LAND AT LEICESTER ROAD, WANSTEAD

APPLICATION FOR COSTS
ON BEHALF OF THE APPELLANT

A SUMMARY

1. This is an application for:

   (i) total costs of the Appellant occasioned by this Inquiry and/or

   (ii) partial costs of the Appellant in respect of this Inquiry.

2. The case for total costs is based upon the unreasonable behaviour of the Council in refusing planning permission for Scheme 2. From the evidence, it is clear that the Scheme 3 application was only submitted consequent upon and because of the refusal of planning permission for Scheme 2. Thus the Appellant's total costs of the Inquiry in respect of both schemes ought to be paid by the Council.

3. The case for partial costs is based upon the unreasonable behaviour of the Council in:

   (a) failing to identify clearly the reasons for refusing planning permission;

   (b) seeking to broaden the matters genuinely in issue through evidence at this Inquiry;

   (c) failing to co-operate in agreeing the content of the Statement of Common Ground and thereby further confusing the nature of the Council's case; and

   (d) persisting in objections which an Inspector has previously indicated are acceptable.

B CIRCULAR GUIDANCE

4. The relevant provisions of Circular 03/09 are as follows:

> Para 1. *"The costs awards regime seeks to increase the discipline of parties when taking action within the planning system, through financial consequences for those parties who have behaved unreasonably and have caused unnecessary or wasted expense in the process."*
>
> Para A22. *"The word unreasonable is used in its ordinary meaning .... The most common examples concern non-compliance with procedural requirements or failure by the planning authority to substantiate a stated reason for refusal of planning permission."*

Two self-evident points need to be made here:

(i) This is not an exclusive list of examples (see also Part B).

(ii) Purporting to object on a ground which is not clearly part of a stated reason for refusal must also be unreasonable.

> Para 8. *"The content of the circular is 'guidance only' but 'represents current national policy in the awarding of costs and will be fully taken into account by the Secretary of State and Inspectors where costs are at issue in planning and related proceedings."*
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> Para 9. *"The guidance applies to all appeals under the Planning Acts in England which are made on or after 6 April 2009."*
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> Annex Part A
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> Para A2. *".... parties may behave in ways that cause delay or frustrate the efficient resolution of outstanding matters."*
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> Para A3. *"the costs regime is aimed at ensuring as far as possible that:*
>
> [1st bullet] *all those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice, whether in terms of timelines or in quality of case.*
>
> [4th bullet] *at the appeal stage, statements of common ground are provided at the appropriate time.*
>
> [5th bullet] *planning authorities properly exercise their development control responsibilities, rely only on reasons for refusal which stand up*

to scrutiny and do not add to development costs through avoidable delay or refusal without good reason.

[8th bullet] *the pursuit of "substantiated applications for costs in a robust but realistic way".*

Full Awards

Para A18. *"A full award of costs relates to the applicant's whole costs of the statutory process, including the submission of the appeal statement and supporting documentation. It also includes the expense of making the costs application in respect of the appeal process, whether in writing or at a hearing or Inquiry. .....*

An application for a full award may be allowed in full, refused or allowed in part."

Partial Awards

Para A19. *"Some cases do not justify a full award of costs – for example, where the appeal is one of several joint appeals, or where the application for costs only relates to one ground of refusal, or only relates to the attendance of particular witnesses." .....*

Para A12. *"Costs will normally be awarded where the following conditions have been met:*

- *a party has made a timely application for an award of costs*
- *the party against whom the award is sought has acted unreasonably and*
- *the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process [see footnote 12] – either the whole of its expense because it should not have been necessary for the matter to be determined by the Secretary of State or appointed Inspector or part of the expense because of the manner in which a party has behaved in the process."*

Para A20. *"A partial award may be made where an application for a full award is being allowed in part or where a partial award is applied for in specific terms. An application for a partial award may be allowed in the terms of the application, refused or allowed in part (that is, a smaller partial award is made). The expense of making an application for a partial award of costs is recoverable where the application is allowed. Where the application is for a full award and the application is allowed in part or, an application for partial award is allowed in part, a proportion of the expense of making the application will be recoverable accordingly."*

Unnecessary or wasted expense

Para A24. *"An applicant for costs will need to demonstrate clearly how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense and decisions will be taken on the balance of probability. Expense should be identifiable or capable of being quantified in some tangible way. Expense may be unnecessary or wasted because the entire appeal could have been avoided or because time and effort was expended on one part of a case that subsequently turned out to have been abortive."*

Para A25. *"The power to award costs enables a party to be awarded the costs necessarily and reasonably incurred in the appeal process. However, applications may relate to what happened before the appeal was lodged." ....*

"The costs of the appeal will typically – for an appellant – be those of employing an agent to submit the appeal and represent them throughout the process. In addition, costs may include the use of a range of professional experts to provide detailed technical/legal advice, including representation at a hearing or inquiry, where held."

It is evident from the above that the costs incurred by the Appellant to meet the objections raised unreasonably by the Council both in part and as a whole have been considerable. These costs relate, not only to the appeal process for both appeals but the time spent in preparation for Scheme 3 prior to the submission of that appeal as a direct consequence of the refusal of planning permission for Scheme 2.

Para A27. *"... the kind of expense or time spent in the matter should be identified in broad terms."*

In terms of a full award of costs, the expense and time spent speak for themselves i.e. everything in connection from the preparation and submission of the appeal in Scheme 2 up to the conclusion of this Inquiry and everything involved with the preparation of Scheme 3 up to the conclusion of this Inquiry. In respect of a partial award it is broadly two-thirds of the Inquiry time spent dealing with the houses, Block A and aspects of Blocks B and C unspecified in the Grounds of Refusal.

Good Practice

Para A28. *"... Good behaviour includes careful and on-going case management."*

Good Practice includes:

[1st bullet] *"Constructive co-operation and dialogue between the parties at all stages."*

[4th bullet] *"Parties should actively review their cases, respond promptly to changing circumstances and provide a clear explanation of a revised stance or position, with nothing coming as a complete surprise throughout the process ...."*

Annex Part B

Para B1. *"Behaviour which is alleged to be unreasonable in the context of an application for an award of costs may be of a procedural or substantive nature. "Procedural" relates to the process. "Substantive" relates to the issues arising on the appeal." ....*

Para B2. *"All appeals are open to costs awards for failure to comply with the relevant statutory requirements as set out in the Regulations." ....*

Para B3. *"Discussion of and agreement on outstanding issues between the principal parties throughout the planning process is likely to reduce the risk of a confrontational attitude developing at appeal stage. It may also reduce the risk of a successful costs application and minimise the overall cost of the process to all concerned, including the cost of administering the appeal system. Costs applications are less likely to be justified where parties take responsibility for their behaviour and act reasonably."*

Para B4. *"Examples of unreasonable behaviour which may result in an award of costs to either principal party:*

[3rd bullet] *"resistance to or lack of co-operation with the other party in providing information, discussing the appeal ... thereby extending the duration of the appeal and associated expense."*

[5th bullet] *"prolonging the proceedings by introducing a new ground of appeal or issue or reason for refusal."*

[6th bullet] *"not completing a timely Statement of Common Ground or not agreeing factual matters common to witnesses of both principal parties, resulting in more time being taken at the inquiry than would have been the case."*

The Planning Authority's handling of the planning application

Para B9. *"The procedures adopted by a planning authority for determining planning applications are generally a matter for the authority within the context of local government accountability. The process followed by the planning authority may be open to criticism in a particular case, but cause and effect need to be addressed in deciding an application for costs.*

Awards against planning authorities

Para B15. *"Planning authorities are at risk of an award of costs against them if they prevent or delay development which should clearly be permitted having regard to the development plan, national policy statements and other material considerations."*

Para B16. *"Authorities will be expected to produce evidence to show clearly why the development cannot be permitted. The planning authority's decision notice should be carefully framed and should set out in full the reasons for refusal. Reasons should be complete, precise, specific and relevant to the application. Planning authorities will be expected to produce evidence at appeal stage to substantiate each reason for refusal with reference to the development plan and all other material considerations including any relevant judicial authority. If they cannot do so they risk a costs award against them for any unsubstantiated reason for refusal. ... The key test will be whether evidence is produced on appeal which provides a respectable basis for the authority's stance ..."*

Para B18. *"Planning appeals often involve matters of judgment concerning the character and appearance of a local area or the living conditions of adjoining occupiers of property. Where the outcome of an appeal turns on an assessment of such issues it is unlikely that costs will be awarded if realistic and specific evidence is provided about the consequences of the proposed development. On the other hand, vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis, are more likely to result in a costs award."*

Para B20. *"Planning authorities are not bound to accept the recommendations of their officers. However, if officers' professional or technical advise is not followed, authorities will need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the decision in all respects. If they fail to do so, costs may be awarded against the authority."*

Para B23. *"Similarly, planning authorities are expected to give thorough consideration to relevant advice or representations from statutory consultees such as the Environment Agency or English Heritage ... before determining a planning application. While it is the primary responsibility of planning authorities to either accept or reject that advice, they should clearly understand the basis for doing so and should provide, where necessary, a clear and rational explanation of the position taken."* ....

Para B24. ...*"What matters in any subsequent costs application is whether or not the authority can show good reason for accepting or rejecting the consultee's advice."*

Para B29. *"Examples of circumstances which may lead to an award of costs against a planning authority:*

[4th bullet] *"persisting in objections to a scheme, or part of a scheme, which has already been granted planning permission or which the Secretary of State or an Inspector has previously indicated to be acceptable."*

5. The relevant regulations and other guidance make plain what is required in terms of clear identification of issues and the case which a planning authority intends to make in respect of both grounds of refusal and Rule 6 Statements. The grounds of refusal and Rule 6 Statement by the Council in the case of these two appeals plainly fail those tests.

C GROUNDS

Full Award

6. The relevant matters in relation to a full award are as follows:

(a)(i) The Council unreasonably refused planning permission for Scheme 2 which resulted in the unnecessary costs of appeal of Scheme 2 and preparation and appeal of Scheme 3. (See A12, A24, B15 above).

(ii) Although the Appellant's representative had requested to speak at the meeting of the Regulatory Committee determining the Scheme 2 application in July 2009, he

was not given the opportunity to address the Committee and the CRA representative opposing Scheme 2 was permitted to speak twice as long as her allotted time (CH p16 para 5.21; CH App 16 p1; Wood p44 para 6.12.4). (See B9 above).

(iii) Although Hicks gave direct oral evidence on this point there was no challenge to his account of events. Neither was there any attempt by the Council to call evidence to rebut Hicks' evidence concerning those events, even though it was on notice through prior exchange of proofs of evidence. The Appellant's evidence has therefore gone unchallenged on this point and must be accepted.

(iv) As a result of the biased and unfair behaviour of the Committee, which was by definition unreasonable in preventing the Appellant from making previously agreed representations, the Appellant was unable to counter inaccurate and misleading statements against Scheme 2 or to answer any questions from the Committee members which would have resulted in a different view being taken of the proposals.

(v) In particular the Appellant was prevented from emphasising the importance of the support from English Heritage for Scheme 2. It is important to note that the Committee had expressly deferred consideration of the Scheme 2 application at its meeting on 30 April 2009 in the light of EH's intervention at that stage and for further revisions to be made (Hicks para 5.14).

(b)(i) The Council failed to take the advice of its professional officers, endorsed by the Acting Head of Department Control, which reviewed, analysed and responded to all representations concerning Scheme 2 in recommending that planning permission be granted. It is not clear on what basis the Committee took a contrary view. (See B20 above).

(ii) The Council failed to take the advice of English Heritage which was clearly reported to them in the July 2009 Committee Report and has failed to provide "a clear and rational explanation of the position taken." In fact both Algar's and Williams' evidence completely ignores the advice of English Heritage and fails to acknowledge that it was given. It is as if English Heritage did not participate at all. No rational explanation has been given for this, merely a statement that English Heritage's view does not accord with their own. That is unreasonable behaviour. (See B23, B24 above).

(iii) To the extent that the Council in refusing planning permission was agreeing with the views of the CAP and C&UD officers, neither of those groups took account of English Heritage's view in their representations on the application, even though they were in a position to do so and the settled view of the English Heritage officer, Simon Hickman, was conveyed directly to the C&UD team by email dated 4 June 2009 (not disclosed to the Appellant in spite of requests to the Council to do so until day 2 of the Inquiry). The reliance if any placed on the views of the CAP and C&UD officers is flawed in respect of the continued failure to take into account the views of English Heritage. Had the Committee taken responsible notice of the views of their officers and English Heritage and allowed

the Appellant to address the meeting it is entirely conceivable on a rational approach and on the basis of all the material considerations that planning permission would not have been refused and all further costs incurred by the Appellant would have been avoided.

Partial Award

7. The matters relevant in relation to a partial award of costs are as follows:

(a)(i) The Council failed to comply with requirements of the Regulations and guidance concerning the content of grounds of refusal and Rule 6 Statements. (See A22, B2 above).

(ii) As a result, beyond the issues of design of Blocks B and C in Scheme 2 and Scheme 3 in relation to Nutter Lane, the locally listed buildings and the Conservation Area, and the height of those blocks in Scheme 3, it is impossible to know what other aspects, if any, about either scheme were unsatisfactory and warranted the refusal of planning permission. (See B16 above).

(iii) As Algar admitted, the use of the word 'particularly' meant that it was unclear what other aspect(s) of the development proposals were unacceptable.

(iv) One cannot discern from the grounds of refusal or the Rule 6 Statement that there was anything at all specifically unacceptable about Block A and/or the houses and/or some other aspect of the development in either Scheme 2 or 3. (See A3, B18 above).

(v) The Council's evidence concerning Blocks A, B and C and the houses has been vague and generalised and lacking in objective analysis. For instance it is the "bigness" which is said to be objectionable, yet no lesser height is identified as acceptable, no measure identified by which that can be judged.

(b)(i) The failure to particularise other aspects of the development means that the elaboration of the objections of the Council in their witness' proofs to include Block A and the houses and other aspects of Blocks B and C goes beyond the basis upon which planning permission was refused. (See B4 above).

(ii) In addition or alternatively, the reliance on those other objections means that they ought to have been specified in the grounds of refusal and were not. Either way, the broadening of the grounds on which the Council's case has been presented through evidence at the Inquiry has required additional time and cost to be expended by the Appellant in dealing with these issues, both before and at the Inquiry.

(iii) The use of the term design without further definition in itself implies appearance only and Algar confirmed that the grounds had been narrowed and he expected the Appellant's case to focus on detailed design issues, not size and density.

(iv) Objections in Algar's evidence in relation to "historic spaciousness of the area", "cramped appearance, over development, the car park area, the most rural element of the Conservation Area" were raised for the first time in evidence. There was no indication that there was any outstanding objection in terms of

density in the absence of an objection based on Policy BD3. Specifically it had not previously been suggested that either Scheme 2 or 3 represented 'over development' of the site by reference either to site cover or the dimensions of individual buildings.

(v) The objection related to the 'rural element' of the Conservation Area was drawn directly from the Final Draft Character Appraisal. Like all other reliance placed upon that document, this was unreasonable behaviour for the following reasons:

- the document has not been adopted and although used for development management purposes, there is no Council resolution to authorise such use;
- applicants for planning permission are not made aware that C&UD officers rely upon it;
- the document is not even publicly available; and
- the document was not listed in the Council's Rule 6 Statement as one on which the Council intended to rely and was first referred to in the evidence of the Council.

(vi) The Council's case went beyond what officers of the Council previously indicated was the extent of the Council's objection. Unlike the Council's witnesses, these officers did not speak solely from the narrow view of the C&UD officers.

- CH App 3 p6 – Art Deco style suggested by Acting Head of Development Control (JP) who accepted there was no design issue on the houses.

- CH App 5 – AHDC happy with changes to Blocks B and C and thought the two buildings worked well.

- CH App 4 – Bailey completely satisfied with design of Blocks B and C and contrast to the locally listed buildings.

All the above occurred before further changes were made to accommodate the views of EH.

- CH16 New AHDC – (EW) stated reason for refusal on Scheme 2 concerned the design of Blocks B and C alone.
  - The Chairman had no issue with Block A.
  - Views of the C&UD team rather harsh and inconsistent approach.
  - Telford would have a strong case at appeal.
  - Development Control officers would be unable to defend refusal of either scheme at appeal.

- CH17 The houses and Block A were acceptable:
  - Bailey pointed to diversity as the established character of the area.
  - Only comments made by officers concerned Blocks B and C.
  - Algar admitted he kept quiet and did not raise any reservations.

- CH18 Further drawings submitted and Option 2 approved for massing which was the basis for the final design.

(c)(i) The Council failed to agree the SoCG in a timely fashion. You have had direct evidence from Hicks that there was a five week delay between submission of the second draft SoCG on 29.3.10 and the returned amended draft received at 18.34 hours on 4.5.10. No explanation has been given in evidence of this unacceptable delay and intervening silence in spite of two chasing enquiries and MHQC undertaking to seek instructions for the explanation. MHQC explained that he was advising the Council prior to the issue of the Council's Rule 6 Statement so clearly the Council were properly legally advised in relation to all procedural issues. (See A2, A28, B3, B4).

(ii) Hicks and Woods and Miele have all indicated in their main proofs that they understood that there were no issues in relation to Block A and the houses and Blocks B and C beyond the matters listed above by reason of discussions with the Council in the context of the preparation of the SoCG. It is inconceivable that all these witnesses would have expressed that understanding unless they had a clear basis for doing so. It has not been stated by way of rebuttal that they had no such basis for that understanding.

(iii) The Council further did not assist in providing timely responses to requests for information. (See B4 above).

(d) It is evident from the Inspector's decision letter on Scheme 1 that he found the design of houses (which were reproduced in Scheme 2) to be acceptable. Yet the Council unreasonably in evidence sought to keep the issue of those houses' design in issue. It has not been clearly explained why they are no longer

acceptable; it is only asserted to be so because of the more recent designation of the Conservation Area, however no harm to its character and appearance has been identified.

Similarly the Inspector accepted that a three storey element to development on the corner of Gloucester Road and Leicester Road would be acceptable in principle, yet the Council has still sought to keep the height of Block A in issue as part of its objections, again because of the description of the Conservation Area and without identification of relevant harm to its character and appearance. (See B29 above).

8. By reason of all these matters additional time and expense has been wasted before and at this Inquiry in order to deal with matters orally in x, xx and rebuttal, especially the preparation of the Miele rebuttal evidence.

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