup> September 2023**

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### **Costs application: in relation to Appeal Ref: APP/N5660/W/23/3317382 1-4 Brixton Hill Place, London SW2 1HJ**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by BHPD Limited for a full award of costs against the Council of the London Borough of Lambeth.
  - The inquiry was in connection with an appeal against the refusal of planning permission for demolition of the existing buildings and redevelopment of the site to provide an H-shaped building ranging from 2 to 5 storeys in height comprising 24 self-contained residential units (Class C3), together with the provision of three disabled car parking bays, refuse and cycle storage, child play area, landscaping and boundary treatment.
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### **Decision**

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

### **Background**

2. Planning Practice Guidance (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 expense in the appeal process. PPG also advises that the behaviour of parties during the time of the planning application can be taken into account in deciding whether unreasonable behaviour has occurred, although the costs themselves can only be awarded in relation to unnecessary or wasted expense at the appeal.

### **The submissions for BHPD Limited**

3. An application for full costs for unreasonable behaviour was made in writing as was a rebuttal statement. I do not repeat the application here, save to highlight that it is for full costs and in relation to all reasons for refusal, for varying reasons. A key theme running through the application is the alleged unreasonableness of the Council during the course of the planning application leading to unnecessary or wasted costs at the appeal.

### **The response by the Council of the London Borough of Lambeth**

4. This was provided in writing and I do not repeat the application here, save to highlight that the Council view the lack of pre-application engagement by BHPD Limited as being a key factor in how the planning application was determined, and in the approach to the appeal.

## Reasons

### *General*

5. The Council did not seek to minimise the number of reasons for refusal and did not engage pro-actively with BHPD Limited during the determination period of the planning application. This is not in the spirit of how local planning authorities should engage with applicants, as set out at Paragraph 38 of the National Planning Policy Framework (the Framework). Therefore, the Council acted unreasonably in this respect. However, BHPD Limited did not undertake pre-application negotiations with the Council. Pre-application negotiations are commonplace and, as acknowledged by Paragraph 39 of the Framework, have significant potential to improve the efficiency and effectiveness of the planning application system for all parties. I acknowledge that the Council charge fees for this process but it requested its standard fees and I have been provided with no substantiated evidence that these are set at an unreasonable level.
6. It was the combination of the behaviour of both parties which led directly and indirectly to the scope of the appeal being significantly narrowed during the course of the appeal process, rather than at application stage. Next I turn to the individual reasons for refusal but this is an important thread running through this Costs Decision.

### *Reasons for Refusal*

7. As can be seen in my Appeal Decision, the marketing undertaken by BHPD Limited was deficient and did not comply with Policy ED1 of the Lambeth Local Plan 2020-2035, adopted September 2021 (the L-LP). In addition, although I concluded that the 'fallback' position was valid, this was a nuanced consideration based on various matters of professional judgment and it was reasonable by the Council to adopt a different approach. The Council's behaviour was, therefore, reasonable in relation to the first reason for refusal.
8. A Certificate of Lawfulness<sup>1</sup> was granted in September 2020 which found that there was no community use on the appeal site. However, the certificate left ambiguities regarding the extent of the floorspace of the building that had been confirmed to be in office use, particularly regarding an area in use as a training centre. Final confirmation that, in planning terms at least, the entire building is in office use was not received until an appeal decision<sup>2</sup> was issued in January 2023, ie after the planning application was refused in September 2022. The Council were therefore acting reasonably in refusing the planning application on the ground of loss of community floorspace. The Council subsequently withdrew their objection on this ground in their Statement of Case issued in April 2023. This was early in the appeal process and shortly followed the release of the appeal decision. The Council's behaviour was, therefore, reasonable in relation to the second reason for refusal.
9. The planning application was accompanied by a Viability Assessment. The Council did not provide any feedback on this during the course of the application<sup>3</sup>. As of the exchange of Proofs of Evidence on 6 June 2023, the Council were still disputing the Viability Assessment, on various grounds. Following a further exchange of evidence, the parties agreed the viability

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<sup>1</sup> Ref 20/01597/LDCE

<sup>2</sup> Ref APP/N5660/W/22/3305193

<sup>3</sup> Confirmed by the Council under cross examination

position and the Council dropped this reason for refusal on 12 June 2023. However, as set out above, it was a combination of BHPD Limited not engaging in the pre-application process and the Council not engaging in the application determination process that led to the viability position not being agreed earlier. During the appeal process, the Council actively engaged with BHPD Limited to reach an agreed position. The Council's behaviour was, therefore, reasonable in relation to the third reason for refusal.

10. The access is a relatively narrow, shared surface road. It has been used by vehicles and pedestrians for over 100 years but the proposal would lead to a material increase in pedestrian movements, in particular, as well as some servicing and car movements. It was not unreasonable of the Council to refuse the planning application on this basis. I acknowledge that the Council dropped this objection to the proposal following the appeal decision<sup>4</sup> in January 2023. However, this was in response to a material change in circumstances. There is no inconsistency with the approach to the first reason for refusal because that was not only based on the outcome of the appeal but also other factors relating to Policy ED1 of the L-LP and loss of office floorspace. The Council's behaviour was, therefore, reasonable in relation to the fourth reason for refusal.
11. The Council did not undertake a site visit either during the planning application process or ahead of the formal site visit towards the end of the Inquiry. Although partially visible from surrounding public areas, access to and throughout the site provides a much better understanding of the character and appearance of the appeal site and the potential influence of the proposal on the site and its surroundings. This was therefore plainly unreasonable behaviour. Despite this, though, the case put forward by the Council was considered and thorough. I concluded in my Decision that the proposal would not harm the character and appearance of the area. However, the proposal is for a relatively large new building on a tightly constrained site in an area with a complex and varied character and appearance. It was therefore a matter of reasonable professional judgment to object to the proposal on these grounds. Therefore, whilst there was some unreasonable behaviour by the Council in relation to the fifth reason for refusal in not conducting a site visit, this did not lead to unnecessary or wasted expense at the appeal by BHPD Limited.
12. The Rush Common and Brixton Hill Conservation Area (the CA) is large and of varied character and appearance. Although both myself and BHPD Limited came to different conclusions to the Council with regard to the effect of the proposal on the significance of the CA, this is a matter of professional judgment. In addition, the balance of any harm to heritage assets versus the public benefits of the proposal is also a matter of professional judgment. In both cases, the judgment of the Council was reasonable. The Council's behaviour was, therefore, reasonable in relation to this element of the sixth reason for refusal.
13. The buildings on the appeal site have a relatively complex history and heritage value. The Council placed a higher value than either myself or BHPD Limited on the heritage value of the existing buildings on the appeal site. It is likely that this is at least partially due to an over-estimation regarding the remaining amount of original building fabric. If the Council had undertaken a site visit, they would likely have been able to be more accurate in this regard. However,

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<sup>4</sup> Ref APP/N5660/W/22/3305193

the heritage value of the existing buildings was a legitimate area of dispute. The conclusion that there would be a low level of less than substantial harm from the proposed demolition of the buildings carries closely to my own conclusion. Therefore, whilst there was some unreasonable behaviour by the Council, this did not lead to unnecessary or wasted expense at the appeal by BHPD Limited in relation to this element of the sixth reason for refusal.

14. The Council accepted under cross examination that the separation distance between living rooms over the proposed courtyard would be 17.5m. In the Council's Proof of Evidence this distance was stated to be 14.8m. In the context of the revised distance, under cross examination the Council withdrew their objection to the proposal with regard to unacceptable privacy for the future occupants of Flats 0.04 and 0.05 and Houses 0.01, 0.02 and 0.03. The distance was simple to measure on the submitted, scaled drawings. There were other relevant factors to consider, such as the proposed terraces and courtyard planting. However, the inaccurate distance was the key factor in relation to the Council's concerns regarding privacy between these units. The Council's behaviour was, therefore, unreasonable in this regard and the behaviour gave rise to unnecessary or wasted expense at the appeal by BHPD Limited in fighting this element of the seventh reason for refusal.
15. The eighth reason for refusal was based on policies in the Development Plan, namely Policy T6 of the L-LP and Policy D12 of the London Plan 2021. Although the London Fire Brigade had not raised objection, substantiated and reasonable requests for additional information were made by the Council's internal building regulations team. This team, whilst not the organisation that would sign-off a building with regard to fire regulations, is an experienced team with regard to building compliance and its requests were reasonable and related to the Development Plan policy. When the additional information was provided by BHPD Limited with the appeal submission<sup>5</sup>, the Council dropped this reason for refusal. The Council's behaviour was, therefore, reasonable in relation to the eighth reason for refusal.
16. The Council accepted under cross examination that the proposal would not result in undue harm to the living conditions of the residents of Kintyre Court with regard to loss of daylight. However, this is consistent with the Council's position in its Proof of Evidence where it stated that this might be the case, pending further information being provided regarding the layout of the flats in Kintyre Court. BHPD Limited provided a leasehold drawing of a typical flat layout but this was only within the relevant Proof of Evidence. It was reasonable of the Council to question this position up until this evidence was provided. The Council's behaviour was, therefore, reasonable in relation to the ninth reason for refusal.
17. The proposed building is relatively large and relatively close to a number of surrounding neighbouring residential properties. It would be bulkier and higher than the existing buildings in many locations and it has the potential to adversely affect outlook from the higher levels of Kintyre Court and from other surrounding buildings. However, the proposal would have the same shoulder height as the existing boundary wall to Kintyre Court, and there would be no material change to the sense of enclosure to the garden spaces of Kintyre Court. The Council's behaviour was therefore unreasonable in this regard and

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<sup>5</sup> A London Plan Fire Safety Report and Design Note

this gave rise to unnecessary or wasted expense at the appeal by BHPD Limited in fighting this element of the tenth reason for refusal.

18. Additional information was submitted by BHPD Limited during the course of the appeal to clarify the swept path of delivery vehicles and detailing a revised car parking arrangement. The Council reviewed this information and promptly withdrew their objection on this ground. It is likely that this issue could have been resolved ahead of the appeal being lodged had there been greater engagement by the Council during the course of the planning application. However, this goes back to the point already set out above regarding the link between the lack of pre-application engagement by BHPD limited and the approach by the Council during the application determination period. The Council's behaviour was, therefore, reasonable in relation to the eleventh reason for refusal.
19. The existing refuse collection arrangement uses Brixton Hill Place. This is also what is proposed. The Council confirmed in its Statement of Case in April 2023 that it no longer objected on this basis. Its original concern was that it had not been demonstrated that an alternative, off-street, solution could not be found. As with the highways issue set out above, it is likely that this issue could have been resolved ahead of the appeal being lodged had there been greater engagement by the Council during the course of the planning application. However, for the same reasons regarding the pre-application engagement, the Council's behaviour was reasonable in relation to the twelfth reason for refusal.
20. The Council refused the planning application because of an alleged failure to demonstrate suitable design standards, energy efficiency or biodiversity. The information regarding design standards and energy efficiency had already been submitted with the planning application in the Sustainable Design and Construction Statement and Energy Report and had been overlooked by the Council. If this had been considered appropriately then this would not have formed part of the reason for refusal. In addition, the Council has confirmed that its concerns regarding biodiversity could be secured by condition to require a Biodiversity Gain Plan. These issues were dropped by the Council on 25 April 2023 but there would still have been unnecessary or wasted expense in the appeal process for BHPD Limited in relation to the thirteenth reason for refusal up to this date.
21. The Council refused the planning application because of an alleged failure to adequately justify the acceptability of the selected point of discharge, the existing run-off rate, and the adoption of a non-greenfield run-off rate, all in relation to surface drainage measures. However, the information relating to the point of discharge and existing run-off rate had already been provided within the Flood Risk Assessment. This had been overlooked by the Council. If this had been considered appropriately then this would not have formed part of this reason for refusal. Therefore, in relation to those two elements of the fourteenth reason for refusal, the Council behaved unreasonably resulting in unnecessary or wasted expense in the appeal process for BHPD Limited up until 25 April 2023.
22. However, the Council's approach in requiring agreement from the Local Lead Flood Authority (LLFA) regarding whether or not adopting non-greenfield run-off rates was acceptable, was reasonable in principle. It was the delay in receiving a consultation response from the LLFA which led to that part of this

reason for refusal. The LLFA's behaviour was unreasonable but this was not in the control of the Council. This issue was dropped by the Council on 25 April 2023, following receipt of the LLFAs comments. The Council's behaviour was, therefore, reasonable in relation to this element of the fourteenth reason for refusal.

23. An Air Quality Assessment (AQA) in support of the proposal is a requirement of Policy SI1 of the London Plan 2021. The Council should not, therefore, have validated the planning application without an AQA. However, because the need for an AQA is clearly set out in the Development Plan, it is reasonable to have expected BHPD Limited to have submitted the document, even if it was not explicitly requested by the Council. The Council withdrew its objection on receipt of an AQA. The Council's behaviour was, therefore, reasonable in relation to the fifteenth reason for refusal.
24. The Council did not review the draft s106 Planning Agreement submitted as part of the planning application. This was because BHPD Limited did not pay the Council's costs to undertake this work. As with the pre-application fees, the requested costs were in accordance with the Council's standard fees. I have not been provided with any substantiated evidence as to the fees being set at an unreasonable level. In the lead-up to, and at the, Inquiry the Council and BHPD Limited engaged and agreed a final s106 Planning Agreement in the form of a Unilateral Undertaking, dated 17 July 2023. The Council attended the relevant round table session at the Inquiry. The Council's behaviour was, therefore, reasonable in relation to the sixteenth reason for refusal.

### **Conclusion**

25. Taking all of the above into account, I find that unreasonable behaviour by the Council resulting in unnecessary or wasted expense by BHPD Limited, as described in PPG, has been partially demonstrated and that a partial award of costs is justified.

### **Costs Order**

26. 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 Lambeth shall pay to BHPD Limited the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurrent in dealing with: the privacy between units across the courtyard in relation to reason for refusal 7; sense of enclosure to the garden areas of Kintyre Court in relation to reason for refusal 10; reason for refusal 13; and, point of discharge and existing run-off rate in relation to reason for refusal 14. Such costs are to be assessed in the Senior Courts Costs Office if not agreed.
27. The applicant is now invited to submit to the Council of the London Borough of Lambeth, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*O S Woodward's*  
INSPECTOR