Costs Report to the Secretary of State for Communities and Local Government

by C L Sherratt DipURP MRTPI

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

Date 30 June 2014

Town and Country Planning Act 1990

Appeal by Utopia Village Sales Ltd

The Council of the London Borough of Camden

Inquiry held on 8 & 9 April 2014. Site Visit carried out on 24 April 2014.

Utopia Village, 7 Chalcot Road, London NW1 8LF

File Ref: APP/X5210/A/14/2212605

File Ref: APP/X5210/A/14/2212605
Utopia Village, 7 Chalcot Road, London NW1 8LF

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Utopia Village Sales Ltd for a full award of costs against the Council of the London Borough of Camden.
- The inquiry was in connection with an appeal against the refusal of an application for prior approval for development permitted by the Town and Country Planning (General Permitted Development) Order 1995.

Summary of Recommendation: A partial award of costs be granted.

The Submissions for Utopia Village Sales Ltd

1. The application for a full award of costs is made in writing (ID4 & CD1)[1]. The appeal is against the interpretation of the regulations set out in Class J and section N of the General Permitted Development Order 1995 (as amended) (the GPDO). The approach taken by the Council is unreasonable and has caused unnecessary expense. Alternatively, if it is concluded that the Council's decision was unreasonable in relation to some of the reasons for refusal but not in relation to others, then the appellant applies for a partial award of costs in relation to the unreasonable reasons for refusal and the unnecessary expense that the Appellant has been put to in dealing with these reasons in the appeal process.

2. There were 15 reasons for refusal. It has been acknowledged throughout by the Council that a section 106 planning obligation would resolve reasons 1 - 4. Accordingly, these reasons for refusal should not have been promulgated. The Council have withdrawn reason 5; it should not have been imposed in the first place.

3. The Council now concede that reasons 6 – 13 and 15 are based on legally irrelevant considerations but argue that until a ministerial statement was made by Mr Boles on 7 February 2014, the Planning Practice Guidance (PPG) of 6 March 2014 issued and the Explanatory Memorandum to the amendments to the GPDO dated 13 March 2014 published, the scope of paragraph N (8) was "vague" and "open to interpretation" such that it was not unreasonable for the Council to put forward these reasons for refusal.

4. This is untenable. The legal position has been clear throughout. Section 60 (2A) of the 1990 Act was inserted by section 4 of the Growth and Infrastructure Act 2013. Section 60 (2A) provides that the GPDO "may require the approval of the local planning authority, …, to be obtained –

   (a) for the use of the land for the new use;

   (b) with respect to matters that relate to the new use and are specified in the order."

5. Class J of the GPDO falls within section 60(2A)(b) not (a); this is clear from reading Class J which gives permission for the change of use from Class B1(a) to Class C3, and in paragraph J.2 requires an application to the local planning authority "as to whether …prior approval … will be required as to - " and then

[1] These references relate to the Inquiry Documents listed in my main report.

there are three matters specified that relate to the new use. Prior approval can not be required for the use itself of the land for residential purposes.

6. Once the statutory root of paragraph J.2 is understood, it is obvious when one turns to paragraph N8, which refers in terms to what the local planning authority shall do when determining the application (the prior approval application relating to the specified matters) that the reference in paragraph N(8)(b) which says that the local planning authority shall "have regard to the National Planning Policy Framework as if the application were a planning application" means (and can only mean) those parts of the National Planning Policy Framework (NPPF) that relate to those three specified matters and nothing else. It would be ludicrous if the planning permission given by Class J subject to the condition in paragraph J.2 requiring an application to be made for prior approval in relation to only three matters could be rendered nugatory by the local planning authority seeking to refuse the prior approval application, and thus prevent the new use, on the basis of issues beyond those specified in paragraph J.2. Even if prior approval is not required for any of the specified matters the local planning authority could still refuse the application for prior approval on some other unspecified ground. It is obvious that the Council's approach is untenable.

7. Quite apart from these points which arise from reading the primary and secondary legislation, the Department for Communities and Local Government (DCLG) explained the scope of N(8) in a letter dated 8 August 2013 to the Peak District National Planning Authority (CD19).

8. The scope of paragraph J.2 and N(8) has been clear throughout and it was unreasonable of the Council to refuse the application on the basis of reasons 6 – 13 and 15. More recent publications which are relied upon by the Council as having made a previously unclear position, clear, did no such thing – doubtless when the Secretary of State determines this appeal he will know why these more recent statements were made and whether rather than being necessary in order to clarify the previously unclear, they were necessitated by the unreasonable behaviour of Council's such as this one frustrating the clear intention of Government in introducing Class J.

9. Camden Council have been provided with copies of letters from DCLG to the Peak District National Park, in which DCLG clearly sets out the correct interpretation of the legislation in that the NPPF shall only be applied to prior approval applications in respect of matters which relate to that Class (in this case flood risk, contaminated land and Highways and Transport impacts).

10. Camden Council has determined a number of previous prior approval applications in accordance with the legislation, only considering the three matters relating to Class J.

11. The Council say their original interpretation of Class N(8) had the support of an Opinion but the Council has refused to disclose it and in the absence of being able to read it, there is no way of telling whether the Council's original interpretation was legally correct or whether, for example, it merely expressed the opinion that the interpretation was an arguable one, and if so, whether Counsel advised that it was barely arguable. In the absence of seeing the Opinion, no weight at all should be placed upon it. Any Opinion given that the Council's original interpretation was correct, was, with respect, plainly wrong.

12. The Council's approach is also at odds with the legal advice and submissions it was party to when seeking to judicially review the legislation in relation to exemptions. The judge in this case clearly sets out his judgement that the only matters to apply when considering such applications were the three set out in Class J.

13. The Council seeks to re-write reason 14. The reason was unreasonable in the first place and should never have been imposed. Importantly the reason for refusal in the notice of refusal does not refer to the European Convention on Human Rights (ECHR), and only raises issues which are legally irrelevant for the same reason as explained in relation to numbers 6-13 and 15.

14. The re-cast reason is legally untenable for those reasons that form the appellant's legal submissions.

15. The Council's approach is unreasonable and has delayed the process. The appellant has, as a result, incurred a number of additional wasted expenses. This includes expanded fees pertaining to town planning advice, legal advice and costs associated with a conference with leading Counsel. Furthermore additional costs have been associated with handling and assessing the appeal in terms of time and administration costs.

The Response by the Council of the London Borough of Camden

16. The Council responded to the application for costs in writing (ID5).

17. In relation to reasons 1 – 4 (highway / transport issues) the appellant accepts that these are all valid issues that need to be dealt with. The terms of the s106 had to be discussed and agreed and therefore any time spent on these issues would have been incurred in any event. Having these issues as reasons for refusal therefore involved no additional expense to the appellants.

18. Reasons 6 – 13 relate to the interpretation of Class J and paragraph N of the GPDO. The GPDO is very far from clear and the Minister felt the need to clarify it in the Explanatory Memorandum. When he did that, the Council reviewed its position, accepted the Minister's interpretation and withdrew those reasons for refusal, thus acting entirely appropriately.

19. Class J2 refers to a determination of whether prior approval is required as to the three named issues. However, paragraph N(8) states that the local planning authority when determining an application shall have regard to the NPPF … as if the application were a planning application". It does not say, as it could, and in the light of the Explanatory Memorandum should, "in determining whether prior approval is required" or words to that effect. In other words, it is entirely unclear whether the intention was to restrict consideration of the NPPF merely to the determination of whether prior approval is required or to the consequences of the prior approval.

20. Contrary to the appellant's submissions, it is not clear that the reference to the NPPF is limited to the three specified matters, because the GPDO does not say that and instead makes reference to a planning application.

21. Further, there is nothing ludicrous in this interpretation because what it would mean is that if prior approval would be required, then the local planning authority can take into account other matters within the NPPF in determining the prior

approval. It is difficult to see why this should not be the case, for example in relation to affordable housing.

22. The appellant relies on section 60(2A) but it is not apparent what this adds to the argument. Section 60(2A)(b) says "*with respect to matters that relate to the new use and are specified in the order*", but N(8) is part of the Order, and therefore inter alia sets out the terms of what is specified as being relevant to the consideration.

23. The appellant misunderstands the Council's position. It is accepted that the need for prior approval rests on the three criteria in Part J, but the Council's concern was that N(8) appeared to then require the Council to have regard to the NPPF in determining the application. The GPDO was unclear, and the issue needed to be determined in order to provide clarity both for the local planning authority and local residents. As is clear, the consequences of this GPDO amendment are ones that have raised a very high level of local concern, and confusion over what can and cannot be taken into account.

24. Given this lack of clarity, the Council's behaviour has been entirely reasonable. It acted promptly once the Explanatory Memorandum made it clear. Notwithstanding the letter from DCLG to the Peak District National Park Authority there was no clear official position prior to the Explanatory Memorandum.

25. In any event, there has been minimal or no wasted expense incurred in relation to the argument over these grounds. The appellant has not prepared evidence on these grounds. The inquiry has gone ahead anyway by reason of the human rights issue. There has been no wasted expense in relation to the other reason for refusals save for perhaps the minimal expense of a few letters.

26. In relation to the Article 8 ground it is impossible to see how the Council's position can be regarded as unreasonable. The requirement to act compatibly with Article 8 is a legal obligation which rests on the Council, as well as the Secretary of State under the HRA. It is not a discretionary matter that the Council can choose to disregard as a matter of judgement. There can be no doubt that the interference with people's privacy and homes engages Article 8 in this case. There can equally be no doubt that under Part J, there is on the face of the words, no balancing exercise to be struck, as was clearly required to be done under the planning system pursuant to Lough. It cannot be said that the Council was unreasonable in pursuing this argument.

27. There is an interesting issue as to whether the protection of future privacy falls within Article 8, but the Council's view was that it was not necessary to determine that in this appeal. If the Secretary of State accepts the Council's position then it was not necessary to engage in complex arguments about future 'victims' under the HRA. The Council acted reasonably to ensure no wasted expense was incurred.

28. For these reasons the application for an award of costs, should be dismissed.

Conclusions

29. Costs may only be awarded against a party who has behaved unreasonably, and as a result this has directly caused another party to incur unnecessary or wasted expense in the appeal process.

30. Negotiations and discussions about the terms of the s106 were necessary and I do not consider the Council behaved unreasonably refusing the prior approval application on the grounds set out in reasons 1 – 4 inclusive, in the absence of a completed agreement. No unnecessary expense was incurred by the appellant.

31. Reason 5 could simply not be substantiated. It was withdrawn in sufficient time to ensure that any abortive work (and therefore wasted expense) was minimal. The Council's actions were nevertheless unreasonable and did result in at least some wasted expense.

32. Reasons 6 – 13, 14 (as originally drafted) and 15 relate to the interpretation of Class J and in particular paragraph N(8) of the GPDO. Following the issue of the Explanatory Memorandum the Council acted promptly and reviewed its position, subsequently withdrawing those reasons for refusal and re-drafting condition 14. The Council's reasons for initially taking wider planning considerations in to account are substantiated. It seems to me that the Explanatory Memorandum was needed to ensure paragraph N(8) was interpreted as intended. The status of the letter referred to the Peak District National Park Authority was not legal authority in itself or of sufficient weight to render the Council's interpretation irrational or implausible. I consider, the Council's behaviour was not unreasonable in this regard.

33. Finally, turning to the re-drafted reason 14, the Council informed the appellant at an early stage of the appeal process of the basis on which they intended to proceed; that being in relation to human rights considerations. Its behaviour was not unreasonable. The Council's case in this regard is not without merit and, notwithstanding I do not recommend in favour of the Council's approach, was nevertheless substantiated at the Inquiry. I do not consider the Council acted unreasonably in maintaining a refusal on the basis of human rights considerations.

34. To conclude, I consider that unreasonable behaviour resulting in unnecessary expense, has been demonstrated in relation to reason 5 which could not be substantiated. I therefore recommend that a partial award of costs is justified.

Recommendation

35. I recommend that the application for a partial award of costs be granted in relation to any costs arising in addressing reason 5 before it was withdrawn.

Claire Sherratt

Inspector