The Planning Inspectorate

Costs Decision

Hearing held on 15 March 2022 and 8 June 2022

Site visit made on 8 June 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 July 2022

Costs application in relation to Appeal Ref: APP/X5210/W/21/3277179
The Brunswick Centre, Bloomsbury, London WC1N 1BS

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Lazari Properties 2 Limited for a full award of costs against the Council of the London Borough of Camden.
- The hearing was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for a certificate of lawful use or development described on the application form as: "Class E".

Decision

1. The application for an award of costs is refused.

Submissions

2. A written application was made and a written response was provided. Comments in reply to the response were also made in writing.

Reasons

3. 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.

4. The main focus of the costs application is in respect of delay in processing the lawful development certificate (LDC) application by the Council. For an appeal against non-determination, the PPG[1] states that, if an appeal in such cases is allowed, the local planning authority may be at risk of an award of costs, if the Inspector or Secretary of State concludes that there were no substantive reasons to justify delaying the determination.

5. But I have dismissed the appeal and I have not found the delay to be inexplicable or inexcusable, as described by the applicant, given that the LDC application is complex, confusing, imprecise and ambiguous. I say this for a number of reasons.

6. First, the LDC application relates to some 40 plus units, and other land, making it highly unusual. Each unit has its own planning history. Bearing in mind section 193(4)(a) of the 1990 Act, a problem with any one of those units (or

[1] Appeals - Paragraph: 048 Reference ID: 16-048-20140306

any other part of the land) would result in the need to redefine the scope of the LDC application, unless it were refused completely. The size and configuration of the site does not make redefining the land an easy task.

7. The submitted LDC application included a site plan with the whole site outlined in red, when it is obvious from an inspection of the site or a review of its planning history that not all of the land outlined in red could possibly be in 'Class E'. I say this given the mix of land uses the site contains and its configuration. In particular, I note that the sui generis unit 36 was only removed from the application by the appellant some 5 months after it was submitted. To my mind this would reasonably cast doubt on whether other units should also be removed, for similar reasons.

8. Second, different descriptions are found in the LDC application, so what is applied for is imprecise and ambiguous. The description was still unclear months after the LDC application was submitted, despite the Council's repeated attempts to clarify it and it was still not clear by the time of the Hearing. Due to section 193(5) of the 1990 Act, proceeding with the description provided on the LDC application form or covering letter would not free the appellant from the restrictions imposed by conditions of the 2003 permission, unless that matter is described in the certificate, as I have set out in my appeal decision.

9. In other words, the appellant could not possibly get an LDC for what is described in the covering letter as "the existing use of the commercial floorspace at the Brunswick Shopping Centre in London, for **any** operation within Class E" (emphasis added) because of various conditions on the 2003 permission, controlling how the land is used. In this regard, the LDC application is inherently contradictory, as was pointed out by the Council in email correspondence dated 30 April 2021, (Document 23).

10. The covering letter for the LDC application indicates that only conditions 4 and 11 still apply, the implication being that other conditions do not. That being the case, conditions 4 and 11 do not need to feature in the description on the LDC but the opposite is true for other conditions. For the LDC to describe the matter in respect of conditions, it is entirely reasonable for the Council to expect the LDC application to make clear precisely what is sought in respect of any of the conditions of the 2003 permission. But neither the LDC application nor its covering letter clearly do this.

11. A position was eventually reached where it became clear that, of all the conditions on the 2003 permission, it is Condition 3 which is the target of the appellant. It seems to me that it is only after this was established that the Council's concerns about other conditions controlling the land (eg Condition 5) could possibly fall away, given that the wording of Condition 3 is clear that the 'retail floorspace' it concerns excludes the supermarket. But even this is confused by the eventual description which refers to "the Brunswick Shopping Centre" as a whole rather than just its internal commercial floorspace. The two are not the same.

12. Third, the appellant is clear that their case does not rely on immunity, pursuant to 'the 10 year rule' under section 171B(3) of the 1990 Act, and, that there are no units at the site operating in breach of the 2003 permission. But 'the 10 year rule' is precisely why a section 191 LDC application involving non-compliance with a condition would normally be made. This makes the LDC application highly unusual and confusing and, in the suggested absence of any

breach, it implies that the appellant 'proposes' to not comply with a condition, when there is no such provision under section 192(1) of the 1990 Act. The example decisions provided by the appellant do not help in this regard, given that none of them refer to conditions on a previous permission.

13. My attention has been drawn to a misunderstanding that 'the 10 year rule' is relevant. Whilst it is clear there are incidences where the Council has indicated it considered it to be relevant, this is understandable given the confusing nature of the LDC application. In any event, given the difficulties with the description and the specification of the land, I am not satisfied such a misunderstanding had any material effect on the time taken to consider the application. I say this particularly in light of the repeated requests by the Council for evidence of the existing use, noting a statutory declaration to support the appellant's case was not provided until some 5 and a half months after the LDC application was submitted.

14. In the context of all of the above, and against the backdrop of the Covid-19 pandemic (which clearly affected the availability of Council resources in this case), I find that the time taken by the Council to consider the LDC application does not constitute unreasonable behaviour. This is particularly the case given the difficulties with the description and the specification of the land.

15. Although the Council failed to make a decision within the prescribed time, even if it had, the appeal would not have been avoidable since the Council's position at the Hearing was that a certificate should not be issued. So in the terms of the PPG[2], I do not see the Council as having prevented or delayed a decision on an LDC application which should 'clearly' have been permitted. This is a complex case that requires interpretation of the 2003 permission, drawing on relevant case law.

16. The appellant has drawn my attention to comments expressed by the Council about the scrutiny of residents and implications of the LDC application for other sites. I appreciate these are not relevant considerations for an LDC application. But they are good reasons why the Council would want to ensure it properly decides an LDC application. This involves carrying out the necessary due diligence, including checking all the many relevant planning history files (some of which are said to be archived) and taking appropriate legal advice (where necessary). This is particularly the case for such a large, and important historic site. This takes time. It is clear the limited amount of information submitted with the LDC application did not help the Council in this regard. Nor did the fact that some information (at least in respect of unit 36) was clearly not accurate.

17. From the information provided to me, it seems that the Council was not ready to show its hand at the point when the appeal was lodged as it had not received its advice from Counsel, advice it reasonably felt was needed given the complexity of the case. So I do not agree that the Council only supplied relevant information at appeal when it was previously requested, but not provided, at application stage, as is clearly suggested by the applicant.

18. The applicant states that in December 2020, the Council confirmed in writing that it agreed with the appellant's position in respect of the lawful, existing use of the site. I have reviewed the correspondence my attention has been drawn to in this regard.

[2] Appeals - Paragraph: 049 Reference ID: 16-049-20140306

19. An email written by a Council enforcement officer states: "We agree with your Counsel opinion that the recent changes to the UCO[3] in respect of condition 3 of planning permission PSX0104561 does allow for the Brunswick to operate within Class E not in compliance with this condition." But that same email also clearly states that the LDC application "cannot at this moment be granted in the terms expressed in your covering letter" and clearly indicates that the application requires amendment in terms of the description and the land. This email must be viewed in this context. It cannot be taken as a decision of the Council and it does not mean the Council was in a position to grant the LDC.

20. A subsequent email, written by a Council solicitor, states: "Our position is that the centre can be used for Class E purposes subject to the following: - Compliance with all conditions in the planning permission dated 1 September 2003 (ref: PSX0104561) save for condition 3. - Confirmation that all units within the centre were in use on 31 August for A1, A2, A3, or B1 purposes." The applicant has interpreted this as a statement of agreement between the parties. But my reading of this email is that the solicitor was merely trying to clarify the terms of the LDC application.

21. The applicant states that the Council has raised various questions regarding the nature of the LDC application, which have already been answered in previous correspondence. But no further details have been provided to substantiate this specific claim.

22. The appellant states that officers have requested additional information that far exceeds the level necessary to satisfy the relevant legal standard of proof and that the evidence provided goes significantly beyond that typically required to support an LDC application. But this does not recognise that this is not a typical LDC application, for reasons I have set out above.

23. I accept that the Council's requests have been muddled by the confusion which has arisen over 'the 10 year rule'. But it was not unreasonable for the Council to ask for evidence of the actual use of the units, bearing in mind the nature of some of the uses concerned, particularly those relating to the sale of hot food, and the limited information submitted at the time of the LDC application, (set out in the covering letter).

24. Regarding the Council's concerns about units serving hot food to take away, at the Hearing the appellant said they were under "no onus to provide evidence". But this reflects a fundamental misunderstanding of where the burden of proof lies in such a case. The evidential situation was not improved by the statutory declaration submitted in February 2021, or the retail surveys submitted in April 2021. These both just refer to use classes, rather than evidencing the land use actually being carried out on the date of the LDC application, particularly given the Council's concerns about the proportion of hot food takeaway business.

25. The appellant states that at no point has the council provided any evidence of its own to contradict or otherwise make the appellant's version of events less than probable. But on the appellant's own evidence, the vast majority of the tenants at the site (existing and past) are national multiples and their business model and nature of operations are well known and understood[4]. They include companies for whom hot food to takeaway is clearly a significant part of their

[3] Use Classes Order
[4] Grounds of Appeal, November 2021, paragraph 3.17

business, such that it is highly probable that on the date of the LDC application the hot food takeaway component in some of those units was a primary component of the use, particularly because of the effects of Covid-19.

26. The appellant considers the retail surveys corroborate their case. But given the type of visual inspection typically undertaken for the purposes of a retail survey, I am not satisfied these surveys can be taken as an indication that there is no hot food takeaway primary component in any of the units in dispute. A material change of use in this regard, would not necessarily be immediately apparent from a visual inspection (hence the 10 year period required before immunity may be achieved, under section 171B(3) of the 1990 Act). In any event, all the retail survey data precedes the date of the LDC application and any effects of the Covid-19 pandemic.

27. My attention has been drawn to allegations made about the appellant by the Council. But there is no evidence such allegations have caused them to incur unnecessary or wasted expense in the appeal process.

28. The applicant's comments on the response to their costs application indicate that costs are also sought in respect of the Council's failure to substantiate its reasons for refusal. But no further details have been provided and the Council submitted a detailed appeal statement setting out its concerns about the LDC application and it defended its position at the Hearing.

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

L Perkins

INSPECTOR