



Costs Decisions

Site visit made on 26 June 2024

by C Beeby BA (Hons) MIPROW

an Inspector appointed by the Secretary of State

Decision date: 31 July 2024

Costs applications in relation to Appeal Ref: APP/F5540/W/23/3330464 147-161 High Street, Hounslow, TW3 1QL

- 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).
 - Application 1 is made by the London Borough of Hounslow for a full award of costs against Ganco Limited.
 - Application 2 is made by Ganco Limited for a full award of costs against the London Borough of Hounslow.
 - The appeal was against the refusal of planning permission for the partial demolition of an existing building, retention of the ground floor retail units and redevelopment to create a building rising to six storeys to provide 55 residential units, with associated amenity spaces, refuse and cycle storage.
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Decision: Application 1 (made by the London Borough of Hounslow against Ganco Limited)

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

The submissions for the London Borough of Hounslow: Application 1

2. The Council seeks a full award of costs in respect of the need to instruct consultant surveyors to review an updated Viability Assessment submitted by the appellant. The Council submits that unreasonable behaviour was demonstrated by the appellant in providing Build for Sale (BfS) evidence during the appeal rather than during the Council's consideration of the planning application.

The submissions for the appellant: Application 1

3. The appellant sets out that the scheme concerned Build to Rent (BtR) properties at the time of the Council's decision. The relevant Viability Appraisal at that point consequently related only to a BtR scheme.
4. The appellant submitted a Viability Statement of Case with the appeal which included viability appraisals for both the final BtR scheme, and for a BfS scheme. The appellant submits that it is commonplace to update viability evidence at appeal, and that the evidence submitted comprised updates to previous documents and consequently was not new evidence.
5. The appellant states that the Council did not request an update to the BtR viability appraisal when the application was under consideration, but referred to viability as a concern in its delegated report. The appellant consequently provided an updated BtR viability appraisal within their Viability Statement of case in order to respond to the Council's concerns.

Reasons: Application 1

6. 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.
7. Examples of unreasonable behaviour that may lead to an award of costs against appeal parties are given in the PPG and may concern:
 - delay in providing information or other failure to adhere to deadlines;
 - only supplying relevant information at appeal when it was requested, but not provided, at application stage;
 - introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.
8. The Council's decision notice cites two reasons for refusal, which concern the level of affordable housing and the housing mix proposed by the scheme. Whilst the Council seeks a full award of costs, its grounds for doing so relate only to the affordable housing reason for refusal. The housing mix reason is consequently not part of the application for costs. Thus, any costs award must be limited to those costs incurred in relation to the affordable housing reason for refusal.
9. The BtR scheme proposed at the time of the Council's decision could not viably offer more than 5% affordable housing.
10. However, the initial application had proposed solely BfS properties. Financial assessments indicated that that earlier tenure basis could viably offer 21% affordable housing. Permission was consequently ultimately refused by the Council on the partial basis that the application had failed to demonstrate that the maximum reasonable affordable housing offer had been provided, contrary to development plan policy.
11. An updated Financial Viability Assessment (FVA) was then submitted with the appeal. This included BfS figures which had been absent from the FVA under consideration at the time of the Council's decision.
12. A review of the updated FVA on behalf of the Council found that the scheme would now generate a deficit whether all units were BtR or BfS. On that basis it was concluded that the scheme could not provide additional affordable housing, even if the tenure of the housing proposed was to be amended. The Council consequently no longer sought to defend its affordable housing reason for refusal at appeal.
13. Development plan policy requires applicants for permission to demonstrate that the maximum reasonable affordable housing offer has been provided, and refers to the strategic borough-wide target of 40% of all new housing as affordable. The policies do not limit viability assessment to one tenure at once. Indeed, the Viability Planning Practice Guidance states that "Scheme level viability assessment may be improved through the inclusion of two sets of figures, one based on a build to rent scheme and another for an alternative

build for sale scheme. This would enable authorities to compare and understand the differences”.

14. Whilst the Council did not explicitly request the submission of updated BfS figures prior to making its decision, it indicated to the appellant on three occasions during the application that the scheme was not considered to provide the maximum reasonable amount of affordable housing. The appellant initially submitted BfS figures which were found to allow for 21% affordable housing, on which the Council’s subsequent requests for 20% appear to have been based. Furthermore, viability was under consideration from the initial stages of the application. The PPG on the subject set out that scheme viability assessment may be improved through the inclusion of both BtR and BfS figures.
15. Thus, in light of both the history of the application and the advice of the PPG, the appellant could reasonably be expected to have been aware, prior to the Council’s decision, that the submission of additional BfS figures could have resolved its stated concerns regarding the proportion of affordable housing offered. This is further supported by the appellant’s submission of BfS figures at appeal stage, which showed an awareness that this information had the potential to overcome the concerns expressed prior to the Council’s decision.
16. Whilst updated viability evidence may be submitted with appeals in some instances, in this case it has not been demonstrated that the updated FVA could not have been submitted during the application, particularly as a BfS scheme was initially considered at that stage. The affordable housing reason for refusal could therefore potentially have been resolved at an earlier point than at appeal.
17. The appellant consequently behaved unreasonably in delaying the provision of information and in introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen. This caused the Council to incur unnecessary or wasted expense in the appeal process, comprising the costs of engaging a review of the updated FVA which was submitted with the appeal.
18. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the affordable housing reason for refusal and a partial award of costs is therefore warranted in respect of Application 1.

Costs Order: Application 1

19. 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 Ganco Limited shall pay to the London Borough of Hounslow the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in relation to the affordable housing reason for refusal; such costs to be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Ganco Limited, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Decision: Application 2 (made by Ganco Limited against the London Borough of Hounslow)

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

The submissions for the appellant: Application 2

21. The appellant seeks a full award of costs. They submit that unreasonable behaviour was demonstrated by the Council because they did not take account of a relevant recent appeal decision. They consider that the Council's lack of consideration of the other appeal decision contributed to their subsequent request to increase the proportion of affordable housing at the appeal scheme to 20%. They submit that, together, these considerations formed unreasonable behaviour, which contributed to unnecessary expense in defending the viability element of the reason for refusal.
22. The appellant further submits that the Council's withdrawal of the viability reason for refusal of permission at appeal formed unreasonable behaviour. They consider that unnecessary expense arose from the need to defend this reason for refusal, although both their own and the Council's viability assessors had reached agreement on the maximum proportion of affordable housing which the scheme could support at application stage.

The submissions for the London Borough of Hounslow: Application 2

23. The Council refers to its statement within the officer report that the evidence demonstrated, at that point, that a BfS and shared ownership scheme could provide more affordable housing than the BtR scheme proposed. It therefore concluded that the appellant had not provided the maximum reasonable amount of affordable housing on site, contrary to local plan policy. The Council refers to the Viability PPG that scheme viability assessment may be improved through the inclusion of two sets of figures, one based on a BtR scheme and another for an alternative sale scheme.
24. The Council states that it withdrew part of the sole reason for refusal in response to the appellant's submission of an updated viability assessment at appeal. The update included BfS figures which were not before the Council at the time of its assessment. A review of the update confirmed that no additional affordable housing could then be provided. The Council's withdrawal of part of the reason for refusal was consequently based on new evidence which was only submitted at appeal. The Council submits that the new information should have been provided during its assessment of the application had the appellant wished for it to be taken into account. It states that the onus is on the appellant to provide information to support their application, rather than on the Council to request it.

Reasons: Application 2

25. Examples of unreasonable behaviour that may lead to an award of costs against a local planning authority are given in the PPG and may concern:
- persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable.

- withdrawal of any reason for refusal or reason for issuing an enforcement notice.
26. Whilst I note the conclusions of the other appeal decision referred to, in that case previous figures had not indicated that a higher proportion of affordable housing could be provided than that offered at the decision stage. The circumstances of the other decision were consequently materially different from those under consideration by the Council at the time of its decision. In the current case the Council took account of the BfS figures in seeking to negotiate the maximum reasonable amount of affordable housing, in accordance with development plan policy. Those figures informed its request for 20% affordable housing, rather than the findings of the materially different appeal decision.
27. The Council consequently did not persist in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector had previously indicated to be acceptable. Thus, the Council did not demonstrate unreasonable behaviour in declining to follow the reasoning of the appeal decision.
28. The Council's officer report noted the agreement of both sides that the BtR scheme proposed at that point could not viably offer additional affordable housing. However, it then took other evidence into account, comprising the initial viability assessments suggesting that a BfS scheme could offer this. These contributed to its conclusion that the scheme had failed to demonstrate that it would provide the maximum reasonable amount of affordable housing. The Council's subsequent withdrawal of that part of its reason for refusal was based on new evidence which was only submitted at appeal.
29. Thus, whilst the Council withdrew part of its reasons for refusal at appeal stage, this was based on new information submitted by the appellant and therefore the Council could not have taken this decision earlier. No unreasonable behaviour was consequently demonstrated by the Council in doing so.
30. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated in respect of Application 2.

C Beeby

INSPECTOR