The Planning Inspectorate

Costs Decisions

Inquiry held on 7 to 13 and 20 June 2022

Site visit made on 14 June 2022

by A J Mageean BA(Hons), BPl, PhD, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 August 2022

APPLICATION A:
Costs application in relation to Appeal Ref: APP/X5990/W/22/3292545
Curzon Street, London, W1J 5JA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Leconfield House Limited for a partial award of costs against Westminster City Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for replacement of existing 7th floor level and roof plant area, excavation of three new basement levels, infilling of windows at the rear, replacement windows and doors at ground and first floor level, new loading doors onto Chesterfield Gardens and refurbishment works, all for use of the building as a 60 to 70 bedroom hotel and private members' club including restaurants, spa/wellness centre and retail (sui generis use), with plant at 6th, 7th floor, roof level and basement level 3 and roof terraces at seventh floor level.

APPLICATION B:
Costs application in relation to Appeal Ref: APP/X5990/W/22/3292545
Curzon Street, London, W1J 5JA

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Westminster City Council for a partial award of costs against Leconfield House Limited.
- The inquiry was in connection with an appeal against the refusal of planning permission for replacement of existing 7th floor level and roof plant area, excavation of three new basement levels, infilling of windows at the rear, replacement windows and doors at ground and first floor level, new loading doors onto Chesterfield Gardens and refurbishment works, all for use of the building as a 60 to 70 bedroom hotel and private members' club including restaurants, spa/wellness centre and retail (sui generis use), with plant at 6th, 7th floor, roof level and basement level 3 and roof terraces at seventh floor level.

Decisions

1. Application A is refused.

2. Application B is refused.

Application A: Submissions for Leconfield House Limited

3. The submissions were made in writing. In summary, the appellant's application relates firstly to substantive and procedural matters associated

with the basement construction reason for refusal, and secondly to procedural and substantive matters relating to the Council's refusal to grant planning permission in this case.

4. In relation to the first matter, for which the appellant seeks a partial award of costs, it is said that basement construction is primarily a technical area demanding technical expertise. The only Council officers with the relevant expertise to express a view on this point, that is building control and environmental health, were consulted and raised no objection. As the evidence of the Council consisted of vague, generalised and inaccurate assertions about the proposal's impact which were unsupported by any objective analysis, the Council failed to substantiate this reason for refusal. Reference is also made to the difficulty of engaging the Council's witness in the production of topic specific Statements of Common Ground (SoCG) seeking to narrow the issues before the Inquiry.

5. In relation to the second matter, for which the appellant seeks a full award of costs, it is said that the Council acted unreasonably by not granting planning permission in accordance with the committee resolution. As a result of the consequent delay, it is also said that the Council acted unreasonably by applying the newly adopted policy requirement for 12 months marketing evidence, with which it was impossible for the appellant to comply.

Application A: Submissions for Westminster City Council

6. The Council's response was made in writing and is summarised here. In relation to the first matter, the point is not whether the basement can technically be constructed, but whether the additional impacts on residential amenity would be acceptable. The Council maintains that it has not been demonstrated that the basement could be constructed without such harm. There was a high degree of consistency between the evidence of the respective witnesses in this regard. As the cases of the two Rule 6 parties also referred to basement excavation, the appellant would have incurred the same expense in the appeal process.

7. With reference to topic specific SoCG, the Council's position is that the later documents requested by the Inspector seeking to further narrow the differences between the parties were produced late in the day, with no opportunity for the Council to engage prior to the opening of the Inquiry.

8. In response to the second matter, the publication of the Inspector's Report on the City Plan, and its subsequent adoption, altered the balance of considerations, thereby calling into question the principle of development. In terms of whether the committee resolution could have been implemented with the use of a negatively worded planning condition to secure the S106 agreement, this situation did not amount to the 'exceptional circumstances' referred to in the Government's Planning Practice Guidance (PPG).

Application B: Submissions for Westminster City Council

9. Procedurally, the delay in the delivery of the appellant's application for costs caused the Council to incur additional costs in responding to the application after the Inquiry had otherwise concluded. On substantive grounds the appellant's case is without basis and unreasonable.

Application B: Submissions for Leconfield House Limited

10. The timing of the appellants costs application was not unreasonable, and the time required to prepare a response was not altered by this. The appellant's application on substantive grounds is not unreasonable.

Reasons

11. 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.

Application A

12. Turning firstly to the appellant's substantive and procedural concerns regarding the basement construction matter. The newly adopted City Plan Policy 45 provided the basis for this reason for refusal. I am aware that the officer report did not identify conflict with this Policy, nonetheless the planning committee was entitled to reach a different view, providing this could be substantiated.

13. Policy 45 requires that such developments should both safeguard structural stability and minimise impacts on the surrounding area, with the supporting text referring to the serious impacts basement construction can have on the quality of life of neighbours. Greater control is provided for basement extensions of more than one storey, which may be allowed in certain 'exceptions'.

14. It does not follow, therefore, that basement construction is primarily a technical matter. The Council's building control and environmental health officers raised no objection, and I have accepted in my decision that technically it would be possible to construct the appeal proposal. However, Policy 45 also allows for consideration of effects on surrounding uses and occupiers in terms of whether construction impacts would be adverse. For example, the evidence relating to the site's accessibility focused on the effects of construction traffic on neighbouring uses and occupiers in terms of noise and general disruption. Such matters require planning judgement to be exercised rather than an assessment against the technical standards of other regulatory regimes.

15. The Council's witness on construction matters may not have had technical construction qualifications, though their evidence was based on their experience of schemes involving deep basement construction. This looked at the likely impacts on quality-of-life considerations arising from such construction, focusing on the nature of the works and timescales involved, and making comparisons with single storey basement additions. The witness agreed that in technical terms it would be possible to construct the basement, with compliance with the Code of Construction Practice required by condition. However, whether the development would comply with planning policy was a different matter, requiring the exercise of planning judgment.

16. There was a high degree of consistency between the party's witnesses on construction impacts in terms of processes and timescales. Beyond this,

some of the Council's evidence relating to quality-of-life impacts was not verified. Nonetheless, I found that there was sufficient evidence to demonstrate that the Policy 45 tests for deep basement construction had not been met. It follows that I cannot agree that the Council's evidence overall on this point was vague, generalised or inaccurate. Even if I were to find that the Council had failed to substantiate this reason for refusal, the appellant would have had to produce evidence to address the similar concerns raised by the Rule 6 parties.

17. The appellant suggests that the Council has acted inconsistently by reaching a different conclusion under Policy 45 in relation to the permitted deep basement development at the Ritz Hotel. However, my decision identified the circumstantial differences supporting different conclusions in each case.

18. The appellant sites the difficulty of engaging the Council's witnesses on the production of topic specific SoCG, suggesting that a lack of cooperation at this point was unreasonable. However, I am aware that there was dialogue between the parties on this point in the week prior to the Inquiry, and also some confusion around exactly what form the SoCG should take. I am also aware that at this point there was limited opportunity for meaningful engagement before the Inquiry opened. My view is therefore that in these circumstances the Council did not act unreasonably.

19. I turn now to the second matter, the appellants suggestion that the Council acted unreasonably by not granting planning permission in accordance with the committee resolution. As I have set out in my decision, the fact that the committee resolution in February 2021 allowed for consideration of whether a negatively worded planning condition could be used to secure the S106 agreement did not in itself require that planning permission be granted on this basis. With reference to the PPG on this point, whilst the development was at risk due to imminent policy changes, this in itself did not represent an exceptional circumstance for the use of a negatively worded planning condition. The committee resolution also gave the option of refusing the application if the S106 agreement had not been completed within the appropriate timescales, on the basis that its provisions had not been secured. Whilst there is no evidence of the Council acting in accordance with the committee resolution, it is clear that it would have been possible to refuse planning permission at this point.

20. The emerging City Plan was noted as having limited weight at the time of the February 2021 planning committee as this was prior to the publication of the Inspectors report on the Examination in Public. The day the City Plan was adopted coincided with the agreement of the amended S106 agreement. The fact that the S106 agreement was agreed a few hours prior to the adoption of the City Plan is immaterial, noting that the emerging plan provisions would have attracted increased weight, thereby altering the balance of considerations, at the point of the publication of the Inspector's report in March 2021.

21. It was appropriate that at this point the application should be reconsidered under the newly adopted policy framework. This included the Policy 13 requirement for a minimum of 12 months marketing evidence to support the loss of office floorspace. It was not unreasonable to seek full compliance

with this policy from the point of adoption, noting that there would have been prior awareness of the emerging policy and its implications for some time prior to adoption.

22. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated for Application A.

Application B

23. The PPG advises that costs applications should be made 'as soon as possible', the deadline being no later than the close of the inquiry. As a matter of good practice and where circumstances allow, it is suggested that costs applications should be made in writing before the hearing or inquiry and added to or amended as necessary in oral submissions.

24. In this case the appellant's costs application related to both the Council's actions in the period leading up to the refusal of planning permission, and the nature of the evidence presented to the Inquiry. It therefore appears that it would have been possible for the appellant to submit a timelier costs application. Nonetheless, the parties' positions on such applications had been reserved from the point of the Case Management Conference. As such I do not consider the appellant's subsequent actions in this regard to be particularly unreasonable. Specifically, whilst it may have been more convenient for the Council's advocate to prepare a response prior to the delivery of closing submissions, there is no evidence before me to suggest that additional costs have been incurred by having to respond to the application after the Inquiry would otherwise have concluded.

25. I have also considered the Council's suggestion that, as the appellant's costs application had no reasonable prospect of succeeding, the Council is entitled to seek the costs of responding to it. Specifically, it is suggested that the appellant's case is based on a number of misconceptions.

26. The adoption of the City Plan led to the refusal of this application which had previously been on course to be permitted. In these circumstances it is perhaps unsurprising that the appellant sought to challenge this decision in terms of both the application and parameters of the newly adopted policies. The purpose of the planning appeal regime is to allow for such an independent review. The fact that the appellant's costs application pursued similar points is also understandable. Therefore, whilst my findings in relation to both the appeal decision and the appellant's costs application are in the Council's favour, this is not to say that the appellant was not entitled to test the basis on which the Council's decision had been made.

27. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated for Application B.

A J Mageean

INSPECTOR