



Costs Decision

Site visit made on 9 December 2024

by Mr Cullum Parker BA(Hons) PGCert MA FRGS MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 29 January 2025

Costs application in relation to Appeal Ref: APP/Z5630/Q/24/3351903 Underground Car Park Kingston Riverside Henry Macauley Avenue, Kingston Upon Thames, KT2 5FE

- 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 Premier Ground Rents No.5 Limited for a full award of costs against the Council of the Royal Borough of Kingston-upon-Thames.
 - The appeal was against a refusal to modify a planning obligation.
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Decision

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

Reasons

2. The Planning Practice Guidance 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.
3. The Applicant considers that the Local Planning Authority (LPA) has failed to properly exercise its development management responsibilities by relying on a reason for refusal which does not stand up to scrutiny on the planning merits and adds to development costs through avoidable delays. This includes the LPA using vague, generalised or inaccurate assertions about a proposals impact, which is unsupported by any objective analysis.
4. The facts of the application are detailed within the evidence presented by the main parties, so I have not replicated them here. It is, nonetheless, important to note that the application for the modification of the planning obligation, which is the subject of the separate appeal decision under s106B TCPA, was submitted for determination on 15 July 2022 with an anticipated 8-week determination period.
5. The Applicant has provided a timeline in their application for costs, detailing their contact with the LPA in the period between July 2022 and March 2024 – a period of around 20 months. This timeline was not disputed by the LPA in their rebuttal; in the absence of evidence to the contrary I must work on the basis that it is broadly reflective of the events it cites including timings.
6. Whilst there is an ability to appeal against non-determination within the prescribed period, it appears as though the Applicant agreed five 'extension of time' in order to address the concerns raised by the LPA. This indicates to me that the Applicant had been trying, without success, to address the concerns

- raised by the LPA over this period in a manner consistent with being pragmatic and finding solutions.
7. The Council has responded to the application for costs by pointing out that the protracted nature of the application was a result of negotiation between the main parties. It appears as though this occurred in practice – though the timeline suggests there were large periods of quietness from the LPA such as between 12 March 2023 to 8 July 2023. It is also true that amendments to the proposed modifications have addressed some of the concerns raised by interested parties; for example that the parking could be used by members of the general public, when the modifications and car parking management plan do not seek that.
 8. However, the LPA's case is weakened by the fact that it had the ability to refuse the application for modification of the s106 within the 20 months (once taking out the 21 days notification period). Instead, the LPA decided to agree and/or seek an extension of time not once, not twice, and not even thrice, but five times. If the modification was problematic and/or objectionable it was in the LPA's gift – indeed it is clearly set out in the legislation as such – to refuse the application.
 9. Instead, the LPA continued to require chasing by the Applicant to find out when a decision would be made; and this was for a period of 20 months as detailed in the Applicant's timeline. Whilst it is for each LPA to consider how it wants to deliver its service, and I appreciate that at its heart the LPA was trying to find solutions, one would typically expect possibly one or two amendments to an application. By the time these steps are passed, one would expect that the scheme was so faulty that the LPA would exercise its powers under the TCPA and refuse the modification – especially after 20 months had passed! This would have provided both the Applicant (and also the local community) an opportunity to understand what was wrong with the modifications sought.
 10. In terms of the appeal stage, the LPA had the opportunity to submit an appeal statement setting out its case. It chose not to¹. It also chose to not respond to the Applicant's Statement of Case. The LPA had an opportunity; indeed it is an express right under s106B (5), of appearing before and being heard by a person appointed by the Secretary of State for the purpose. The Applicant indicated that initially they wanted to be heard. The LPA had decided to not submit any appeal statement or any correspondence to address the Applicant's written evidence, nor did the LPA indicate that they wished to be heard under the TCPA.
 11. Indeed, the LPA sought the written representation process and had an opportunity to submit further evidence. They decided to not to do so. Given the absence of any new information being submitted by the LPA, the Applicant was invited to review their request to appear and be heard. The Applicant decided that they were content for the evidence to be considered under the written representation process.
 12. The LPA has indicated in their costs response that the Inspector has chosen '*a truncated and informal process to conduct the appeal via a written representations process...*'. And that the LPA has been '*blindsided by the Inspector in this process and the LPA has not acted unreasonably in not*

¹ As confirmed in the LPAs email to PINs Case Officer dated Thursday 2 January 2025 sent at 3:01PM

providing a statement of case as the LPA was contesting the procedure and would have had the opportunity to amplify any areas of the decision that needed thrashing out at the hearing itself.'

13. On the first point, it is well established and common practice that appeals can be considered by means of an Inquiry, a Hearing or Written Representations. Moreover, it is well established that all of these processes provide an open, fair and impartial consideration of the merits of the cases of the parties involved. Normally, the power to determine the appeal procedure is at the discretion of the Secretary of State, and their appointed person/Inspector as set out under s319a TCPA. However, this provision does not appear to apply to appeals under s106B, and it is not possible for the SoS or Inspector to fetter this right.
14. The LPA chose to not exercise its right to appear and be heard; and did not indicate that it wished to provide any further information or evidence before the appeal. That was a decision that the LPA made, and the appointed person was open and fair in setting out their view that *'a hearing would not necessarily be a useful use of time'* as set out in the email of Friday 3 January 2025 at around 11:42am, with the LPA having a copy on 15 January 2025. It is unfortunate that the LPA do not appear to have been fully aware of what the legislation states; and the rights it appears to give specific parties – and more so given that these matters were clearly set out in the correspondence on the procedure.
15. The LPA made it clear that it was relying upon its Decision Notice, as detailed in the LPA's Costs Response at Paragraph 2.6 where they indicate: *'the LPA considering that its reason for refusal is clear and that it highlights the reason for its refusal in its commentary on the dec has been conveyed to the Inspector and the LPA would have had a chance during the course of a hearing to further discuss the matter.'* Indeed, the Decision Notice sets out an informative which in essence is a succinct officer report. That indicates that the LPA's concern that the proposal would result in the stock piling of residents car park permits. However at the appeal stage, even though they were given a number of opportunities to provide the written evidence they felt was required to justified their case, the LPA decided not to. Instead it relied upon the Decision Notice. The LPA also decided that it did not want to exercise it right to appear and be heard.
16. Regrettably, within the Reason for Refusal and informative(s) the LPA appear to have failed to take into account the requirements of s106A(6)(c). Instead there is a vague and generalised assertion that there would be stock piling of permits and increases in waiting times for parking permits for residents who want them. However, this fails to take demonstrate any consideration of the Applicant's evidence which indicates that there is a vacancy rate of around 40%. Moreover, the LPA, through the choices it has made to not submit an appeal statement, and not appear and be heard, or indicate that there is evidence that the decision-maker should have before them in order to make their decision, have provided no evidence to the contrary.
17. The paucity of evidence in this case presented by the LPA has resulted in the use of vague and generalised assertions about the proposed modifications impact, which is unsupported by any objective analysis. As such, I find that the LPA has acted unreasonably in this case. Had the LPA substantiated its case by providing evidence which supported its case, then the Applicant would

have known what case they had to answer. In such circumstances, there would have been a strong likelihood that the appeal process, with its associated costs, could have been streamlined and possibly even avoided altogether as the Applicant would have known the evidence base for the LPA's articulation of its concerns. The unreasonable behaviour in this case has therefore resulted in unnecessary and wasted expense in the appeal process.

18. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified.

Costs Order

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 the Council of the Royal Borough of Kingston-upon-Thames shall pay to Premier Ground Rents No.5 Limited, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
20. The applicant is now invited to submit to the Council of the Royal Borough of Kingston-upon-Thames, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

C Parker

INSPECTOR