



Costs Decision

Site visit made on 21 October 2023

by K Lancaster BA (hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26th February 2024

Costs application in relation to Appeal Ref: APP/F5540/W/23/3321628 Gable House, 18-24 Turnham Green Terrace, Chiswick, W4 1QP

- 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 Chiswick House Ltd (Chiswick Business Centres Ltd) for a full award of costs against the Council of the London Borough of Hounslow.
 - The appeal was against the refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
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Decision

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

The submissions for Chiswick House Ltd (Chiswick Business Centres Ltd)

2. An application for a full award of costs was submitted in writing by the applicant against the Council of the London Borough of Harrow on procedural grounds.
3. The applicant alleges that the Council failed to engage with case law that established that if it would be irrational to enforce against works undertaken pursuant to planning permission, those works will be effective to implement the permission.
4. The applicant states that during the determination period, the case officer raised concerns regarding the details submitted to discharge condition 3 (materials) and originally requested the submission of additional information. Subsequently, the Council then suggested the removal of condition 3 from the application, indicating that the other two conditions could be approved. However, the applicant states that the Council then changed their position, advised that the permission had lapsed, and that the Council would not accept any additional information. The application was subsequently refused, and the conditions were not discharged.
5. The applicant states that the permission was lawfully implemented, and that the information required to be submitted and approved to discharge the pre-commencement conditions was submitted to the Council prior to the works being carried out. The Council confirmed that only Condition No.10 was a true condition precedent, for which details were agreed with the Council. Therefore, the applicant's position is that the only reason for refusal of the application was the Council taking the view that the planning permission had lapsed.
6. The applicant believes that the Council could have determined the application, because the permission is extant and either agreed and extension of time to agree further details in respect of materials or agreed to amend the application

removing Condition No.3 and approving the submitted details in respect of condition nos. 6a and 10.

7. As a result, the applicant states that the Council has acted unreasonably by acting contrary to and not following well-established case law, which resulted in the submission of this appeal and the applicant incurring additional costs in doing so.

The response by the Council of the London Borough of Harrow

8. The Council accepts that there were some errors made in relation to the advice issued to the applicant in relation to the submission of proposed amendments and extensions of time to determine the application. However, they also state that these errors did not alter the outcome of the application, as the Council can refuse an application based on the originally submitted details.
9. In relation to whether or not the original planning permission had expired and whether the Council was able to issue a decision discharging conditions, when the stated commencement of development occurred prior to the submission of an acceptable construction logistics management plan. The Council maintains that the development was not lawfully commenced prior to expiry of the permission.
10. The Council has set out their position within the officer report and expanded upon their reasoning in the statement of case in response to the appeal. Essentially, the Council have confirmed that their position is that the works to fire escape were carried out at such a time that the submitted Construction Logistics Plan required amendments to be deemed acceptable, which only occurred after the expiration of the planning permission. The Council's position is that, as this is a condition which goes to the heart of the permission, the Council is of the view that the development cannot be deemed to have been lawfully commenced.

Reasons

11. 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. PPG¹ provides that local planning authorities (LPAs) are at risk of an award of costs if they behave unreasonably with respect to the procedural matters, such as demonstrating a lack of co-operation with the other party, or in relation to the substance matter of the appeal, for example, by unreasonably refusing planning applications.
12. In relation to the application for costs, the main area of dispute relates to whether or not the original permission lapsed, without a lawful commencement of development taking place.
13. As outlined in my appeal decision, the original planning permission was granted on 2 October 2019 subject to a number of conditions including a requirement for development to commence within three years of this date. As such, the planning permission would expire after 2 October 2022 unless it had been lawfully implemented. The permission also included a number of conditions

¹ Paragraph: 047 Reference ID: 16-047-20140306 and Paragraph: 049 Reference ID: 16-049-20140306

required that they be discharged prior to the commencement of development, including the three conditions in dispute in this appeal. An application for approval of details pursuant to these conditions was submitted to the Council on 30 September 2022.

14. The appellant has provided evidence in the form of dated photographs (dated 23 September 2022) and a legal opinion (dated 30 March 2023) to support their claim that the development commenced prior to this date. The photographs are dated 23 September 2022. They also cite an exception to the 'Whitley Principle'², whereby if the condition requires that a detail or design is approved before a given date, and the developer applies for that approval before that date, and the approval is subsequently given so that no enforcement action could be taken, work that is carried out before the deadline and in accordance with the ultimately approved scheme can amount to a lawful start to development. Accordingly, their position is that the development has lawfully commenced.
15. The Council's position is set out as an informative on the decision notice and states that the original permission 01135/18-24/P2 has expired without the pre-commencement conditions being discharged. Therefore, the implementation of the permission 01135/18-24/P2 is now unlawful, and the applicant need to apply for a new full planning permission for the proposed works.
16. As outlined in my appeal decision, whether or not the planning permission has been lawfully implemented is not a matter for me to decide within the context of an appeal made under Section 78 of the Act. The appropriate mechanism for establishing the lawfulness of an existing development would be to apply for a Certificate of Lawful Development under s191 of the Town and Country Planning Act 1990. I understand that the applicant has not taken the opportunity to seek the formal determination as to whether the development has been lawfully commenced.
17. The Council in refusing the application, which is the subject of the appeal, did so on the basis that they found that insufficient information had been submitted to satisfy the requirements of condition no.3, relating to materials. Whilst I acknowledge that the Council had indicated during determination of the application that they would be willing to accept additional information, they subsequently refused the application before the amended information could be provided. I also acknowledge that the Council took this approach based on their assessment of whether the planning permission had expired. This was communicated to the applicant prior to the decision being issued.
18. It is clear that the parties are of opposing views in this regard. However, my appeal decision turns on whether sufficient information has been provided in respect of condition 3 and the effect of the materials on the character and appearance of the area, including whether or not the proposed materials would preserve or enhance the Chiswick High Road Conservation Area (CHRCA). In this respect, I have found that the additional information submitted with the appeal has provided sufficient details to clarify the profile, colour, texture, and appearance of the materials which would be used in the development. I have also concluded that the proposed materials are acceptable.

² Whitley & Sons v Secretary of State for Wales [1992] 64 P&CR 296

19. The Council have undertaken an assessment of the materials and the information submitted within their officer report, and although I have reached different conclusions to the Council, an award of costs does not necessarily follow the outcome of the appeal. The submission of additional information with the appeal was also significant in reaching my conclusions and the Council did not have the benefit of this information prior to the appeal.
20. Consequently, whilst I accept that the Council's approach to whether or not the planning permission had lapsed could have been handled in a more proactive and co-operative way, they are entitled to make a decision on the acceptability of an application based on the details submitted and are not required to agree to an extension of time for additional information to be submitted. Accordingly, I find that the Council has not acted unreasonably.
21. Furthermore, additional evidence in the form of a legal opinion setting out the basis on which the applicant considers that the development has been lawfully commenced was only submitted in support of the appeal. The Council did not have the benefit of this information when determining the application.
22. Accordingly, notwithstanding the dispute, the Council reached their judgement based on the information available to them at the time. Consequently, whilst the Council has reached a different conclusion to the applicant, in establishing whether or not the development has commenced, this is not a matter for this appeal. The appropriate mechanism for establishing the lawfulness of an existing development would be to apply for a Certificate of Lawful Development under s191 of the Town and Country Planning Act 1990.
23. Consequently, for the reasons given above, I therefore conclude that unreasonable behaviour resulting in unnecessary or wasted expense has not occurred and an award of costs is not warranted.

K Lancaster

INSPECTOR