Costs Decision

Inquiry held on 9 & 10 February 2010

by Phillip J G Ware **BSc DipTP MRTPI**

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

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Decision date:
9 March 2010

Costs application in relation to Appeal Ref: APP/X5210/A/09/2116161
65 - 69 Holmes Road, London NW5 3AN

- 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 the Council of the London Borough of Camden for a full award of costs against Mr Dyar Lally.
- The Inquiry was in connection with an appeal against the refusal of planning permission for the "demolition of existing warehouse buildings at 65 – 69 Holmes Road. The erection of a part six storey, part three storey building, plus two basement floors. The development will provide 367 self-contained study rooms (sui generis use) plus ancillary facilities. A warehouse is provided on the lower basement level and an associated showroom and loading bay on the ground floor."

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

Background

1. The Council's reasons for refusal, Statement of Case and Proofs of Evidence criticised the quality of the proposed warehouse floorspace in the scheme. This criticism particularly related, amongst other matters, to the servicing arrangements and to the ceiling height of the basement warehouse.

2. On the first day of the Inquiry the appellant stated that an error had been made on the application plans and requested that I consider revised plans dealing with amendments to these matters. I declined to allow the substitution of the plans, on the basis that the alterations were substantial and could lead to prejudice.

3. The Inquiry continued on the first day. At the start of the second day the appellant renewed the request that the amended plans be considered at the Inquiry. I again declined to allow this substitution. The appeal was then withdrawn without further evidence being heard.

The Submissions for the Council of the London Borough of Camden

4. The Council sought the full costs of preparing for and contesting the appeal, which was withdrawn at an exceptionally late stage in the process – after the Inquiry had begun. The appellant's pursuit of the appeal had been unreasonable and had put the Council to unnecessary expense.

5. The issue of the quality of the warehouse floorspace had been raised by the Council on numerous occasions over a long period of time. It was not a new

matter, and could have been addressed much earlier, as demonstrated by the following chronology:

(i) On 26 July 2008, in a pre-application meeting related to the appellant's previous scheme for the site, Council officers referred to the policy dealing with the retention/provision of employment use.

(ii) On 16 December 2008 an email from Council officers to the current appellant's previous agent, related to the previous scheme, drew attention to the relevant Unitary Development Plan (UDP) policy. In particular, it was noted that consideration should be given to maintaining a business use on the site.

(iii) (The subsequent planning application was withdrawn.)

(iv) The appellant's Planning Statement (and Design and Access Statement) accompanying a new planning application (the appeal scheme) referred to the advice given by officers, the UDP policy and the provision of commercial floorspace. The Statement noted that pre-application advice was that it would be preferable if the current B8 use was retained, and stated that the proposed floorspace was greater than the current provision and was of similar quality. The Statement specifically noted that the ceiling height within the warehouse would be 3 metres and this was shown on the submitted plans.

(v) In a letter dated 2 September 2009 from Council officers to the appellant's previous agent, comments were made about the quality of the proposed commercial space. Specific concern was expressed in relation to service access and the basement ceiling height. The view was expressed that this floorspace would not be viable.

(vi) The response to this letter was dated 17 September 2009. Amended drawings were provided, largely dealing with alterations to provide more natural light and affecting the goods lift. Reference was made to the "proposed B8 floor height" at 5.8 metres. However this clearly referred to the showroom element, as this height did not relate to the basement (still 3 metres).

(vii) Revised plans were submitted, showing some amendments at basement level. However the ceiling height remained unaltered.

(viii) The officer's report dealing with the application referred to the basement ceiling height and stated that this was not adequate for a viable industrial business to function and that it would not attract commercial occupiers. The lack of a direct link between the loading bay and the showroom was also noted as reducing the quality of the accommodation. Planning permission was refused.

(ix) After the appeal was lodged, the Council again referred to the inadequacies of the employment floorspace in its Statement of Case. This was assessed in more detail in the Council's evidence, produced on 12 January 2010.

(x) It was not until 28 January 2010 that the appellant's agent wrote to the Planning Inspectorate, stating that an application was to be made to the

Inquiry seeking the substitution of revised plans. This application was made to the Inquiry, and rejected, on 9 February 2010.

6. At the very latest, the appellant should have reviewed the position at the time he decided to lodge an appeal. The appellant knew that the Council saw the provision of good quality floorspace as a key issue. The appellant's agents were not passive, and were actively dealing with a S106 Obligation and Freedom of Information Act requests. They had ample warning of this matter and had time to address it.

7. The Council than had to undertake a considerable amount of work and incur expense to defend the decision of the authority and prepare for the Inquiry.

8. By withdrawing the appeal after the Inquiry had begun, the appellant tacitly accepted that the scheme as decided by the Council had no reasonable chance of success on appeal. Once the appeal was lodged, the appellant should have been prepared to proceed on the basis of the scheme as decided by the Council, but this was clearly not the case.

9. Overall, it is clear that the appellants were warned on a number of occasions of the Council's concern over the poor quality of the employment floorspace. Either they took a deliberate decision not to amend the scheme, or such amendments were omitted in error. The mention in the Planning Statement that the ceiling height was to be 3 metres sits uneasily with the suggestion that it was an error. But, in either case, the Council's position was clearly stated and the appellant's actions were unreasonable and caused the Council to incur unnecessary expense.

The Response by Mr Dyar Lally

10. The appellant accepted the chronology of events set out by the Council.

11. This is not a case where costs should be awarded, as it was not a hopeless appeal. The professional judgement of a large number of witnesses for the appellant was due to be presented to the Inquiry, and it would have been perfectly possible that the appeal would be allowed.

12. The decision to withdraw the appeal was taken specifically to avoid wasted costs. It would have been open to the appellant to proceed with the appeal but it was accepted that, without the amendment to the ceiling height of the basement warehouse, the case for the appellant would have been significantly weaker. The evidence which would have been presented to the Inquiry was that the 3 metre ceiling height was sub-optimal and would make letting more difficult. Nonetheless a planning balance could still have been struck.

13. The appellant chose not to spend a further 5 days of programmed Inquiry time before getting a decision in mid June (after the pre-programmed adjournment of the Inquiry). If the appeal was allowed, the choice then would have been whether to proceed with a sub-optimal scheme. The appellant took the decision that it would be better to divert resources to an optimal scheme as early as possible.

14. In considering the preparation for the case, it should be remembered that the Council had listed an extraordinary 26 reasons for refusal – which in the event came down to a handful of land use issues.

15. It was accepted that the plans show 3 a metre headroom, and that this was an issue which was flagged up by the Council. However this was a genuine error and it was the belief of the appellant that it had been dealt with. In particular the letter dated 17 September 2009 from the appellant's previous agent referred to 5.8 metre headroom.

16. The miscommunication came to light before the evidence was finalised. At that point there were three options for the appellant:

    - Pursue a sub-optimal development through the appeal process.
    - Withdraw the appeal at that stage.
    - Seek to substitute revised plans on the first day of the Inquiry.

17. It was reasonable to pursue the third course of action. However when the application to substitute the plans failed, this removed the third option. The subsequent withdrawal of the appeal was not because it had no reasonable chance of success, but was a sensible decision taken to avoid the costs of pursuing an appeal. The appellant acted reasonably throughout.

Conclusions

18. Circular 03/2009 advises that, irrespective of the outcome of an 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.

19. The background to this claim is that the appellant was fully professionally represented at all stages in the application and appeal process. This should be taken into account in considering whether he acted unreasonably.

20. There is no dispute between the parties as to the chronology of events described above. More importantly, it is not in dispute that the quality of the replacement commercial floorspace – both related to the servicing arrangements and (particularly) the basement ceiling height – was identified as a concern for the Council from a very early stage in the process.

21. The only area of uncertainty over the chronology is in relation to the meaning of the letter dated 17 September 2009 from the appellant's previous agent. This refers to a height of 5.8 metres, whilst the plans continued to show 3 metres. On balance, I consider this reference was likely to be intended to refer to the ground floor showroom but, in any event, even if it was intended to relate to the basement warehouse, the consequent error on the plans was subsequently clearly identified in the officer's report and subsequent documents.

22. The right of appeal must be exercised in a reasonable manner. In this case, the Council infers from the fact that the appeal was withdrawn (after the applications to substitute revised plans failed) that the appellant considered that the appeal then had no reasonable prospect of succeeding. However the appellant's view was that, although proceeding on the basis of the original plans would reduce their chance of success, it was nevertheless an arguable case.

23. I cannot judge the chances of success of the appeal based on the original plans, or indeed the revised plans, as I did not hear the majority of the evidence - and in any case the planning judgement is not before me. Nor is there any need to reach such a judgement, as the issue in this case is whether there was a good reason to withdraw the appeal.

24. If the appeal was withdrawn because the appellant considered that there was no reasonable prospect of the appeal succeeding on the basis of the original plans, that would clearly be unreasonable behaviour. Appellants must be confident in the strength of their case at the time of lodging an appeal, on the basis of the proposal decided by the Council. If this scenario were correct, the appellant would have had no good reason to withdraw the appeal.

25. The alternative scenario is that, proceeding on the basis of the original plans, the case was still arguable but the scheme was 'sub-optimal'. However it is not reasonable to withdraw an appeal on the basis that a better scheme might emerge. The appeal system should be used only as a last resort, with the appellant being ready to proceed with the appeal on the basis of the scheme decided by the Council.

26. I have carefully considered the reasons given by the appellant for the withdrawal of the appeal, but can find nothing approaching a good reason for withdrawing at such a late stage. Based on professional advice, the appellant must have realised that, at the very least, the application to substitute revised plans might fail. Under these circumstances, to proceed with the appeal once the need or desirability of amending the scheme had become apparent was unreasonable. The actions of the appellant clearly put the authority to the unnecessary expense of preparing for and attending the Inquiry.

27. I am not persuaded by the argument that the appellant in fact saved costs by ending the Inquiry early. Although the withdrawal of the appeal would have obviously saved additional expense beyond that point, it does not relate to the reasonableness of the appellant's approach up to that date. Nor does the fact that there were a large number of reasons for refusal have a direct bearing on the costs issue, as these reasons would have been considered in a decision on the planning merits of the appeal.

28. I find that unreasonable behaviour, as described in Circular 03/2009, has been demonstrated and that unnecessary expense has been incurred. I therefore conclude that an award of costs is justified. I shall exercise the powers transferred to me accordingly.

Formal Decision and Costs Order

29. 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 Mr Dyar Lally shall pay to the Council of the London Borough of Camden, the costs of the appeal proceedings, such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned an appeal more particularly described in the heading of this decision

30. The applicant is now invited to submit to Mr Dyar Lally, 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.

P. J. G. Ware

Inspector