



Costs Decision

Hearing (Virtual) held on 19 October and 12 December 2023

Site visit made on 20 October 2023

by D Wallis MRTPI, BSc (Hons), PGDip (Environmental Planning)

an Inspector appointed by the Secretary of State

Decision date: 13th December 2023

Costs applications in relation to Appeal Ref: APP/G5180/W/23/3321134 33-41 Masons Hill, Bromley, BR2 9HD

- The applications are made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - An application is made by Cobalt (Bromley South) Limited for a partial award of costs against London Borough of Bromley.
 - An application is made by the London Borough of Bromley for a full award of costs against Cobalt (Bromley South) Limited
 - The appeal was against the refusal of planning permission for the Demolition of the existing buildings and redevelopment of the site for a new part8/part 11 storey building comprising flexible commercial floorspace (Use Class E) at ground floor and residential units (Use Class C3) above, along with associated amenity space, ancillary refuse and recycling storage, cycle parking and disabled persons car parking.
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Decision

1. Applications for costs were made by both the Applicant and the Council against each other. Both of the applications for an award of costs are refused.

Application A: The submissions for the London Borough of Bromley (the Council)

2. The costs application was made in writing in between the sitting days of the Hearing. No further oral submissions were made when the Hearing resumed on 12 December 2023.
3. The Council submits that a flood risk sequential test was missing from the Applicant's flood risk assessment when the planning application DC/21/00741/FULL1 was first submitted. The Council points out that the application form, the National Planning Policy Framework and the Planning Practice Guidance (PPG) require a compliant flood risk assessment to accompany an application for development, including a sequential test.
4. The Council states that the incomplete flood risk assessment is the responsibility of the Applicant and that pursuing an appeal in light of the omission amounted to unreasonable behaviour. Furthermore, the Council highlights that, once the failure to submit sequential test information had been raised by a third party on 16 August 2023, the Applicant did nothing to resolve the situation.
5. Consequently, the Council seeks a full award of costs since, in its view, unnecessary expense was incurred by the Council having to defend an appeal that never should have been brought, attend a hearing that never should have

started and participate in a second hearing day which should not have been necessary.

Application B: The submissions for Cobalt (Bromley South) Limited

6. The costs application was made in writing in between the sitting days of the Hearing. No further oral submissions were made when the Hearing resumed on 12 December 2023.
7. The Applicant states that the Council effectively introduced a new reason for refusal on the first day of Hearing without any prior warning, correspondence or submissions. In doing so, the Applicant was caught unaware and needed to request an adjournment to the Hearing to allow for an addendum to be prepared to its pre-submitted flood risk assessment.
8. The Applicant points to the history of the application and appeal processes, stating the Council did not raise any concerns on the sequential test until it was raised in the Hearing itself via a third party. This, the Applicant states, is contrary to advice in the PPG and the requirements of the Town and Country Planning (Development Management Procedure) Order 2015 article 34(1), which require a decision notice to state clearly and precisely the full reasons for refusal.
9. The Applicant states that had the Council raised the matter beforehand, it could have addressed the problem earlier so that there would have not been any need for an adjournment of the Hearing. By leaving it late, the Applicant states the appeal has been prolonged to a second day, giving rise to unnecessary costs. A partial award is therefore sought for the second day of the Hearing proceedings.

Reasons

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

Application A

11. It is incumbent on a Council to set out clearly their reasons for refusal on the face of the decision. The matter of the lack of a sequential test was not picked up by the Council at any point during the determination of the application, as demonstrated by the committee report underpinning the Council's decision notice. The Council proceeded to refuse the application but not on the basis of an inadequate flood risk sequential test.
12. In considering whether to lodge the appeal, the Applicant was entitled to review the reasons for refusal and prepare submissions on that basis. Considering there was no reference to the sequential test in the reasons for refusal, the Applicant was entitled to believe there was no dispute between itself and the Council on the matter. Pursuing the appeal on this basis was an informed and reasonable decision in my view.
13. The Council, at the top of page 2 of its application for an award of costs, state the appellant chose to do nothing once the third-party objection raising the lack of a sequential test had been received on 16 August 2023. However, the

Council's own defence against the applicant's costs claim implies that the Council was merely responding to the Inspector's questions about the third-party comments and happened to agree with them. In light of this, with the third-party comments in the public domain, I must consider the Council also chose to do nothing until the day of the Hearing.

14. Pertinently, the Council proceeded to collaborate upon and sign a Statement of Common Ground (SoCG) dated 5 October 2023 with clause 6.57 stating: "It is agreed that the findings of the site-specific flood risk assessment submitted in support the application have been accepted by LBB and the EA and no objection has been raised by the EA or LBB in relation to the location of the development in Flood Zone 2." Signing this document, supposedly in full knowledge of the objector's comments, makes the Council complicit in doing nothing about the issues raised by the objector. On the basis of this SoCG, it is not surprising the Applicant did nothing to respond to the objector, given it believed the matter was agreed common ground with the Council.
15. If the third party had not raised the issue, prompting my questions at the Hearing, I am not confident that the matter would have been aired by the Council at all.
16. In terms of waste or unnecessary expense, the Council cannot be surprised that raising such a fundamental issue at the Hearing would have prompted an adjournment of some kind. It cannot be expected that such a matter could be introduced into appeal proceedings, with the intention of directly influencing the Inspector's decision-making, without the Applicant having a fair chance to substantiate its case. To this extent, by failing to disclose the issue in advance, the need for the Hearing to begin in the first place, and then need to be resumed at the later date, was inevitable and any costs incurred by the Council in attending were necessary.
17. The expenditure by the Council in participating in the Hearing was wholly necessary given its publicly stated position on entering into the Hearing on day one. The Applicant had a right to pursue an appeal. Whilst the Applicant did produce fresh evidence at a late stage necessitating an adjournment, it was a direct, fair and proportionate response to an effective new reason for refusal being introduced at the Hearing itself. The fact that a second day had to be programmed into the appeal and attended was a consequence of the Council's own failure to make clear its position earlier.

Application B

18. The Applicant is correct that a new substantive reason for refusal was introduced by the Council on the first day of the Hearing, regardless of whether the Council sought to push the matter formally or just bring it to the Inspector's attention. This, in effect, had to become a new main issue for the planning appeal that I was determining. The matter had not been raised by the Council previously in its determination of the planning application, in its decision notice, nor in its defence of its decision in preparation for the appeal Hearing.
19. Furthermore, as stated above, the Council also signed a SoCG confirming that the contents of the flood risk assessment, inclusive of the lack of a sequential test, was acceptable.

20. The Council has demonstrated unreasonable behaviour by failing to set out fully its reasons for refusal, for not raising a concern on the sequential test throughout the appeal process until the day of the Hearing and for signing the SoCG in knowledge that there was in fact a dispute about what appeared to be an agreed matter.
21. In terms of unnecessary expenditure however, the Applicant is required by national and local policy to submit a sequential test as part of a flood risk assessment. The Applicant admits at paragraph 6 of its application for costs that no sequential test was included in the flood risk assessment.
22. In giving reasons why a sequential test was not submitted, the Applicant relied upon the vulnerability classification in Table 2 of the Planning Practice Guidance and that the vulnerability of the use on the appeal site would not change via the appeal scheme. However, reading the PPG as a whole (Paragraph 032 Reference ID:7-030 20220825) and the notes to Table 2 (Paragraph 079 Reference ID: 7-079-20220825) it clearly sets out the sequential test should be applied first before using Table 2, which relates to when the exception test is required.
23. The Applicant also justifies the lack of a sequential test on the basis that the appeal site should be classified as being in flood zone 1. That is not what is written in the flood risk assessment and the Applicant also signed the SoCG with the Council that clearly states in paragraph 6.57 that the appeal site is agreed as being in flood zone 2.
24. Once the matter of an inadequate sequential test was raised by a third-party via myself in the Hearing, the Applicant did not seek to defend its position or rebuke the Council's position in the terms expressed above. Instead, the Applicant sought a longer adjournment to allow a sequential test to be undertaken and subsequently consulted on. In my view this is a clear acceptance that the original flood risk assessment was defective and required a sequential test to be undertaken.
25. For the Applicant, the adjournment of the Hearing for a later resumption was borne out of necessity for it to undertake the work that should have been done many months prior at the application stage. Had diligence been given earlier in the process, the sequential test would not have had to be done retrospectively. Had the third-party comments been treated properly prior to the Hearing, the Applicant would have still needed to undertake the sequential test and it would still have needed some discussion in the Hearing. The costs incurred to do the work were a wholly necessary expense.

Conclusions

26. In my view, both the Applicant and the Council are culpable, failing to provide a sequential test and failing to notice that it not been undertaken. Nonetheless, despite the catalogue of errors, I conclude that no unnecessary costs have been incurred by either party.

Application A

27. Despite submitting a flawed application, the Applicant cannot be found unreasonable in pursuing the appeal and was entitled to do so on the basis of the disclosed reasons for refusal. Seeking an adjournment was a fair and proportionate response to having a new reason for refusal presented at the

Hearing. No unreasonable behaviour is demonstrated on behalf of the Applicant and no unnecessary expense has been incurred by the Council in participating in the Hearing, thus the request for a full award of costs is not warranted.

Application B

28. I find that the Council's actions amount to unreasonable behaviour through the introduction of a new reason for refusal in the appeal Hearing when it had every opportunity to do so in advance.
29. However, the expenditure by the Applicant was necessary to ensure the original flood risk assessment was completed properly and to substantiate its own case. Regardless of the timing of preparation of the sequential test, it was necessary work that would have required clarity at the Hearing.
30. Therefore, no unnecessary or wasted expenses have occurred, and the request for a partial award of costs is not warranted.

David Wallis

INSPECTOR