Costs Decision

Inquiry opened on 6 May 2010
Site visit made on 29 June 2010

by Mrs H M Higenbottam

BA (Hons) MRTPI

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

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date:
17 August 2010

Costs application in relation to Appeal Refs: APP/W5780/A/10/2121325 (Scheme 3) & APP/W5780/A/10/2119252 (Scheme 2)
Chepstow House, 49 Leicester Road, London E11 2DW

- 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 Telford Homes Plc for an award of costs against the Council of the London Borough of Redbridge.
- The inquiry was in connection with two appeals against the refusal of planning permission for
- Scheme 3: 24 dwellings comprising of 6 x 4 bedroom two storey semi detached houses and 3 x three storey and part 2.5 storey apartment blocks (referred to as block A, B and C) totalling 16 x 3 bedroom flats and 2 x 2 bedroom flats together with associated car parking and landscaping
- Scheme 2: 24 dwellings comprising 6 x 4 bedroom two storey semi-detached houses and 3 x three storey apartment blocks (referred to as blocks A, B and C) totalling 17 x 3 bedroom flats and 1 x2 bedroom flats together with associated car parking and landscaping.
- The Inquiry sat for 6 days on 6, 7, 25 and 27 May and 14 and 28 June 2010.

Summary of Decision: The application is allowed in the terms set out below in the Formal Decision and Costs Order.

The Submissions for the applicant

1. The application is made for a full and a partial award of costs.

2. The application for a full award of costs is based on the unreasonable behaviour of the Council in refusing planning permission for Scheme 2. As Scheme 3 was only submitted consequent upon, and because of, the refusal of planning permission for Scheme 2, the full costs in relation to both appeals should be awarded. The full award application refers to Annex A paragraphs A12 and A24 and Annex B paragraph B15 of Circular 03/2009.

3. The case for partial costs is based upon the unreasonable behaviour of the Council in:
   - Failing to identify clearly the reasons for refusing planning permission;
   - Seeking to broaden the matters genuinely in issue through the evidence submitted to the Inquiry;
   - Failing to co-operate in agreeing the content of the Statement of Common Ground (SoCG);

- Persisting in objections which an Inspector had previously indicated to be acceptable.

The partial award application refers to Annex A paragraphs A2, A3, A22 and A28 and Annex B paragraphs B2, B4, B16, B18 and B29.

4. In respect of the full application for costs the expense and time spent includes the preparation and submission of the appeal in Scheme 2 up to the conclusion of the Inquiry and everything involved with the preparation of Scheme 3 up to the conclusion of the Inquiry.

5. In respect of the 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.

Full Award of Costs

6. The appellant's representative had requested to speak at the July 2009 Regulatory Committee meeting to which the Scheme 2 application had been reported. He was not given the opportunity to address the Committee and the Counties Residents Association representative opposing Scheme 2 was permitted to speak twice as long as her allotted time. This evidence has been unchallenged and must therefore be accepted. The appellant complained to the Council about the way in which it determined the Scheme 2 application. However, there has been no response to that complaint.

7. This led to the appellant being unable to counter inaccurate and misleading statements against Scheme 2 or to answer any questions from Committee members which would have resulted in a different view being taken of the proposals. In particular it prevented the appellant from emphasising the importance of the support from English Heritage (EH) for Scheme 2. The Committee had deferred consideration of the Scheme 2 application from the 30 April 2009 meeting in the light of EH's intervention and for further revisions to be made.

8. The Council failed to take the advice of its professional officers recommending that planning permission be granted. It is not clear on what basis the Committee took a contrary view. EH advice was clearly reported to the Committee in July 2009 and the Council have failed to provide a 'clear and rational explanation of the position taken.' The Council's Inquiry evidence fails to acknowledge EH gave advice.

9. The Conservation Area Panel (CAP) and the Conservation and Urban Design team (C&UD) failed to take account of EH's view in their representations to the committee. However, C&UD were aware of the views of EH as an email dated 4 June 2010 from EH to the team, set out the views of EH in relation to Scheme 2. This email was not disclosed to the appellant despite requests to the Council, until day 2 of the Inquiry.

10. Had the Committee allowed the appellant to address the meeting it would have allowed the lack of reference to EH's comments by either the CAP or C&UD to be stated. It is entirely conceivable that planning permission would not have been refused and all further costs incurred by the appellant, would have been avoided.

11. The applicant considered applying for a Judicial Review in relation to the way in which the Council took the decision on Scheme 2. However, due to the timescales on such an application the applicant considered it was better to spend that time on a scheme to gain planning permission.

Partial Award of Costs

12. The Council failed to comply with the requirements of the Regulations and guidance concerning the content of grounds of refusal and Rule 6 Statements. As a result, other than 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. The use of the word 'particularly' meant it was unclear what other aspect(s) of the development proposals were unacceptable.

13. The application for costs is not legalistic. It is about the absence of words necessary to substantiate the case made in the Council's evidence. If regulations and guidance mean anything at all, the grounds of refusal are woefully inadequate in spelling out the case which has been made or in the alternative the case which has been made has gone beyond what the reason for refusal was driving at i.e. blocks B and C. The Council are only entitled to substantiate what the reason for refusal clearly states. A Council can not hide its hand until an Inquiry and then spring an argument. The case a Council makes has to be to substantiate the reason for refusal.

14. It is wrong to say the only actions available to an appellant are to seek an adjournment or to exclude evidence. The third option is to seek an application for costs. If evidence was requested to be excluded it would lead to a Judicial Review, with a hearing a year or so hence. Inspectors are loath to exclude evidence, so the appellant was bound to have to deal with it. Not having an adjournment does not mean it does not take longer to deal with the case.

15. Government guidance can not be to seek an adjournment where matters were raised late in the day, as this would slow down the planning system. The appellant can still be taken by surprise but not seek an adjournment and it could still waste time, result in added costs to deal with matters in detail or in dispute.

16. The SoCG took over 5 weeks and was not 'a bit slow'. It was eventually signed, after a further 3 weeks active communication, on 25 May 2010. The Inquiry opened on 6 May 2010. It does not identify that there was prior understanding between the parties. The meeting note of 23 March 2010 can only be relied upon if the points of agreement found their way into the SoCG. Had the Council signed up to the SoCG the appellant would have been on notice of what the Council's case was. Precisely because they did not sign the SoCG it could not be relied upon. There has been uncooperative silence on behalf of the Council in relation to why it was not agreed before the start of the Inquiry. The Council's assertion that 'officers are hard pressed' is not an explanation.

17. Paragraph 5.16 of the SoCG does not mean the whole of Policy BD1 is at issue or all elements of it; it simply means that's all that could be agreed.

18. Neither the grounds of refusal or the Rule 6 Statement specify anything at all unacceptable about Block A and/or the houses and/or some other aspect of the development in either Scheme 2 or 3.

19. The Council's evidence has been vague and generalised, lacking objective analysis. Its witnesses wilfully misrepresent 'design' within the context of the reason for refusal. The Council's evidence did raise the effect of the proposals on the setting of the grade II listed Applegarth. However, at the Inquiry the Council confirmed that the proposals would not affect the setting of Applegarth.

20. The failure to particularise other aspects of the development within the reason for refusal means the elaboration of the objections by the Council's witnesses to include Block A, the houses and other aspects of Blocks B and C goes beyond the basis upon which planning permission was refused. The reliance on these objections demonstrates that they ought to have been specified in the grounds of refusal and were not. 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, including Dr Miele's supplementary proof, and at the Inquiry.

21. The Inquiry has taken 6 days because the Council unreasonably put in issue the matters they have. If the reason for refusal had been 'stuck to' the Inquiry would have taken 2 days. Therefore 4 days have been wasted.

The Response by the Council

22. There is no foundation for either a full or partial award of costs. Costs applications are usually made on the premiss that an appeal succeeds or it relates to procedural malpractice on a particular issue pursued but have proven to be without foundation.

23. A full award of costs would be absurd if either or both appeals were dismissed. If one or both appeals are dismissed it demonstrates that there is substance in the Council's case.

Full Award of Costs

24. It is not true that the appellant had to proceed to Scheme 3 as a result of the refusal of Scheme 2. Therefore total costs for both appeals can not be claimed. The application for costs does not say the Council acted unreasonably in refusing Scheme 3; therefore the applicant can only pursue a claim for partial costs.

25. The applicant did not pursue a Judicial Review in relation to the determination of Scheme 2 by the Council. The applicant therefore accepted the Council's conduct in the determination of this scheme.

26. There was nothing to suggest members did not consider all officers advice. They had the advice of the C&UD officers, EH and other consultees. The members preferred the views of C&UD. It has to be assumed that members considered the application in the round.

Partial Award of Costs

27. The Government has not sought to prevent authorities from producing their full case at the last moment. Planning is too important. If evidence of substance has been produced and established, costs can not be awarded against the Council.

28. If an Inspector takes the view at pre-inquiry statement stage that the nature of the case is not clear but none the less the appeal is determined on a matter of substance, the remedy in dealing with the case on short notice is to seek an adjournment. Costs could then be sought on that adjournment.

29. It is highly significant that no adjournment was sought. The appellant has not been taken by surprise. Witnesses have not had to research evidence. The Council have not acted unreasonably. Cross examination grappled with substance not the issue being introduced.

30. Once the reason for refusal is looked at the words 'particularly design' can mean a range of matters including detail through to size, mass and scale. The issue raised was not as narrow as suggested. The SoCG (paragraph 5.12) refers to Policy BD1, most relevant points at issue are 1, 2 and 4. It was open to the appellant to seek to insist that this paragraph should be narrower, limiting it to point 2 of Policy BD1.

31. It is critical to bear in mind the difference between the previous appeal and this one. The appeal site is now within a designated Conservation Area. The statutory test is 'light years away from' Scheme 1 (the previous appeal). The change is to the evaluation of the character and appearance of the area. The Council have to exercise a very solemn task, to characterise it as unreasonable is unfair.

32. The appellant attempted to suggest that density in a non-arithmetic sense was not an issue but then proceeded to deal with it in cross examination. The definition of terms, size, bulk, mass and scale were debated in the cross examination of Mr Wood, none of which suggested the reason for refusal was limited. The appellant is an experienced developer. The concerns with the schemes are recorded in C&UD comments, the Planning Officer Report and EH advised the decision should be guided by conservation experts.

33. The appellant came to the Inquiry expecting it to relate to something other than design. The Council's witnesses evidence was patently truthful and was their truly held views; they were not unreasonable.

34. The appellant could have sought exclusion of evidence as irrelevant. He did not do that. The Council presented a case of substance and therefore even if the appeal succeeds there should be no award of costs.

35. In relation to procedural matters, the appellant considers that even if both appeals fail costs should be awarded. This is not accepted. The reason for refusal could have been fuller; language was used economically. However, if it is accepted that design means different things then the SoCG and meeting note dated 23 March 2010 (which agreed points 1, 2 and 4 of Policy BD1 were relevant) demonstrates that the appellant was aware of the different aspects of

design at issue. The 23 March meeting was held before the exchange of proofs and therefore the reason for refusal must have been clear to the appellant.

36. The Council did not fail to co-operate in agreeing the SoCG. It is a hard pressed borough with limited resources. It is not rare for a SoCG to be agreed late in the day. Although the Planning Inspectorate wants the SoCG to be agreed early because of the adversarial process parties do not want to risk compromising their cases. The Council seeks to protect what it wants to and the appellant seeks to achieve a development. To award costs there would have to be some effect of not signing the SoCG. This is not the case as Policy BD1 points 1, 2 and 4 were accepted by both parties.

37. The Council have not persisted in objections which an Inspector has previously indicated are acceptable. The previous appeal decision was prior to the designation of the Conservation Area. The Council have been careful to defend the Conservation Area without being irresponsible of the concern expressed through young/inexperienced officers.

38. The case for a partial award of costs should fail. As far as there are criticisms this is based on the difference of opinion between planning officers and Councillors. This difference of opinion has been pursued responsibly. The witnesses and the advocate have not introduced matters not genuinely at issue. The C&UD Officers views are genuine. The Council has kept on the right side of the line. The correct approach for the appellant would have been to have sought an adjournment or a ruling to exclude evidence.

Conclusions

39. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only 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.

40. Members are not obliged to accept the advice of their own officers. In this case the report to Committee clearly demonstrated a divergence of opinion between C&UD Officers and Planning Officers. Members were perfectly entitled to make up their own minds based on their own local knowledge and experience. Whilst the Council's evidence at the Inquiry followed C&UD Officers views during the application process for Scheme 2, I am not convinced that that was the view of Members or what was intended by the reason for refusal.

Full Award of Costs

41. I consider that Scheme 3 was not an inevitable consequence of the refusal of Scheme 2 and therefore I do not accept the proposition that a full award of costs should be made.

Partial Award of Costs

42. Section 22 (c) of the General Development Procedure Order 1995 as amended requires that where planning permission is refused, the notice shall state clearly and precisely the Council's full reasons for the refusal. The evidence produced by the Council for the appeal, in my view, either went beyond the reason for refusal or the reason for refusal was not clear or precise. It was not

clear on the face of the reason for refusal that the Council were objecting to the semi-detached dwellings and Block A.

43. The Planning Inspectorate document entitled *Procedural Guidance: Planning appeals and called in planning applications* (PINS 01/2009) requires that the local planning authority and appellant prepare a SoCG together and that it is submitted within 6 weeks of the start date of the appeal. The SoCG should identify areas of agreement and disagreement.

44. Although a SoCG was not submitted within 6 weeks of the state date of the appeal, the appellant sought to agree a SoCG with the Council. Whilst a meeting was held on 23 March 2010 no explanation of why the SoCG could not be agreed has been provided. Although, even at this stage the SoCG would have been late, it would have informed the Inquiry and could have informed the evidence.

45. The Council's reference to 'hard pressed officers' is not expanded on and I have seen nothing to demonstrate that if the Council had wished to complete the SoCG it could not have been achieved.

46. The Council's statement of case failed to contain the full particulars of the case they proposed to put forward at the Inquiry. There is no mention of the semi-detached dwellings or the concerns over Block A; it simply refers to the proposed developments. Furthermore, the statement of case fails to refer to the CAFD as a document to be relied upon within the Council's evidence. The statement of case is lacking in substance and detail.

47. The preparation of the SoCG and the statement of case provided opportunities for the Council to explain the case they were seeking to put to the Inquiry. However, both opportunities were missed and the evidence clearly demonstrates that the appellant considered that matters relating to the semi-detached dwellings and Block A were not of concern to the Council. A supplementary proof was produced by the appellant, once the proofs of evidence had been exchanged. The purpose of the supplementary proof was to comment on the Council's proofs of evidence, which in the appellant's view went outside their understanding of the reasons for refusal and the SoCG, which was emerging whilst the Council were preparing their proofs.

48. I consider that the appellant's decision not to seek a Judicial Review, exclusion of evidence or seeking of an adjournment does not demonstrate that an application for costs should be rejected. The appellant demonstrated to the Inquiry their desire to deal with all and any matters at issue, so that the appeals could be determined. That does not equate to the Council's actions being reasonable nor that there were no additional expenses for the appellant.

49. In relation to the previous appeal decision on Scheme 1, for the reasons set out in the decision, I consider that there are material differences between the earlier appeal and the current proposals, in particular the designation of the Conservation Area and the relationship of the semi-detached dwelling (House 6) to Block A. I therefore do not accept that the Council has pursued objections which a previous Inspector had indicated to be acceptable.

50. I consider that the Council acted unreasonably in failing to state clearly and precisely the reasons for refusal, in not agreeing the SoCG until 25 May 2010,

failing to state the full particulars of the case they were putting forward at the Inquiry and failing to refer to the CAFD within the statement of case. This led to the production of a supplementary proof by the appellant and additional Inquiry time being spent on considering the semi-detached dwellings and Block A. Whilst the appellant considers this resulted in an additional 4 days of Inquiry time I consider this to be an overestimate. I estimate the time taken to deal with the issues in relation to the CAFD and considering the semi-detached dwellings and Block A to be 2 days of Inquiry time or one third of the Inquiry.

51. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has been demonstrated and that a partial award of costs is justified and allowed in the terms set out in the Formal Decision and Costs Order.

Formal Decision and Costs Order

52. In exercise of my 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 powers enabling me in that behalf, I HEREBY ORDER that London Borough of Redbridge shall pay to Telford Homes Plc, the costs of the appeal proceedings limited to those costs incurred in the production of Dr Miele's Supplementary Proof and 2 days of Inquiry time, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal more particularly described in the heading of this decision

53. The applicant is now invited to submit to the London Borough of Redbridge, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Supreme Court Costs Office is enclosed.

Hilda Higenbottam

Inspector