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## Costs Decision

Site visit made on 22 October 2012

**by K D Barton BA(Hons) DipArch DipArb RIBA FCI Arb**

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

**Decision date: 14 November 2012**

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### **Costs application in relation to Appeals Refs: APP/X5210/A/12/2176817 and APP/X5210/E/12/2176818**

#### **22 Thurlow Road, London NW3 5PP**

- The application is made under *the Town and Country Planning Act 1990*, sections 78, 322 and Schedule 6, *the Planning (Listed Buildings and Conservation Areas) Act 1990*, sections 20, 74, 89 and Schedule 3, and *the Local Government Act 1972*, section 250(5).
  - The application is made by Mr Simon Rusk for a full award of costs against the Council of the London Borough of Camden.
  - The appeals were against the refusals of planning permission and conservation area consent for the demolition and replacement of the existing garage and construction of a basement extension to the rear.
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### **Decision**

1. The application for an award of costs is allowed in the terms set out below.

### **Reasons**

2. *Circular 03/2009: Costs Awards in Appeals and Other Planning Proceedings* advises that, irrespective of the outcome of an appeal, 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.

### **Basement Matters**

3. Paragraph B20 of the *Circular* states that local planning authorities are not bound to accept Officers' recommendations but if professional or technical advice is not followed then reasonable planning grounds need to be shown for reaching a different decision. In this case, structural information submitted with the application was criticised by the Council leading to the submission of a Basement Impact Assessment (BIA). The BIA was held by the Council, without comment, for seven months before a positive recommendation was made to Committee in May 2012.
4. Members did not accept the Officer's recommendation but had no professional or technical grounds for not doing so. Although local objectors maintain that there are springs in the area, the only technical information available on which to make a decision was a *Desk Study and Ground Investigation Report* and a *Supplementary Ground Investigation Report* carried out by an experienced Engineer. The *Reports* do not identify any springs in the immediate area, nor any evidence of a detrimental impact on ground water. Whilst the views of

local residents are important, local opposition is not in itself a reasonable planning ground for refusing a proposal.

5. Paragraph B16 of the *Circular* requires evidence to be produced on appeal to show why the development cannot be permitted. The Council did not commission any professional or technical advice of its own until 10 weeks after the decision. The advice raises points that would normally be dealt with post planning and does not state that the queries raised are insuperable. If the comments had been provided prior to reaching a decision then the points could have been addressed and an appeal might not have been necessary.
6. An example of unreasonable behaviour given in paragraph B4 of the *Circular* is introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not have arisen if the evidence had been submitted on time. In this case the Council's technical evidence was commissioned so late that the date for exchange of 6-week statements was put back by two weeks. This necessitated a detailed response which fell during the holiday period and involved some reorganisation of holidays. Although a response would have been required even if the Council's technical evidence had been produced prior to the decision there would not have been the delay or the requirement to reorganise holidays.
7. Reference has been made to another BIA, in the same format, by the same Engineers, on another site at Templewood Avenue in Camden where the development was permitted at the same Committee meeting as the appeal proposal was dismissed. However, CPG4 indicates that the level of information required should be commensurate with the scale, location and complexity of the scheme. Although the Templewood Avenue BIA has been submitted, it is not clear what the relative scale and complexity is. It cannot be assumed that reaching different decisions amounts to not determining like cases in a like manner, or unreasonable behaviour.

### **Tree Matters**

8. Policy D27 of the London Borough of *Camden Local Development Framework Development Policies* seeks to prevent the loss of trees of landscape or amenity value. Whilst Members again disagreed with the Officer's recommendation, they are entitled to make a judgement as to the amenity value of trees that would be lost. However, paragraph B27 of the *Circular* indicates that it should be considered whether a reason for refusal could be overcome by a condition. The only professional landscape evidence is that even if the trees were considered to be of amenity value then they could be replaced or moved to a new location and the loss mitigated. There is no explanation as to why this would not meet Members' concerns and the failure to consider the use of conditions amounts to unreasonable behaviour in this case.

### **Section 106 Matters**

9. Paragraph B27 of the *Circular* states that if a matter is capable, in principle, of being overcome by a condition or an obligation then authorities may run a risk of a partial award of costs if this is not made clear at the outset. The requirement for an obligation and/or condition to require a Construction Management Plan and a financial contribution towards highway works was not notified to the appellant whilst the application was before the Council.

10. Although the Council may have brought it to the appellant's attention as soon as an Agreement was considered necessary, there was no change of circumstances between the Officer's recommendation of approval and the issue of the refusal notice. Indeed, a Section 106 Agreement has been completed during the appeal process and the reasons for refusal relating to the Construction Management Plan and financial contribution have been overcome. The Council's behaviour in this respect has been unreasonable.

### **Conclusions**

11. The Council has not demonstrated reasonable planning grounds for reaching the decision it did on basement matters, contrary to Officer's recommendation and the technical evidence available at the time. Whilst the decision in relation to tree matters was reasonable, the failure to consider whether conditions or an obligation would overcome the concerns, and the failure to request a Section 106 Agreement prior to issuing a decision, or impose a condition in relation to a contribution and Construction management Plan amounts to unreasonable behaviour. The Council's unreasonable behaviour has led to the appeal and caused the appellant to incur additional and wasted expense as the appeal could have been avoided by earlier consideration of additional technical advice and the use of conditions and a Section 106 Agreement. A full award of costs is therefore justified.

### **Costs Order**

12. In exercise of the powers under section 250(5) of the *Local Government Act 1972*, Schedule 6 of the *Town and Country Planning Act 1990* as amended, Schedule 3 of the *Planning (Listed Buildings and Conservation Areas) Act 1990*, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the Council of the London Borough of Camden shall pay to Mr Simon Rusk, the costs of the appeal proceedings described in the heading of this decision.
13. The applicant is now invited to submit to the Council of the London Borough of Camden, 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 Senior Courts Costs Office is enclosed.

*K D Barton*

INSPECTOR