



Costs Decision

Inquiry held on 5 and 6 November and
23 December 2009

Site visit made on 5 February 2010

by John Felgate BA (Hons), MA, MRTPI

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

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**Decision date:
8 March 2010**

Costs application in relation to Appeal Refs: APP/X5210/A/09/2107216-9 18-20 Elsworthy Road and 15 Elsworthy Rise, London NW3 3DJ

Costs application by the appellant

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, the Local Government Act 1972, section 250(5), and the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 74, 89 and Schedule 3
- The application is made by Mr J A N Prenn, for a partial award of costs against the Council of the London Borough of Camden.
- The inquiry was in connection with four appeals against the refusal of planning permission and conservation area consent, for the demolition of the existing buildings, and the erection of new buildings comprising 2x five-bedroom, and 2x two-bedroom flats/ maisonettes fronting Elsworthy Road; plus 1x one-bedroom, and 1x two-bedroom flats/maisonettes, garaging and parking, fronting Elsworthy Rise.

Summary of Decision: The application is allowed.

The submissions for the appellant

1. On behalf of the appellant, it was submitted that matters relating to construction management, sustainable construction, and 'Lifetime Homes' standards could all have been dealt with by conditions. The Council had instead refused permission on the grounds that an obligation was required.
2. The Council's insistence on an obligation was unreasonable, because the appellant would be deprived of the right to appeal on planning grounds against any failure by the Council to approve the further details required by the obligation. The Council had produced no substantial evidence or cogent reasoning as to why conditions would not have been adequate.
3. In addition, the provisions required by the Council were excessive, in that the obligation sought to bind the development to compliance with the proposed sustainability plan in perpetuity, and this would be unduly burdensome to future owners and occupiers. In the case of the Lifetime Homes requirement, the Council had already conceded that this could be secured by condition.
4. In insisting that these matters should be included in an obligation, the Council had caused the appellant to incur additional costs, in drafting and negotiating the agreement, and in presenting evidence on these matters before and during the inquiry.

The Council's response

5. For the Council, it was submitted that conditions would not provide for the same degree of control and enforceability that could be achieved under an agreement. Furthermore, it was not unreasonable to seek to maintain on-

going control over future alterations which otherwise could make the development less sustainable, thus undoing the benefits of energy and water saving measures incorporated in the initial construction.

6. In any event, the appellant had entered willingly into detailed discussions regarding an agreement, and had not queried the provisions that are now disputed until 6 October 2009, at a late stage in the process.

Reasoning

7. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused another to incur unnecessary or wasted expense. Paragraph B16 of the Circular states that authorities will be expected to produce evidence to substantiate each reason for refusal. Paragraph B25 says that they should consider imposing conditions to allow the development to proceed. B29 states that authorities should not require an appellant to enter into an obligation, other than in accordance with Circular 05/2005.
8. The absence of legal agreements, relating to 'Lifetime Homes' standards, sustainable construction, and construction management, is cited in refusal reasons Nos 4 and 6 of Appeal A, and Nos 3, 5 and 7 of Appeal C. In addition, although the refusal notice in Appeal A contained no refusal reason relating to Lifetime Homes, the Council subsequently sought to introduce a requirement to that effect, as in Appeal C. However, in my appeal decision, I have come to the view that all of these matters could have been dealt with by conditions, for the reasons explained at paragraphs 29-31 of that decision. I therefore consider that it was unnecessary for the Council to seek legal agreements in respect of these matters in order to make the development acceptable. As such, the agreement sought by the Council did not accord with Circular 05/2005.
9. I found the Council's arguments regarding enforceability vague and unconvincing. No other evidence is before me as to why legal obligations should be required in this case rather than conditions. The Council has therefore failed to substantiate its case on these matters.
10. In the circumstances, I consider that the Council acted unreasonably in refusing planning permission based on the grounds identified above, and in subsequently maintaining that stance up to the inquiry.
11. I appreciate that initially the appellant was prepared to negotiate an unconditional agreement, including all of the matters which are now in dispute. For that reason, I agree that costs should not be recoverable in respect of expenditure incurred with regard to the agreement itself, up to the date when the appellant first challenged the inclusion of sections 4.1 - 4.3, by requesting the insertion of paragraph 3.5. It is agreed that this date was 6 October 2009. But that does not change my view that the Council acted unreasonably in seeking a legal obligation in respect of those matters.

Conclusion

12. I conclude that the Council should pay the appellants' costs arising from the unreasonable behaviour that I have identified. The costs in question are, firstly, those incurred in amending the agreement to include paragraph 3.5;

and secondly, the costs of preparing and presenting evidence to the inquiry regarding these matters.

13. I therefore allow the application for costs, and make a partial award as set out below.

Formal Decision and Costs Order

14. 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 the Council of the London Borough of Camden shall pay to Mr J A N Prenn the costs of the appeal proceedings, limited to those costs incurred in connection with refusal reasons 4 and 6 of Appeal A, and reasons 3, 5 and 7 of Appeal C only; and excluding any costs incurred in connection with the legal agreement prior to 6 October 2009. All such costs are to be assessed in the Supreme Court Costs Office if not otherwise agreed. The proceedings concerned an appeal more particularly described in the heading of this decision.
15. The applicant is now invited to submit details of the relevant costs to the Council of the London Borough of Camden (to whom a copy of this decision has been sent), with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a guidance note on how to apply for a detailed assessment by the Supreme Court Costs Office is enclosed.

John Felgate

INSPECTOR