The Planning Inspectorate

Costs Decision

Hearing held on 27 January 2016
Site visit made on 27 January 2016

by Michael J Hetherington BSc(Hons) MA MRTPI MCIEEM

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 03 March 2016

Costs application in relation to APP/G5180/W/15/3135138
4 and 4a Oaklands Road, Bromley, London, BR1 3SL

- 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 South East Living Group for a full award of costs against the London Borough of Bromley.
- The appeal was against the refusal of outline planning permission for the demolition of existing building comprising 2 apartments known as 4 and 4a Oaklands Road and the erection of a new three and a half storey building comprising 7 one bedroom apartments and 4 two bedroom apartments with 11 off-road parking spaces.

Decision

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

The Submissions for South East Living Group

2. The claim is based on paragraph 16-049-20140306 of the Planning Practice Guidance (PPG), which states that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. One the examples of unreasonable behaviour mentioned by the PPG is a failure to produce evidence to substantiate each reason for refusal on appeal.

3. In the present case it is submitted that the Council failed to produce evidence to substantiate each reason for refusal. Its second refusal reason, relating to carbon dioxide reductions, was withdrawn prior to the hearing. The only remaining reason related to affordable housing provision, but the Council conceded that point at the hearing itself. It is submitted that it should have done so on the advice of its consultants at an earlier stage – i.e. when making its decision. As such, planning permission should have been granted subject to conditions. The appeal was therefore unnecessary and wasted expense was incurred.

4. In respect of the appeal proceedings, it is considered that it is not for the applicant to pay for the evidence to be presented by the Council. In terms of the Council's consideration of the application, there is no requirement upon an applicant to pay for having a viability report assessed. Notwithstanding this, the applicant did pay for the original appraisal to be assessed. The Council's comment that a reduced fee was agreed is not understood. That assessment

resulted in the letter from Lambert Smith Hampton dated 6 May 2015. The areas of concern raised by that letter were addressed by the applicant's response document dated July 2015, which included among other matters a more detailed costs plan from P2M UK Limited. The applicant did not consider that it was reasonable to pay the additional fee that the Council required for that document to be assessed. The applicant's evidence, which has not changed since that document and which is now relied upon in this appeal, was available to the Council at the time of making its decision. It is noted that the Council's assessment at the hearing that the scheme would not be viable is based upon the P2M UK Limited cost plan data.

5. In respect of the Council's comments concerning conditions it is noted that it would have been open for the Council impose a condition against the applicant's wishes. Model conditions published by The Planning Inspectorate demonstrate that it is acceptable to seek to require affordable housing by such a mechanism.

6. Regarding the Council's second refusal reason, it is accepted that the applicant's Energy Statement was submitted after planning permission had been refused. However, bearing in mind that the scheme is in outline, it is felt that there was sufficient evidence in the Design and Access Statement (DAS) to enable the Council to be content that energy efficiency measures could be achieved at the reserved matters stage. Even if that is not accepted, it is felt that this matter could have been addressed by the imposition of a condition.

The Response by the London Borough of Bromley

7. It is submitted that the Council has not behaved unreasonably. The applicant failed to provide evidence at the application stage to demonstrate that the appeal scheme would be unviable with the provision of affordable housing. The viability report which the applicant now seeks to rely upon was submitted during the course of the application. However, in line with the Council's validation requirements, which are set out its Validation Guidance and Local Information Requirements for Planning Applications, the applicant was expected to pay for the Council to have the report reviewed by independent consultants. The applicant refused to pay for the second (July 2015) report to be assessed. Accordingly, it could not be taken into account when the Council made its decision. The Council and the applicant had agreed a reduced fee in respect of assessing the earlier (December 2014) report.

8. The Council considers that the applicant has not been co-operative during the appeal process. It did not submit a statement of facts to the Council until the morning of the hearing[1]. The Council feels that the matter of affordable housing could not have been dealt with by the imposition of a planning condition at the time of making its decisions, because the applicant was not willing to provide affordable housing.

9. In respect of the second refusal reason, an energy assessment was required at outline stage in line with the Greater London Authority's (GLA) guidance on Energy Planning (April 2015). Information in that regard within the DAS was limited and insufficient to support such an assessment.

[1] Inspector's note: this document was not tabled at the hearing.

Reasons

10. The 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.

11. Taking the second refusal reason first, I share the Council's view that insufficient detail was available in other submitted information (notably the DAS) to be certain that the required energy efficiency reductions could be incorporated in the scheme's final detailed design. The submission of such information in association with outline proposals is a requirement of the above-noted GLA guidance: although that document post-dated the submission of the appeal application to the Council, it had been in force for some time prior to the Council's decision to refuse planning permission. In the absence of this information I agree with the Council that the imposition of a condition would have been inappropriate. Accordingly, the Council's stance in respect of the second refusal reason was justified at the time of making its decision. Its behaviour in that regard was not unreasonable.

12. The Council's first refusal reason refers to a failure to demonstrate that the appeal scheme could not support affordable housing provision and sufficient healthcare and education contributions. While the appellant has provided unilateral undertakings in respect of healthcare and education contributions, these both post-date the Council's refusal of planning permission. As set out in the main decision, and subject to the need to specifically identify the relevant projects as also discussed, it is common ground that such contributions are justified. As such, it does not seem to me unreasonable for the Council to have mentioned their absence in its refusal reasons.

13. However, I share the appellant's concerns in respect of the matter of the requirement for affordable housing. At the hearing, the Council and its consultant conceded that it would not be justifiable to seek to secure provision for affordable housing from the appeal scheme given the viability evidence. As such, the Council was clearly unable to substantiate this reason for refusal.

14. I note that the Council's stance in this regard was informed by work commissioned from its consultant after the decision to refuse planning permission. However, that document (dated December 2015) represents an appraisal of evidence that was available to the Council at the time of making its decision to refuse planning permission. The absence of a second fee from the appellant to fund the assessment of that response document does not seem to me to be a reason to effectively ignore its findings when determining the relevant planning application. There was nothing to prevent the Council from commissioning such an assessment itself – as it eventually did prior to the appeal hearing.

15. Furthermore the Council was unable to explain the statutory basis for requiring the applicant to pay for this additional work. While section 62 of the 1990 Act, supported by Article 11 of the Town and Country Planning (Development Management Procedure) (England) Order 2015, enables a local planning authority to require an application for planning permission to include 'particulars' or 'evidence', this does not appear to extend to a requirement for the payment of money in that context.

16. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated in respect of the need for the applicant to put forward its case in respect of the affordable housing element of the Council's first refusal reason. I conclude that a partial award of costs in that respect is justified.

Costs Order

17. 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 Bromley shall pay to South East Living Group the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of putting forward its case in respect of the affordable housing element of the Council's first refusal reason.

18. The applicant is now invited to submit to the London Borough of Bromley, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

M J Hetherington

INSPECTOR