Planning Inspectorate

Costs Decision

Hearing held on 4 February 2025

Site visit made on 5 February 2025

by JP Sargent BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 March 2025

Costs application in relation to Appeal Ref: APP/P5870/W/24/3352826
27-29 High Street, Carshalton, Surrey SM5 3AX

- 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 Maplespring Limited for a full award of costs against the Council of the London Borough of Sutton.
- The appeal was against the refusal of planning permission for the demolition of the existing single storey building and the erection of a 3-storey building to provide 2 commercial units (Class E) at ground floor, and 9 self-contained residential units (Class C3) at ground, first and second floor with associated amenity areas, provision of off-street car parking at rear, refuse and cycle storage and landscaping.

Decision

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

Reasons

2. 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. An application for costs therefore has a twofold test of firstly identifying unreasonable behaviour, and then demonstrating the incurring of unnecessary or wasted expense as a consequence.

3. The applicant contends that, when they considered this scheme, Members were misdirected in a number of ways in the necessary heritage balancing exercise. Firstly, they were advised by Officers that the existing site had a *'neutral'* effect on the conservation area when in the emerging local plan its effect is said to be negative. They were then informed that the scheme's harm to the significance of the conservation area would be substantial, and so, under paragraph 214 of the *National Planning Policy Framework* (the Framework), permission should be refused unless the harm is outweighed by substantial public benefits. Thirdly, it was implied there was a need for an exemplar design, despite the absence of any supporting policy foundation, and finally the only benefits then identified and weighed in the balance were the supply of additional housing and the economic effects arising from the creation of a second retail unit. It was said that had Members been properly advised the whole appeal could have been avoided.

4. Moreover, after having made its decision and following representations by the applicant, the Council changed its position. In the principal Statement of Common Ground (SoCG1) it accepted the existing building has a negative effect on the

conservation area. Furthermore, in December 2024, 8 months after the decision was made, it acknowledged that the harm caused by the scheme would be less than substantial, while in the Statement of Common Ground Concerning Public Benefits of the Proposal (SoCG2) it agreed there were 10 possible public benefits in its favour. The applicant contends that the Council should then have re-assessed the case and undertaken a fresh balancing exercise under paragraph 215 of the Framework.

5. Starting first with the effect of the existing building on the conservation area, by saying that this was *'neutral'* the Officer Report was inconsistent with the view that the building had a negative impact, which the Council had explicitly stated or implicitly implied in various policy and guidance documents, and which it eventually accepted in SoCG1. No basis was offered for the adoption of a '*neutral'* stance in that Report, and I consider this departure from the established approach the Council had otherwise adopted was inconsistent and unreasonable.

6. In relation to the level of harm, it is a matter of planning judgement as to whether harm to a heritage asset is substantial or less than substantial. Such judgements though have to be made within the bounds of reasonableness. I am aware that it is now well-established caselaw that substantial harm to a designated heritage asset has a high bar. I have noted too the size of the site in relation to the overall conservation area, the site's current role, and that the development would be replacing a building that, it was accepted, had a negative effect on the area's significance. Taking these points together, I have been given no basis to show it was reasonable to judge that this proposal would cause substantial harm to the designated heritage asset.

7. Turning to the public benefits, the original Officer Report highlighted the delivery of 9 houses as the only '*tangible'* benefit of the scheme, and that is echoed in the Council's subsequent Statement of Case, and also in its comments in the SoCG2. However, when Members considered the scheme they were aware of the additional benefits raised by the applicant at that time, as they had received the applicant's letter to them dated 27 March 2024, which included a sub heading of 'Planning balance'. Alongside the housing benefit, that explicitly identified the economic and employment benefits arising from the additional shop unit, and these were incorporated into the Officers' Addendum Report. In its 'Planning balance' section the letter also said there were *'other notable public benefits'* but whatever these were they were not articulated at that point. Furthermore, on page 2 of that letter the above benefits found in the 'Planning balance' were also listed under the line *'we contend that the development delivers significant public benefits, these being:',* thereby implying it was a closed list. This list of significant public benefits on page 2 also included improvements to the context and character of the conservation area as well, but from the Council's position it is clear that it did not consider the effect on the conservation area to be a benefit.

8. SoCG2, with its 10 areas of potential public benefit was signed some 3 weeks before the Hearing. From the commentary it contains it would appear the Council did not accept all of those were, in fact, benefits of the scheme. In relation to others, such as transport for example, it can be inferred it accepted they had the potential to be a benefit but should be given limited weight.

9. Finally on this matter I accept that striving for exemplar design is a valid aim. However, it is unreasonable to treat it, as the Council seemed to do, as a requirement, as that went beyond the policy basis.

10. In the light of the above, I find that considering the existing site had a *'neutral'* impact and that the scheme's harm to significance would be substantial constitute unreasonable behaviour that meant the applicant incurred unnecessary expense in having to persuade the Council otherwise.

11. If any level of harm is found to designated heritage assets, the Framework requires a balance to be made between the adverse impacts on the one hand and the public benefits on the other. I am not persuaded that, when the case was determined, Members were unaware of the public benefits identified at that time by the applicant, or that any additional benefits in the SoCG2 would have been of sufficient weight in the Council's judgement to have a material effect on any balance.

12. However, acknowledging that the harm would in fact be less than substantial instead of substantial, and recognising that the contribution the existing building made to the conservation area was *'negative'* rather than *'neutral'*, together have the potential to change the outcome of any balance under paragraph 215 of the Framework. Given its change in stance in relation to these points, I consider it is unreasonable for the Council to be unable to demonstrate it had reviewed its balancing exercise promptly, as part of sensible on-going case management.

13. To my mind though, even if the Council had re-visited the balance of public benefits, and even if it had no longer required exemplary design, it has not been shown it would have found those benefits outweighed the less than substantial harm to the designated heritage asset. Moreover, there is also little to demonstrate that the additional benefits would have been material considerations to justify a decision contrary to the development plan conflict the Council identified in relation to the other concerns it raised that lay outside of heritage matters. As such, I cannot reach the view that the appeal would either have been avoided or been appreciably reduced in its extent.

14. The PPG also says that the Council may be at risk of an award of costs if it introduces a new reason for refusal. In its email of 18 December 2024 and SoCG1 the Council confirmed the proposal would result in harm to the setting of 1-4 The Alms houses [also referred to as 1-4 The Green] and Grove Hall which border the site and are identified as unlisted buildings of local merit, and so would harm these non-designated heritage assets. At the Hearing it qualified this harm, saying it was only in relation to the role those buildings played as part of the conservation area, but nonetheless maintained a concern about the effect the scheme would have on them. The concerns about the impact on these buildings did not explicitly form part of the reasons for refusal, which, I consider, focussed on the harm to the single heritage asset of the conservation area. I therefore find that introducing this concern during the appeal about the effect on the significance of 1-4 The Green and Grove Hall was unreasonable behaviour that inevitably meant the applicant incurred expense in responding to it.

15. On this point, the Council contended that the words '*harm to the conservation area*' in the reason for refusal implied that either designated or undesignated heritage assets (or both) would be harmed to a degree that is unacceptable. That is not a

view I share, as the significance of the conservation area and the significance of individual heritage assets within the conservation area are not necessarily the same. Indeed, there are numerous buildings of heritage value in the conservation area (whether listed or non-designated) and it is reasonable to expect the decision notice to stipulate which, if any, have their significance harmed by the scheme.

16. I recognise too that often appeal submissions involve an expansion of the reasons for refusal, but that must be done without introducing new areas of concern that the reasons, on their plain reading, do not address.

17. Reason for Refusal 9 concerned the absence of a legal agreement. Although the decision notice did not explicitly articulate what this agreement was for, in the Officer Report it said the site was in a Controlled Parking Zone and it was necessary to restrict the access of future residents to permits. To progress this matter and no doubt in an attempt to address the concern before the Hearing, the applicant understandably engaged legal representation to draft the agreement, only for the Council to confirm, less than 3 weeks before the event date, that the site was not in fact in a Controlled Parking Zone at all, and so the agreement was unnecessary. Incorrectly identifying the location of the site in this way, thereby saying there was a consequent requirement for a legal agreement, was unreasonable behaviour, and directly resulted in the applicant incurring wasted and unnecessary expense in connection with legal representation.

18. The final area of concern related to the application of *Sutton Local Plan* Policy 9 and the requirement for at least 50% of the units to have 3 bedrooms. The discussion in the Officer Report made no reference to Policy H10 in *The London Plan 2021.* Indeed, it was not in the Reason for Refusal and at the Hearing, the Council accepted there was no conflict with that policy. I consider there to be a judgement as to whether or not, on the facts of the case, it has been shown that the mix required by *Sutton Local Plan* Policy 9 would be unsuitable. On the evidence before me, and although I have found differently, it was not unreasonable for the Council to conclude as it did. Whilst I noted the other decisions cited, I consider they showed the Council approached the application of this policy with flexibility, and I am not persuaded that those decisions render this one unreasonable.

Conclusions

19. Accordingly, I consider that unreasonable behaviour has been demonstrated in relation to a number of matters. However, it has only resulted in the applicant incurring unnecessary or wasted expense in relation to responding to the Council

- contending the existing site had a *'neutral'* impact on the conservation area, and defining the harm to the significance of the conservation area as substantial,
- stating harm to the significance of the non-designated heritage assets despite it not being found in the decision notice, and
- requiring a legal agreement.

I therefore make a partial award of costs in relation to those 3 matters.

Costs Order

20. 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 London Borough of Sutton shall pay to Maplespring Limited, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in responding to

    - the Council contending the existing site had a *'neutral'* impact on the conservation area, and defining the harm to the significance of the conservation area as substantial,
    - the Council stating harm to the significance of the non-designated heritage assets despite it not being found in the decision notice, and
    - Reason for Refusal 9;

    such costs to be assessed in the Senior Courts Costs Office if not agreed.

21. The applicant is now invited to submit to the London Borough of Sutton, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

JP Sargent

INSPECTOR