



Costs Decisions

Hearing Held on 25 - 26 June 2024

Site visit made on 26 June 2024

by D Szymanski BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 August 2024

Costs application in relation to Appeal A, Ref: APP/A5840/W/23/3323681 Land at 105 Page's Walk, London SE1 4HD

- 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 Shiva Ltd for a full or partial award of costs against the Council of the London Borough of Southwark.
 - The hearing was in connection with an appeal against the failure of the Council to give notice of its decision within the prescribed period on an application for outline planning permission (with the matters of appearance, landscaping and layout reserved) for construction of 2 x 2-bedroom terrace houses and 1 x 4-bedroom terrace house.
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Costs application in relation to Appeal B, Ref: APP/A5840/W/23/3331037 Land at 105 Page's Walk, London SE1 4HD

- 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 Shiva Ltd for a full or partial award of costs against the Council of the London Borough of Southwark.
 - The hearing was in connection with an appeal against the refusal of planning permission for an application for outline planning permission (with the matters of appearance, landscaping and layout reserved) for construction of 2 x 2-bedroom terrace houses and 1 x 4-bedroom terrace house.
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Costs application in relation to Appeal C, Ref: APP/A5840/W/24/3342742 Land at 105 Page's Walk, London SE1 4HD

- 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 Shiva Ltd for a full or partial award of costs against the Council of the London Borough of Southwark.
 - The hearing was in connection with an appeal against the refusal of planning permission for an application for outline planning permission (with the matters of appearance, landscaping and layout reserved) for construction of 3 x 2-bedroom terrace houses.
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Costs application in relation to Appeal D, Ref: APP/TRN/A5840/9440 Land at 105 Page's Walk, London SE1 4HD

- 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 Shiva Ltd for a full or partial award of costs against the Council of the London Borough of Southwark.
- The hearing was in connection with an appeal against the issuing of a Tree Replacement Notice on 4 October 2022 to plant one London Plane (Platanus x

hispanica) standard form tree with a stem girth of no less than 25cm at the place shown marked with a cross on the attached plan.

Decision

1. The application for an award of costs in respect of Appeals A, B, C and D are refused.

The submissions for Shiva Ltd

2. The appellant is of the view the Council has persistently failed to enter dialogue, co-operate, or collaborate with them. They have been forced into long and protracted processes, had to submit further applications, and pursue appeals to seek clarity upon the Council's position. The appellant is of the view that the only real issue of dispute in respect of appeals A – C is the social housing contribution. Conditions or means of addressing matters have only been offered after the determination events.
3. The appellant has been willing to agree a position on the social housing contribution yet had not been provided with a planning obligation to secure the contributions the Council demanded, and the Council was not willing to agree Grampian planning conditions. Instead, the Council has hatched other reasons it objects to or refused the applications, which were brought-up late in the process, were made of spite of, and run contrary to previous officer advice. It also refused the second application prematurely.
4. Further issues such as the reason for refusal relating to the Tree Replacement Notice (TRN) were brought-up some 18 months after an appeal had been submitted. The appellant is of the view the Council's conduct, tactics and approach has been cynical resulting in unnecessary and wasted expense.

The response by the Council of the London Borough of Southwark

5. The appellant initially failed to provide sufficient information to validate an application, which the appellant could have appealed. It was made clear to them in submitting the second application they needed to provide a viability assessment (VA) and pay for its review. The Council has been transparent in explaining how a VA is assessed, and that the Council was only prepared to deal with the matter of securing financial contributions via planning obligations.
6. There has been no prejudice in refusing the second application before the publicity expired. The outcome of the TRN appeal has been delayed by administrative matters in the appeal process, and there would be harm from not complying with the TRN. The other reasons the Council has objected to or refused the applications upon, are matters that needed to be weighed in the planning balance.

Reasons

7. Paragraphs 16-028-20140306 and 16-030-20140306 of the Planning Practice Guidance (the PPG) advise that, irrespective of the outcome of an appeal, where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.

8. Paragraph 16-049-20140306 of the PPG states authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal. This includes preventing or delaying development which should clearly be permitted, making vague, generalised or inaccurate assertions about the impact of a proposal unsupported by objective analysis, or refusing permission on a ground capable of being dealt with by conditions. Paragraph 16-052-20140306 states examples of unreasonable behaviour on procedural grounds can include a lack of co-operation with the other party, and a delay in providing information or adhering to deadlines.
9. There appears to have been protracted dialogue between the Council and the Appellant. Of that I am provided with the details of, it includes application validity, assessment of financial evidence, financial contributions, and the absence of a planning obligation. While I note, on occasions, it appears the Council has taken some time to respond to the appellant's queries, the PPG advises that costs cannot be claimed for the period during the determination of the planning application and that costs unrelated to the appeal are ineligible.
10. The appellant had the choice to appeal against the non-validation of applications, and non-determination for two of them but it did not. The amendments and evidence sought from the appellant for validation and determination purposes appear to be necessary and reasonable given the location, nature of application, and development plan policies. Though in some instances the delays in responding to the appellant might be regarded as unreasonable, from what is before me such delays have not resulted in unnecessary or wasted expense being incurred in the appeal process.
11. Of particular note, and as referenced in my decision letter, where affordable housing is required but not provided, viability evidence is necessary, as set out in Policy P1 of the Southwark Plan (2022) (the SP), supplementary guidance, and the Council's relevant reasons for refusal. The email correspondence suggests the Council has been clear on its position on viability.
12. The basis for the Council's expectation the appellant shall pay for the review of a VA, appears to be from guidance in the Affordable Housing Supplementary Document (2008) (the AHSPD)¹. The appellant not agreeing to pay for a review appears to have been a contributory factor in some delays. Ultimately, it appears the Council has met its own costs in these regards, and I have found contributions to affordable housing are necessary. Similarly, contributions to open space and archaeological monitoring are necessary, but not secured by what is before me. Therefore, the Council has not behaved unreasonably and resulted in unnecessary or wasted expense for the appellant in this regard.
13. The appellant advised part of the reason that obligations have not been signed is due to the Council not providing them. This approach can have advantages, for example with respect to setting out standardised legal terms and clauses. However, the responsibility is on the appellant for drawing-up and submitting a planning obligation. It is not incumbent upon the Council to provide an obligation, and it is at their discretion as to if they draw one up, and whether they charge for the legal work involved its preparation.

¹ Page 37 of the Affordable Housing Supplementary Document (2008).

14. From the correspondence, the appellant was made aware of the Council's approach and even appears to have been provided with a copy of an example of a planning obligation that included a late-stage review. However, the appellant was unwilling to pay the Council's legal costs and did not provide an obligation during the application process. The Council not providing a planning obligation is not unreasonable behaviour, and the appellant has not incurred unnecessary or wasted expense in the appeal process through providing late obligations, as they relate to matters that needed to be addressed by the appellant.
15. The Council was not willing to accept the use of Grampian planning conditions to secure obligations. Its reasons for doing so are well-founded, based upon the relevant guidance in the PPG, and I have not been provided with evidence that would lead me to the view Grampian conditions are an appropriate and robust way of securing the requisite contributions in these cases. The appeal A – C developments are unacceptable without legally robust obligations. These are matters that should have been addressed by the appellant and appear to have been a significant contributor to the lengthy negotiation and determination periods. Therefore, unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process is not demonstrated.
16. The Council has set out its objections, or reasons for refusal, of the applications other than in relation to financial contributions, which the appellant informs me were raised late in the determination process. Some email correspondence suggests they could be deemed contrary to previous informal officer advice upon the proposals. However, officer advice is just that, and is not a formal decision of the Council. The Council's decision can depart from that view or advice, so long as it is adequately justified.
17. I required clarification upon how the Council has approached some aspects of its assessment upon the living conditions of future and neighbouring occupiers, with questioning at the hearing. However, I have found there was material harm in these regards, most of its concerns are justified, and the effects would be such that they must be considered in the planning balance. Although not all effects have been addressed by the appellant, the evidence provided and discussed was necessary to address the matters it did in the appeal process. Therefore, unreasonable behaviour that resulted in unnecessary or wasted expense in the appeal process is not demonstrated in this regard.
18. Specifically in respect of the TRN, the Council states this was raised as a reason for refusal because the TRN appeal had not been determined by the time of its determination of the appeal C proposal. A Council is entitled to issue a TRN if a tree has been removed within a Conservation Area within a given timescale, and in this case, the tree removal resulted in an adverse effect upon the Page's Walk Conservation Area (PWCA). This is set out by the Council and conflicts with the aims of section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. In consequence, raising the harm due to the loss of the tree and potential non-compliance with the TRN is justified, in the circumstances.
19. The Council raised certain issues at the hearing in respect of replacement planting. However, I find the Council's reasoning in finding a policy conflict in this regard was not irrational or unreasonable, and it is a matter that would need to be addressed in determining the appeals, so has not resulted in unnecessary or wasted expense for the appellant.

20. As a matter of planning judgement, despite the loss of the tree, I find the Appeal A – C developments would as a whole, result in overall, small benefits to the PWCA. As matters of judgement, and given the Council has sufficiently reasoned its findings, I find the Council has not behaved unreasonably in either refusing the Appeal C proposal for the reasons it did or issuing the TRN. The loss of any TRN tree would need to be weighed in the planning balance when considering any future application.
21. The premature refusal of the Appeal B application before the publicity expired is unreasonable behaviour. The view that no-one would have been prejudiced from this at that time, cannot be substantiated. The correct publicity for the applications has now been undertaken. However, this issue did not result in the refusal of the applications, or specifically the need to lodge an appeal, and I see nothing of substance to suggest the Council would have reached a different view on the main matters in dispute, were that application publicity to have run its course. The appellant has not demonstrated how it has incurred unnecessary or wasted expense in the appeal process, from the early determination, so an award of costs is not justified in this regard.
22. Though the appellant has suggested it has only been offered conditions late in the process to deal with Council concerns, none of those before me from either party, fully address the Council's reasons for refusal that have resulted in the appeal. The Council has provided the conditions either within its statements of case, or where others were requested or deemed necessary, following discussion at the hearing. They were provided in a timely manner and the appellant has been given the opportunity to comment upon them. Therefore, the Council has not behaved unreasonably resulting in unnecessary or wasted expense in the appeal process.

Conclusion

23. For the reasons set out above, unreasonable behaviour that has resulted in the appellant incurring unnecessary or wasted expense in the appeal process, has not been demonstrated for appeals A – D.

Dan Szymanski

INSPECTOR