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## Costs Decisions

Hearing held on 2 November 2016 and 24 January 2017

Site visit made on 24 January 2017

**by Phillip J G Ware BSc(Hons) DipTP MRTPI**

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

**Decision date: 11 April 2017**

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### **Costs application in relation to Appeal Ref: APP/K5600/W/16/3146132 100 and 100A West Cromwell Road and Shaftesbury Place, 135 Warwick Road, London W14**

- 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 Spen Hill Developments Limited for a full award of costs or in the alternative a partial award of costs against The Council of The Royal Borough of Kensington & Chelsea.
- The Hearing was in connection with an appeal against the refusal of an application for approval of details pursuant to conditions Nos 15, 21 and 22 of a planning permission Ref DPS/DCPP/11/00107/Q06/STR2, granted on 19 July 2012, relating to a Construction Environmental Management Plan, a Risk Assessment related to the control of dust and emissions and a Low Emissions Strategy.

#### **'The conditions appeal'**

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### **Costs application in relation to Appeal Ref: APP/K5600/W/16/3146132 100 and 100A West Cromwell Road and Shaftesbury Place, 135 Warwick Road, London W14**

- 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 Spen Hill Developments Limited for a partial award of costs against The Council of The Royal Borough of Kensington & Chelsea
- The Hearing was in connection with an appeal against the refusal of an application under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.

#### **'The s73 appeal'**

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#### **The costs claims**

1. This document deals with three separate costs claims, all made by Spen Hill Developments Limited:
    - A claim for partial costs in relation to both appeals, dealing with the first day of the Hearing (Claim A)
    - A claim for full costs in relation to the conditions appeal, relating to the interpretation of the Council's legal powers (Claim B)
    - A claim for partial costs in relation to the s73 appeal related to the highway consequences of the Earls Court development (Claim C)
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## **Decisions**

2. The application for a partial award of costs is allowed in the terms set out below in relation to Claim A.
3. The application for an award of costs is refused in relation to Claim B.
4. The application for a partial award of costs is allowed in the terms set out below in relation to Claim C.

## **Background**

5. 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.

### **Claim for partial costs in relation to both appeals, dealing with the first day of the Hearing (Claim A)**

#### *Background*

6. The Hearing opened on 2 November 2016 but was adjourned without any discussion of the merits of the appeals. This was because a substantial bundle of documents from the appellants, delivered to the Council some time before, had apparently only reached the case officer on the day before the Hearing.

#### *The submissions for Spen Hill Developments Limited*

7. The Council had been made aware in correspondence and at a meeting on 14 October that it should expect to receive a set of legal submissions which the appellant, who would be represented by a QC, would be making at the Hearing.
8. The legal submissions were delivered to the Council (and receipted) on 18 October. On the day before the Hearing (1 November) the Council contacted the Planning Inspectorate requesting an adjournment as the authority had not had sufficient time to review the submissions. The Inspectorate responded that I was travelling to the Hearing and would deal with the matter at the start of the event.
9. At the start of the Hearing (attended by the appellant's full team) I stated that I would accept the appellant's submissions as they had been submitted in reasonable time. The Council explained that, because of an 'administrative error' the package containing the appellant's submissions had not been opened by the case officer until the day before the Hearing. The Council explained that it had therefore not taken legal advice and was not in a position to proceed. The Hearing was adjourned after a brief discussion of the situation.
10. The only reason for the adjournment was the Council's behaviour in this respect, and the costs of the appellant's team were wasted.

#### *The response by The Council of The Royal Borough of Kensington & Chelsea*

11. The Council accepts the appellant's description of the reason for the adjournment.
12. The day after the package was received by the Council, an email was sent to the appellant which referred to the authority awaiting the legal submissions. No response was received and the Council could only assume that they were

not in fact going to be submitted or that they would be submitted on the day of the Hearing.

13. Therefore the administrative error on the Council's part was regrettable but not unreasonable.
14. In addition the material could have been submitted at a much earlier stage in the proceedings. The appellant's reason for the late submission was a change in legal representation. This is an inadequate reason for the late submission.

*Reasons*

15. The documents in question were submitted outside the normal timescale for Hearings. However they had been flagged up in advance and were delivered to the Council (and the Inspectorate) two weeks before the Hearing was due to start. That is a perfectly reasonable period for the Council (and myself) to assimilate the material in advance of the Hearing. My decision to accept the documents was not contested by the Council at the Hearing, and has only now been raised in the context of responding to a costs claim. In fact it has no significant bearing on the costs claim.
16. It is not disputed that the documents were delivered to the Council two weeks before the Hearing or that they were not looked at until the day before it opened. I was unaware of this until late in the day before the Hearing, and the event needed to open to discuss the position.
17. The Council was properly put on notice that such submissions were to be submitted, but did not enquire further. It was not for the appellant to pursue the matter as they were aware that the bundle had been delivered to the Council.
18. The whereabouts of the documents before the day prior to the Hearing need not concern me. That is a matter for the Council to review. The fact is that the Hearing could not go ahead in a situation where one party had not had the opportunity to consider the important submissions made by the other party. I say 'important' as the submissions in fact led to the authority changing its position on a key element of the conditions appeal.
19. The behaviour of the authority in this respect was clearly unreasonable, and resulted in unnecessary and wasted expense, as described in the Planning Practice Guidance, related to the first day of the Hearing. A partial award of costs is justified.

**Claim for full costs in relation to the conditions appeal, relating to the interpretation of the Council's legal powers (Claim B)**

*Background*

20. There were two separate matters raised by the conditions appeal. Firstly whether the principle of the partial discharge of the conditions was acceptable and secondly whether the application met the reasonable requirements of the conditions. The costs claim related to the first matter

*The submissions for Spen Hill Developments Limited*

21. The attitude of officers throughout was characterised by a refusal to engage with the appellants and displayed an attitude in conflict with the advice in the National Planning Policy Framework.
22. The Council's approach to the appeal was inherently unreasonable. Due to the Council's negative approach it only acknowledged belatedly that it had the power to grant a partial approval of the disputed conditions. At that late stage the position of the authority was reversed.

*The response by The Council of The Royal Borough of Kensington & Chelsea*

23. The Council has provided emails which demonstrate that there had been a continuing dialogue with the applicants/appellants throughout the process.
24. The Council reasonably required that communication should be through the case officer rather than to other Council officers, and had not looked for problems. Rather it adopted a positive approach throughout.
25. The principle of the partial discharge of the disputed conditions was not considered appropriate, although the authority reasonably changed its position after consideration of the appellant's submissions.

*Reasons*

26. There is a considerable difference between the parties as to the progress of discussions. Each party provided evidence which appears to indicate that negotiations were/were not progressing. In the context of a major scheme and a complex situation regarding approvals, this is perhaps unsurprising. There is nothing which clearly indicates that the Council adopted an unreasonable approach.
27. The Council amended its position related to the ability of the authority to consider a partial discharge of conditions at a late stage in the process. However that is not inherently unreasonable as it did so in the light of the appellant's persuasive submissions.
28. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

**Claim for partial costs in relation to the s73 appeal related to the highway consequences of the Earls Court development (Claim C)**

*Background*

29. One of the issues in the s73 appeal related to the cumulative traffic impact of the proposal in the light of the Earls Court development. The costs claim relates to that matter.

*The submissions for Spen Hill Developments Limited*

30. The position of the appellant at the Hearing, and throughout the application and appeal, reflected an obsession with process, not considering any harm which might be caused. This approach persisted in relation to traffic impact up to the point when the Council's highways officer stated at the Hearing that this matter was not sufficient to form a reason for refusal.

31. To pursue the question of the cumulative impact of the appeal scheme in the context of the approval of the Earls Court development was entirely unreasonable, as this had been assessed at the time of the approval of the latter development.

*The response by The Council of The Royal Borough of Kensington & Chelsea*

32. The onus is on the appellant to demonstrate a lack of harm.

*Reasons*

33. The issue is one of chronology. It would not have been possible to assess the cumulative impact of the two schemes when the 2012 approval was given on the appeal site, as the Earls Court redevelopment was an unknown at that time. However the combined impact was subsequently assessed when the Earls Court development was being considered. The appellant's revised TA noted the reduction in floorspace at the appeal site, and the consequently reduced traffic impact.
34. It is hard to see what more the appellants could have reasonably been expected to do given this history, and for the Council to pursue an objection on the basis of traffic impact was perverse.
35. However the matter was finally settled when the Council's highways officer stated at the Hearing that this was not something which should have led to a (partial) reason for refusal.
36. With this background, I find that unreasonable behaviour resulting in unnecessary and wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs related to the highway consequences of the proposal is justified.

### **Conclusions**

37. The application for a partial award of costs is allowed in the terms set out below in relation to Claim A.
38. The application for an award of costs is refused in relation to Claim B.
39. The application for a partial award of costs is allowed in the terms set out below in relation to Claim C.

### **Costs Order (Claim A)**

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 Royal Borough of Kensington & Chelsea shall pay to Spen Hill Developments Limited, the costs of the appeal proceedings described in the heading of this decision; limited to those costs incurred in relation to the first day of the Hearing; 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 Royal Borough of Kensington & Chelsea, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

**Costs Order (Claim C)**

42. 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 Kensington & Chelsea shall pay to Spen Hill Developments Limited, the costs of the appeal proceedings described in the heading of this decision; limited to those costs incurred in relation to the highway consequences of the Earls Court development; such costs to be assessed in the Senior Courts Costs Office if not agreed.
43. The applicant is now invited to submit to The Council of The Royal Borough of Kensington & Chelsea, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*P. J. G. Ware*

Inspector