The Planning Inspectorate

Costs Decision

Hearing held on 14 and 15 November 2023

Site visit made on 15 November 2023

by L Douglas BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15th January 2024

Costs application in relation to Appeal Ref: APP/A5840/C/22/3306846 41C, 41D and 41E Sydenham Hill, in the North East corner of Beltwood 41 Sydenham Hill, London SE26 6TH

- The application is made under the Town and Country Planning Act 1990 (the Act), sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Greg Coram for a full award of costs against the Council of the London Borough of Southwark.
- The appeal was against an enforcement notice alleging the construction of three terraced houses and the alteration of ground levels.

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.

3. Applications for costs were made by the main parties at the close of the Hearing. This costs decision relates to the application made by the appellant (the applicant); the Council's application is the subject of a separate costs decision. All costs submissions were made in writing. The applicant's costs application in respect of the Council's costs application was made after the close of the Hearing, but this is because it was not possible for that part of the application to have been made any sooner. All costs submissions are a matter of record and there is no need for me to rehearse details in this decision.

4. The PPG advises: 'For enforcement action, local planning authorities must carry out adequate prior investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place, or ensured that it was accurate.'

5. It is concerning that the onus has been put on the applicant to disprove some of the matters alleged by the Council, when those matters do not appear to have been investigated adequately before the enforcement notice was issued.

Ground Levels

6. The Council was unable to explain how it would know if the third requirement of the enforcement notice had been complied with, with regard to the claimed

alteration of ground levels. When asked how and where ground levels had been altered at the appeal site, the Council claimed that they appeared to have changed "between 1 to 2 metres", but that the matter would need to be clarified by a qualified surveyor digging holes in agreed positions.

7. The Council has claimed it cannot be expected to have carried out and incur the cost of boring holes on the applicant's land. However, discussions in the Hearing lead me to doubt that the Council has a clear idea of where and to what extent ground levels may have been altered at the appeal site. The Council's suggestion that the boring of holes would help clarify pre-existing ground levels was disputed by the applicant. The applicant's reasoned explanation as to why the boring of holes would not confirm whether ground levels had been altered was not challenged by the Council.

8. The Council has wide powers for investigating alleged breaches of planning control. They were not used effectively when the Council relied upon inconclusive photographs and unspecified sections on inaccurate plans to substantiate the allegation that ground levels had been altered.

9. I have had to correct the notice to delete the imprecise allegation that ground levels have been altered. It remains unclear whether it is claimed ground levels have been raised across the whole or just some parts of the appeal site, or if they have been lowered at all. The extent of any claimed raising/lowering is also unclear. This is because the Council did not undertake adequate prior investigation in respect of any alteration of ground levels which may have been carried out before the notice was issued.

10. Ground levels may have been altered at the appeal site in breach of planning control and the Council may investigate this matter further. Even if that is the case, it was unreasonable for the Council to include the vague phrase 'alteration of ground levels' in the description of the alleged breach of planning control in the enforcement notice. The appellant incurred unnecessary and wasted expense in the appeal process when addressing this imprecise and unsubstantiated claim.

Affordable Housing

11. The Council's approach as to how the viability of affordable housing contributions should be considered in this case ignored the circumstances under which the terraced houses had been constructed. I appreciate that it was looking at the terraced houses as a standalone development alongside the development plan in place at the time enforcement action was being considered. However, ignoring the overall redevelopment/renovation of Beltwood which the erection of the terraced houses obviously formed part of was unreasonable.

12. Basic enquiries before the enforcement notice was issued may have convinced the Council that the terraced houses formed part of a single project at Beltwood. Taking the materials provided as part of previous planning permissions into account, the Council should have been aware that it would have been unreasonable to seek an affordable housing contribution without first considering whether the viability of the whole Beltwood project may have changed. It was therefore unreasonable for the Council to include paragraph 4.2.4.4 in the reasons for issuing the notice and to claim the development was contrary to Policy P1 of the Southwark Plan (2022) (SP).

13. The Council's unreasonable behaviour resulted in the applicant having to appoint a Cost Consultant to provide an updated Development Cost and Value Report. The Cost Consultant then had to attend much of the first day of the Hearing as it was not known whether the Council disputed that report. His attendance turned out to be unnecessary and time was taken up during the Hearing by the Council disputing his qualified opinion on how accurate figures for construction costs could be provided, in the absence of any other qualified evidence.

14. The Council's unreasonable behaviour in claiming that the development is contrary to Policy P1 of the SP was the result of inadequate prior investigation and led to the applicant incurring unnecessary and wasted expense in the appeal process.

Fire Safety

15. The terraced houses benefit from completion certificates, demonstrating they comply with Building Regulations. Those certificates were issued shortly before the notice was issued and it is unclear whether the Council carried out any prior consultation with its Building Control Team or its records prior to the notice being issued. Policy D12 of the London Plan (2021) (LP) requires the highest standards of fire safety to be achieved, but it is unclear why the Council considered the development did not comply with these policies, other than through the existence of basement lightwell courtyards with windows and doors opening into them.

16. This matter could have been easily investigated before the enforcement notice was issued. There should have been reasonable concern that the development did not meet the highest standards of fire safety for the Council to insist upon a fire safety assessment. Policy D12 only requires a Fire Statement for major development.

17. The evidence demonstrates that the basement bedroom and study in each of the terraced houses can be safely evacuated and that the development accords with Policies D11 and D12 of the LP. Adequate investigation by the Council prior to issuing the enforcement notice should have found it was likely that the development complied with those policies.

18. The Council's objection on fire safety grounds was unsubstantiated and it was unreasonable for the notice to claim the development could not be safely evacuated in the absence of the provision of a fire safety assessment. The Council accepted the development complies with Policies D11 and D12 at the beginning of the Hearing, on the basis of the applicant's submissions; however, its unreasonable behaviour resulted in the applicant incurring unnecessary expense in the appeal process when addressing paragraph 4.2.4.5 of the notice.

Heritage

19. The enforcement notice claims that the terraced houses are contrary to section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and Policy P20 of the SP. These relate to conservation areas. The Council's Hearing Statement claims the terraced houses cause substantial harm to the setting of Beltwood House, and fail to preserve or enhance the character and appearance of the Dulwich Wood Conservation Area (CA). The Council's Hearing Statement

claims the site is within the setting of other listed buildings, but it does not claim any harm was caused to the significance of those buildings.

20. It was clarified at the Hearing that no harm was claimed to be caused to the character, appearance or significance of the CA, and that harm claimed to be caused to the setting of Beltwood House comprised less than substantial harm to its significance in the context of the National Planning Policy Framework (the Framework).

21. It was unreasonable for the Council to have alleged the development failed to preserve or enhance the character or appearance of the CA in the notice and its Hearing Statement, before confirming at the Hearing that no harm had been caused to the significance of the CA. This was because the development preserves the character of the CA. It was also unreasonable to refer to 'substantial' harm in its Hearing Statement, when the Council would have been expected to be aware of the implications of describing the magnitude of heritage harm in that manner when following the approach set out at chapter 16 of the Framework.

22. Although it was odd for the Council's Hearing Statement to mention the settings of other listed buildings, it did not act unreasonably in doing so. The Council's opinion that the development causes less than substantial harm to the significance of Beltwood House, which is not outweighed by public benefits, was sufficiently substantiated in its overall submissions. This opinion did not therefore constitute unreasonable behaviour and the applicant did not incur wasted or unnecessary expense in appointing Dr Edis to attend the Hearing.

23. The applicant incurred wasted expense in addressing the Council's initial unreasonable claims that the terraced houses failed to preserve or enhance the character or appearance of the CA and caused substantial harm to the setting of Beltwood House. That was through producing the relevant parts of appeal submissions and appointing Dr Edis to speak on these matters specifically at the Hearing. Dr Edis provided input on heritage matters essential to support the applicant's case at the Hearing, but he should not have needed to prepare to discuss the effect of the development on the CA or whether the development caused substantial harm to the setting of Beltwood House. The wasted expense incurred by the applicant with regard to heritage issues is therefore limited to the time spent by Dr Edis preparing to speak on these matters, but not his time attending the Hearing.

The Council's Costs Application

24. The Council submitted a costs application on the basis that it is claimed the applicant acted unreasonably on the following points: insufficient plans were submitted as part of the appeal under grounds (a) and (f); proposed amended developments Options 1, 2, and 3 were 'withdrawn' and replaced with Options V1, V2, and V3 at a late stage; and a pre-Hearing site visit was aborted at a late stage.

25. I have found that the applicant acted unreasonably in putting forward Options 1, 2, and 3 as part of his Hearing Statement, only to replace them with Options V1, V2, and V3 shortly after the Hearing opened. It was not therefore unreasonable for the Council to submit a costs application in this regard.

26. It was not necessary for the applicant to submit any further plans as part of the appeal under grounds (a) and (f). The Council failed to adequately explain why any further plans would be needed for me to consider the appeal under those grounds, or why any further plans should be required by condition for enforcement or any other purposes. It was plainly wrong for the Council to suggest there was no appeal under grounds (a) and (f) in the absence of documents specified in a local validation list.

27. Furthermore, the evidence shows that no pre-Hearing site visit was arranged or confirmed with the applicant before the Council attempted to carry out such a visit.

28. The Council's costs application in respect of insufficient plans and a pre-Hearing site visit had no reasonable chance of success. It was unreasonable to seek an award of costs on these grounds. The applicant incurred unnecessary expense in responding to the Council's costs application in these regards only.

The s73 Application

29. The applicant submitted a planning application under section 73 of the Act for amended terraced houses which would have been similar to those put forward as part of the proposed amended developments in the appeal under grounds (a)/(f). The applicant did not lodge an appeal against the Council's failure to determine that application within the relevant timeframe, and it remains undetermined.

30. It is unclear whether the s73 application was accompanied by sufficiently detailed and accurate plans which would have allowed the Council to grant planning permission for that proposal, if it was minded to. I do not take the comments of the Council's Design and Conservation Team Leader on that application as indicative that the Council would have been likely to approve the application.

31. The terraced houses were constructed in breach of planning control. They cannot be altered and completed so as to comply with an extant planning permission. In these circumstances, it was not unreasonable for the Council to issue the enforcement notice following protracted negotiations with the applicant as part of the s73 application. This is especially the case in the absence of what the Council considered to be necessary clear details of acceptable obvious alternatives at that time.

32. I do not therefore consider the Council's failure to determine the s73 application, and its subsequent decision to issue the enforcement notice, constituted unreasonable behaviour resulting in the applicant incurring wasted or unnecessary expense in the appeal process.

Living Conditions

33. There has been a loss of outlook experienced by neighbours. The level of harm caused to the living conditions of neighbouring residents with different circumstances is a subjective matter. It is not strictly reliant on the distances between buildings and boundaries, considering the different land levels involved. The Council was provided with detailed explanations from local residents about how their living conditions had changed as a result of the development. Based on the evidence and what I saw during my site visit, it was not unreasonable for the Council to conclude that unacceptable harm had

been caused to the living conditions of neighbouring residents by way of an increased sense of enclosure.

34. I have found that there is no unacceptable loss of privacy from the dwellings, subject to conditions controlling the use of roofs and the glazing/opening of a first floor window. This conclusion could only be reached after hearing discussions on these matters and following my site visit.

35. The terraced houses have been marketed as having roof terraces[1] and they have elaborate stairs and roof lights leading to them. These were approved as part of historic planning permissions incapable of being fully implemented, subject to conditions controlling the use of the roofs. The parapets built around the roofs of the terraced houses are significantly taller than those permitted and ensure that the roofs are currently suited to use as safe outside amenity spaces, with attractive views of London. Circumstances were therefore very different when the Council considered previous planning applications. For these reasons it was not unreasonable for the Council to suggest that a condition only controlling the use of the roofs would not meet the relevant enforceability and reasonableness tests in this specific case, even though I have found otherwise.

36. Unreasonable behaviour by the Council has not been demonstrated in respect of the alleged harm to living conditions of neighbouring residents, or the claimed need for stairs leading to the roofs to be removed. These points had been raised as reasonable concerns by neighbours and they needed to be addressed by the appellant as part of the appeal.

Conclusion

37. The Council acted unreasonably, as set out above, in respect of matters relating to: (i) imprecise and unevidenced allegations relating to the alteration of ground levels; (ii) affordable housing; (iii) fire safety; and (iv) the effect of the development on the CA and the substantial harm claimed to be caused to the setting of Beltwood House. In addition, it was unreasonable for the Council to seek an award of costs in respect of a claimed lack of detailed plans and a claimed late cancellation of a pre-Hearing site visit.

38. It was not unreasonable for the Council to have issued the enforcement notice in respect of the terraced houses, and to refer to what it perceived to be unacceptable harm to the setting of Beltwood House (which affects the significance of that heritage asset) and the living conditions of neighbouring residents.

39. A partial award of costs in favour of the applicant is therefore justified.

Costs Order

40. 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 London Borough of Southwark shall pay to Mr Greg Coram, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of:

    i) The alleged alteration of ground levels;

[1] Third party submissions dated 28 October 2022

ii) The claimed conflict with Policy P1 of the Southwark Plan (2022);

iii) The claimed conflict with Policies D11 and D12 of the London Plan (2021);

iv) Preparing to discuss the effect on the Dulwich Wood Conservation Area and substantial harm to the setting of Beltwood House; and

v) The Council's costs application, with the exception of paragraphs 2a, 4b, 26 to 30, and 36b of that application;

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

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

L Douglas

INSPECTOR