The Planning Inspectorate

Costs Decision

Hearing held on 30 May 2012
Site visit made on 30 May 2012

by M T O'Rourke BA (Hons) DipTP MRTPI

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

Decision date: 17 July 2012

Costs application in relation to Appeal Ref: APP/X5210/A/12/2169260
100a Fellows Road (land fronting King's College Road) London NW3 3JG

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Dr Otto Chan 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 refusal of planning permission for erection of a basement, ground and first floor (street level) single dwelling house (Class C3) fronting King's College Road.

Decision

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

The submissions for Dr Otto Chan

2. The application for a full award of costs (or a partial award in the event that not all the grounds are accepted) was made in writing (Document 7). In summary four reasons were given of the Council's unreasonable behaviour resulting in the appellant incurring unnecessary or wasted expense. These were its failure to engage in constructive dialogue at the pre-application stage and during the application process. Its failure to deal with an asserted objection by attaching an appropriate planning condition. Its failure to substantiate the reasons given for refusing permission and to permit a development that could reasonably have been permitted. Its failure to determine similar cases in a like manner, by particular reference to the grant of permission on the adjoining site to the north.

3. Additional oral submissions were made. The aims of the costs regime are set out at paragraph A3 of the Annex to Circular 03/2009. They include ensuring as far as possible that *all those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice, whether in terms of timeliness or in quality of case* (1st bullet); that *planning authorities and applicants enter into constructive pre-application discussions* (3rd bullet); and that *planning authorities properly exercise their development control responsibilities, rely only on reasons for refusal that stand up to scrutiny and do not add to development costs through unavoidable delay or refusal without good reason* (5th bullet). Costs on this site had been inflated because of the length of the battle with the Council.

4. The National Planning Policy Framework advises local planning authorities that they *should approach decision-taking in a positive way to foster the delivery of*

sustainable development and to *look for solutions rather than problems*. The Council did not work proactively with the applicant and its action has delayed the bringing forward of sustainable development. The appellant had personally intervened to try and understand what the Council's objections were and was told that officers did not like the old scheme; did not like the revisions; and what was wanted was a new scheme.

5. The Council referred at the hearing to the Vieira judgement (Document 6). It had never mentioned it before to the appellant. It was made in February 2012 and cannot justify the Council's refusal in September 2011 to accept revised plans for the appeal site. It dealt with a different set of circumstances where a retrospective application was only made because of objections by the next door neighbour who was then not consulted on revised plans contrary to the legitimate expectation based on the Council's Statement of Community Involvement that he would be.

6. The Statement of Community Involvement states that everyone who makes a comment on an application will be notified of any significant revisions made to the application. In the Vieira case, the revision to the plans was of significance to the neighbour. In the appeal case, the Council's officer accepted that the revisions did not bear on the neighbours. But in any event the appellant did consult widely on the revised plans, as advised to do in The Planning Inspectorate's Good Practice Advice Note 09 *where the local planning authority are unwilling to co-operate in a constructive dialogue*. There was evidence at the hearing that neighbours had received that letter and the Council confirmed it had had no further objections as a result.

7. In response to the Council's submissions, the grounds of refusal were not reasonable. They were not substantiated by evidence. All of the reasons for refusal could be addressed by way of the imposition of conditions.

8. The dialogue was not ultimately fruitful despite the appellant doing everything that was asked of him by the Council. The Council unreasonably failed to determine what it would find acceptable on the site. The dialogue was not constructive. The Council's timeline and record of discussions is not accepted. Officers raised 17 separate points against development on the site. They seemed to be trying to find any reason to refuse permission, confirming Dr Chan's view that officers did not like the scheme.

9. When the Camden Planning Guidance 4 on Basements and Lightwells was adopted is irrelevant. It was never mentioned in the dialogue and no reference was made to any part of it in the correspondence on the application. The appellant provided the requested basement support statement which the Council said was satisfactory.

The response by London Borough of Camden

10. The general principle in appeals is that the parties involved normally meet their own expenses (paragraph A7). Costs are only awarded when a party has acted unreasonably and that unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

11. Whilst there was an admittedly lengthy period of dialogue on this site, the refusal of planning permission was entirely reasonable and reasoned. In the end the dialogue had not resolved the outstanding issues such that a solution could be realised. The Council had reached the decision that it was not able to

arrive at an acceptable solution by ongoing negotiations. That was not an unreasonable decision. Throughout the pre-application and application period the Council had continued the dialogue making constructive responses on the schemes put before it.

12. The delay in determining the application was because necessary information was not provided at the outset and came through in dribs and drabs even though this was a difficult and constrained site where there were objections.

13. What is important is that the Council gets the decision right from the point of view of residents as well as the applicant. The timeline produced by the Council in response to the appellant's statement sets out matters rather differently to the position asserted by the appellant.

14. The fundamental issue to be determined is whether the Council acted unreasonably in reaching its decision and whether this lead to an unnecessary appeal. Through lengthy and detailed discussion at the hearing and the planning officer's well thought out justification for the decision taken, it cannot be said that the Council has acted unreasonably.

15. In respect of the appellant's claim that the Council acted unreasonably in failing to consider whether any necessary amendments could be secured by the imposition of conditions, this goes to the matter of consultation. If the Council had done this it would have conflicted with its obligations in the Statement of Community Involvement to re-consult on amendments. The appellant sought to argue that this need only arose because of the particulars of the Vieira case, however the Statement of Community Involvement was current before then and the appellant should have been aware of it. It gives clear guidance to officers that any amendment to a plan needs formal re-consultation and the Council would be in trouble if it did not do that. There were interested objectors in this case. It was a risk that the Council was not prepared to take.

16. As to the criticism that there was not constructive dialogue, Camden Planning Guidance 4 (CPG4) on Basements and Lightwells only came in during the course of discussion and would have altered the basis for negotiation. It did not help the discussion develop when information came in piecemeal. The Council's responses were clear on its position on the scheme.

Reasons

17. 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 expense or wasted expense in the appeal process.

18. Much of the justification put forward by the appellant for an award of costs related to what happened before the appeal was lodged and which was claimed to demonstrate unreasonable behaviour on the Council's part. It is clear from both the appellant's statement and the Council's timeline that negotiations on the development of this site were tortuous and extended, during that time there were changes to the responsible case officer which evidently did not help in the consistency of the advice being given on the Council's behalf to the appellant's advisers.

19. The Circular stresses the importance of parties entering into constructive pre-application discussions. It refers to the then Planning Policy Statement 1, now

replaced by the National Planning Policy Framework which also refers to local planning authorities taking a positive approach. It is reasonable to expect that discussions post application should also be constructive.

20. The Council's comments on the appellant's statement state that *officers do not seek to give prescriptive advice …. Instead the emphasis is on constructive guidance...* That may be their intention but looking at the correspondence I can well understand why in this case the appellant and his advisers struggled to work out what exactly officers found objectionable about the scheme and therefore what could be done to amend and improve it. In that regard I consider that the Council's behaviour post-application/pre-decision was less than helpful but I am not persuaded that it went so far as to be unreasonable behaviour in the Circular terms.

21. Circular paragraph B16 advises that decisions should be carefully framed and should set out in full the reasons for refusal. At appeal that authorities will be expected to produce evidence to substantiate each reason for refusal by reference to the development plan and all other material considerations. Seven reasons were given for refusing the appeal application. The Council accepted in its statement that the last four reasons could be addressed by way of a planning obligation, which was produced as a draft agreement at the hearing and later completed, and the first three were the substantive reasons for refusal.

22. In respect to the first reason which turned on an assessment of the impact on the proposal on the character and appearance of King's College Road, it was clear to me on my site visit that that assessment misinterpreted the character of the area. That misinterpretation continued in the Council's statement which erroneously applied the Conservation Area Statement's description of the character of the principal streets to this cross street where there are no front gardens and the main character derives from the strong boundary walls that the scheme would retain. Having regard to the advice at paragraph B18, in that the Council made inaccurate and generalised assertions about the proposal's impact, unsupported by any objective evidence, it behaved unreasonably.

23. In respect of the second reason for refusal, the Council provided no evidence of its own to substantiate its claim that the development would provide low levels of natural light. Evidence from the appellant's expert witness was that the Building Research Establishment standards and the Council's own requirements in CPG4 would be met. Whilst the Council sought to defend its reason on the basis that it did not have the calculations to verify the results, it appears it never asked for them. Neither did it explain why it should doubt the daylight and sunlight report produced by a reputable national consultancy.

24. As to the assertion of low levels of natural ventilation, the Council's own standards accept artificial ventilation. In any event the skylights would be capable of being opened, and any concerns the Council had about this could have been addressed by the imposition of an appropriate condition. Whilst the Council sought to argue that they would be obliged to consult neighbours and others that would only arise in the case of material amendments to the plans.

25. Similarly whilst the Council's statement referred to the garden level bedrooms lacking an outlook, this is not a specific requirement of the Council's own guidance; it was not raised in any post application correspondence with the

appellant; and was not objected to in the development approved on the adjoining site. The evidence produced on appeal did not provide anywhere near a respectable basis for the Council's stance. In failing to substantiate this reason for refusal the Council behaved unreasonably.

26. As to the third reason for refusal relating to the impact of the water tank on a tree outside the site, an arboricultural report had been submitted and agreed by the Council's tree officer that concluded that the building would not have an impact on any trees. This would have applied equally to the water tank. In any event the Council could have asked for further details in respect of the water storage tank or dealt with the matter by way of a condition, given the potential to relocate the tank elsewhere in the rear garden. In that the tank would be below ground, the Council's concerns about re-consultation would not apply. Again the Council failed to produce adequate evidence to substantiate this reason for refusal.

27. In that the Council refused planning permission on two planning grounds that could have been capable of being dealt with by conditions, paragraph B25 warns that it runs the risk of an award of costs. I have already concluded that the Council in not substantiating those reasons for refusal behaved unreasonably. It also behaved unreasonably in pursuing the appeal and not making clear at the outset that the water tank and natural ventilation matters were capable in principle of being overcome by conditions and thus compelled the appellant to present evidence and provide experts at the hearing to address reasons for refusal which could have been overcome by other means, contrary to advice at paragraph B27.

28. Circumstances where an award may be made against a Council include not determining like cases in a like manner (paragraph B29 5th bullet). In that permission had not long before been granted for a similar basement development to the north, the Council's persistence in pursuing the first and second reasons for refusal was unreasonable in the absence of evidence that the circumstances on the appeal site were materially different.

29. For all these reasons I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in Circular 03/2009, has been demonstrated and that a full award of costs is justified.

Costs Order

30. In exercise of the 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 enabling powers in that behalf, IT IS HEREBY ORDERED that the Council of the London Borough of Camden shall pay to Dr Otto Chan the costs of the appeal proceedings described in the heading of this decision.

31. The applicant is now invited to submit to the body awarded against, to whose agents 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.

Mary O'Rourke

Inspector