



Costs Decision

Site visit made on 29 April 2024

by Robin Buchanan BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14th June 2024

Costs application in relation to Appeal Ref: APP/A5840/W/23/3333639 157 Dunstons Road, London SE22 0HB

- 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 Mr Lakh Kallar of Dunstons 7 Limited for a full award of costs against the Council of the London Borough of Southwark.
- The appeal was against the refusal of planning permission for proposed development described as 'erection of two semi-detached houses and garden room/storage'.

Decision

1. The application for a full award of costs is refused.

Preliminary Matters

2. I refer to abbreviations used in my appeal decision.
3. In response to the costs application the Council referred to some documents that the applicant had already cited in its appeal statement. The Council also provided a Viability Assessment December 2023 (VA) which supports the Council's draft S106SPD. The VA pre-dates the Council's appeal statement though wasn't mentioned therein. Even if the VA does not relate to the version of the draft S106SPD that the Council referred the applicant to in October 2023 (see below), before the applicant's appeal statement, it pre-dates the applicant's appeal final comments, so was available to the applicant in the appeal as well as in response to the Council's costs comments. There has, therefore, been no procedural unfairness or prejudice caused. Accordingly, I have taken the Council's costs comments and the applicant's response into account, including insofar as they are material to my appeal decision.

Background

4. Parties in planning appeals normally meet their own expenses. However, 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. Both limbs must therefore be present to result in a costs award. The alleged unreasonable behaviour is procedural and substantive during the Council's consideration of the application and in making its decision, as well as in the appeal, to the extent that the applicant considers the appeal should not have been necessary.

Reasons

5. The planning application form refers to a pre-application meeting with the Council in November 2019. This was more than 2 years before the SP was adopted in February 2022 and more than 3 years before the planning

application was submitted in April 2023. Even if this meeting established the planning policies the Council would rely on for an imminent application, this did not at the time include the SP and a proposal for two dwellings was not then within the scope of AH provision under the previous development plan. If an emerging SP was discussed it was not an adopted plan. The application form refers to a design and access statement but it was not submitted as part of the appeal. There is no other evidence, such as a covering letter or planning statement, to show that the applicant had already accounted for the provision of AH on this small site to meet the Council's new SP Policy P1.

6. So, although there had been no change in planning policy **since** the application was submitted, the applicant appears to have been unaware of this significant change in policy **when** it was submitted. If so, the Council's 19 April 2023 letter, explaining the need to make provision for AH on small sites, likely came as a surprise but that is not the Council's fault. Pre-application engagement is advocated by the NPPF and PPG. In this case the significant elapse of time since advice was obtained increased the risk of it being overtaken by events. There is no evidence that the applicant sought up-to-date advice and no apparent reason why not.
7. This led to protracted correspondence about AH provision during the application process, including (on the extracts before me) that the 40% fast track route was not the applicant's position 'from the word go' (ie submission of the application), it was only 'made clear' subsequently. An initial position of the applicant was 35% provision¹, which was not the fast track route but no viability assessment was submitted, as the Council otherwise expected, so this initially clouded the issue. The applicant then engaged directly with the Council, separately to his architect and as did latterly his affordable housing consultant. These requests sought, and elicited, responses from more than one Council officer. It is unsurprising that these circumstances caused the applicant 'difficulties' and commensurate delay in trying to resolve this matter during the application process, instead of beforehand, but that was not of the Council's choosing.
8. Initially, and thereafter, the Council referred the applicant to documents that it considered explained and justified £100,000 PHR. This included the SPD and the draft SPD but in this case the former does not give £100,000 PHR for the proposal and the latter is not an adopted SPD. The Council also directed the applicant to SP Policy P1 but it does not refer to £100,000 PHR and taken in isolation does not explain or justify this figure. Nor does, on its own, directing the applicant to the location of the site in a CIL Zone or to what is shown on the Council's website, as the Council did.
9. In the extracts provided, this correspondence started in April 2023 but it was not until September 2023 that the Council mentioned the SP Inspectors' examination report and SP and SP Policy P1 supporting evidence base documents. But even then, taken at face value and albeit a higher figure, those documents included £130,000 PHR, not £100,000 PHR. In October 2023 the Council directed the applicant to the emerging draft S106SPD which referred to £100,000 PHR. This may have by then been when this document was sufficiently advanced to warrant public release, but it had no status as an adopted SPD.

¹ Letter dated 26 April 2023 prepared by Affordable Housing 106

10. As a result, though quite timely, these therefore largely cursory Council responses lacked clarity or precision so contributed to the prolonged correspondence. This was ultimately to the frustration of the applicant and its professional advisors who pursued a complaint to the Council, but not just for reason of delay or the quality of advice received, but also disagreement in principle with the Council's position. Given this impasse, the Council properly exercised its duty to determine the planning application, including to refuse planning permission for the reason and policies set out in its decision notice.
11. The mostly procedural circumstances outlined above led the applicant to decide to pursue the matter through the appeal process, rather than engage further with the Council and try to resolve matters in dispute, then submit a fresh application. It will be evident from my appeal decision that this has not prevented or delayed development which should clearly have been permitted. Awards of costs cannot extend to compensation for indirect losses, such as those which may result from alleged delay in obtaining planning permission.
12. However, once the applicant had engaged with the Council about AH provision at application stage, there is no apparent reason why the Council could not have been more transparent and certain about the basis of its position. Moreover, it should have communicated this clearly and promptly to the applicant. Instead, it failed to give sufficient explanation or justification soon enough, including some vague or generalised assertions initially unsupported by any cogent objective evidence. That was plainly unreasonable.
13. But notwithstanding the above, the applicant disputed not just the origins and credibility of a £s PHR figure, but the essence or integrity of SP Policy P1 as a basis for the AH financial contribution, including because it did not contain a £s PHR figure. Furthermore, and anyway, the applicant disputed the relevance of LP Policies H2 and H4 which eventually formed part of the Council's reason for refusal. I have resolved these substantive matters in my appeal decision and therefore as these are also relied on in this costs application.
14. Given the applicant's fundamental difference of position to the Council shortly after the application was submitted, and maintained thereafter, there is no apparent or compelling indication that the Council's unreasonable behaviour prior to its decision made any material difference to the applicant's decision to pursue the appeal, or that the appeal would have been avoided. Moreover, there is no evidence that as a result this has had a significant, or any material bearing, on the costs that have been incurred by the applicant in submitting the appeal and maintaining all these arguments.

Conclusion

15. For the reasons given above, I find that unreasonable behaviour by the Council resulting in unnecessary or wasted expense in the appeal process, as described in PPG, has not been demonstrated. Accordingly, a full award of costs is not justified, nor is a partial award for these same reasons.

Robin Buchanan

INSPECTOR