Costs Decision

Inquiry held on 9 and 10 July 2008
Site visit made on 10 July 2008

by JP Roberts **BSc(Hons) LLB(Hons) MRTPI**

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

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Decision date:
10 September 2008

Costs application in relation to Appeal Ref: APP/Y1110/A/08/2062116
Junction of Haven Road / Alphington Street, Exeter, Devon SX2 8AF

- 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 Telefónica O2 (UK) Ltd. for a full award of costs against Exeter City Council.
- The inquiry was in connection with an appeal against the refusal of planning permission for the installation of a 15m monopole with 3 no. antennas, a radio equipment housing and ancillary development.

Decision

1. 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 Exeter City Council shall pay to by Telefónica O2 (UK) Ltd., the costs of the appeal proceedings, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under section 78 of the Town and Country Planning Act 1990 as amended against the refusal of planning permission for the installation of a 15m monopole with 3 no. antennas, a radio equipment housing and ancillary development on land at the junction of Haven Road / Alphington Street, Exeter, Devon SX2 8AF.

2. The applicant is now invited to submit to Exeter City Council, 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.

The Submissions for Telefónica O2 UK Ltd

3. There is a general presumption that the parties to appeals should bear their own costs. But it is contended that the Council has acted unreasonably and that the appellants have borne unnecessary costs. The application has two approaches. The first is for a partial award regarding the issue of alternative sites, the issues of inadequate information being provided that site were unavailable and the issue relating to appeal decision APP/Y110/A/05/1189557 (the Hill Barton decision) regarding the further alternative sites.

4. These matters did not feature in the decision notice. They were raised in the Rule 6 statement, and amplified in the Council's letter of 17 April 2008. As a result of this, additional sites had to be examined, visited and considered by the appellant's witnesses, and appeal decisions had to be researched.

5. The Hill Barton decision was sent to the appellants without explanation. That explanation was received in a letter dated 30 June 2008, to the effect that the Inspector was entitled to go on a frolic of his own in identifying alternative sites. This is plainly wrong. Paragraph 13 of that decision makes it clear that the Inspector looked at an alternative site that was suggested to him.

6. The Town and Country Planning (General Permitted Development) Order 1995 is clear that the decision notice should refer to all the reasons for refusal. Reliance is placed on the advice in paragraphs 7 and 8 of Annex 3 to Circular 8/93 *Awards of Costs Incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings*.

7. The Council's claims as to why it introduced alternative sites have been inconsistent and are unconvincing. The appellants were required to provide evidence to show that there were no suitable alternative sites because they needed to show that the appropriate test of PPG8 was satisfied. In respect of health matters, the appellants needed to deal with this, because it could not be known in advance whether a member of the public would attend the inquiry and raise the matter, and the evidence was proportionate.

8. The Council's raising of additional sites introduced a new reason for refusal, to which the appellants had little time to respond. Extra work was undertaken in visiting and photographing sites, and in making enquiries about them, all in vain, because these matters were abandoned by the Council.

9. The Council did not accept that Policy EN7 was met because of the additional information about these sites; that concession was only made reluctantly at the inquiry.

10. The second approach is for a full award of costs, again relying on the advice in paragraphs 7 and 8 of Annex 3. The Council has not produced evidence to substantiate the reason for refusal with reference to the development plan and all other material considerations. The reason for refusal alleges a conflict with Local Plan Policy EN7; no explanation was given for such a conflict and in cross-examination, the Council conceded that the proposal complies with the policy. In respect of the other policies referred to, Structure Plan CO6 and Local Plan Policy DG1, no evidence was provided of a more suitable design available.

11. The reason for refusal was not substantiated with regard to material considerations such as PPG8. That says that regard must be had to need and to alternative sites as well as to visual harm. These matters were not set out in the Council's evidence. Indeed, the evidence was put forward on the basis that alternative sites were available, a position abandoned just before the inquiry.

12. The Council's evidence does not acknowledge that there is a need to have regard to the need for telecommunications development. Even with regard to visual harm affecting amenity, there is no analysis of character. The allegation of harm relates to the concern that the pole would be seen. This is not synonymous with harm. There is no analysis of the development to show that it would be so harmful to local character that planning permission should be refused. Even if it had been put on that basis, it was not balanced against need or lack of alternative sites or technical constraints, and indeed the Council

considered that there were alternative sites available until immediately before the inquiry.

13. The Council has not met the tests of paragraph 8 of Annex 3, nor produced evidence in relation to the development plan and all other considerations. A full award of costs is merited; if a pole could not be sited here, it couldn't be sited anywhere, so absurd is the Council's position. A full award of costs is justified in this case because of the Council's gross unreasonableness.

The Response by Exeter City Council

14. The Council resists both applications. The appellants' point that parties normally bear their own costs is reiterated. It is not the case that the Council acted unreasonably resulting in the appellants' incurring unnecessary cost.

15. In respect of the application for a partial award, the Council entered into correspondence and consideration of alternative sites because it was prompted to do so by a sentence in the appellants' grounds of appeal, whether or not this was a misinterpretation of that sentence.

16. The consequence was that the Council asked about other sites. On analysis, there were obvious omissions, especially where streetworks installations were suggested by the appellant, but rooftop installations were not. The search sequence in PPG8 puts rooftop installations before streetwork ones. The appellants' technical witness accepted that a question of that type was not an unreasonable one, but we heard that he thought it irrelevant. But if it is relevant for the appellants to address this issue, it must be relevant for the Council to ask reasonable questions about an obvious gap in the process.

17. In long experience of planning appeals, attempts by a Council to clarify issues have never been met with such a hostile response. Appellants usually draft the statement of common ground, but in this case the appellants only did so at a late stage after an inquiry from the Council. This was unfortunate, because had the statement been prepared earlier it would have been a useful exercise in narrowing issues and saving time.

18. Correspondence on issues and what flows from them should not be grounds for an award of costs. The appellants' letter dated 18 February 2008 did not appear to be challenging the contents of the Council's Rule 6 Statement; it looked as if they were engaging with the Council on the issue.

19. Even if it is found that the Council was unreasonable in raising alternative sites, on the evidence it did not appear that the appellants spent much time in examining them; evidence for the appellants indicated that anyone involved in telecommunications development would know that Ashmore Court was a hopeless case. Likewise County Tyres was rejected as being a hopeless building for a rooftop installation. The church by B&Q (about which there was some confusion) was dismissed on the basis that one could not have a rooftop installation on a footway. Whilst enquiries were made by the appellants of the position regarding the Staples building, that site could have been ruled out anyway on technical grounds.

20. There is no evidence that they spent any time in addressing the Council's concerns about the adequacy of the claim that the owners of various sites were

not interested in allowing the installation of telecommunications equipment. The appellants' response is that it was not reasonable of the Council to ask. The introduction of the Hill Barton decision was in response to the appellants' criticism of the Council's approach, and it was provided to the appellants in good time, and shortly afterwards, an explanation was given for it.

21. Thus in respect of the application for a partial award, the Council raised matters in order genuinely to engage with the appellants on the availability of alternative sites, which is something that the appellants have been at pains to point out needs to be considered in the balance against harm to visual amenity. The Council has not acted unreasonably as it has not sought to expand the scope of the reasons for refusal. The correspondence was helpful in that it enabled the Council to concede that Policy EN7 was satisfied.

22. In respect of the full award, the Council's evidence at paragraphs 6.6-6.10 provides a concise analysis of harm. An element of subjectivity is required in assessing harm and the Council's evidence set out how harm was caused in this case.

23. Reference to paragraph 7.1 of the Council's evidence and to extracts from policies in paragraph 5.2 shows that the harm was balanced against other matters as required by PPG8. A full award of costs is not justified.

24. Without prejudice to this submission, any award of costs should only be partial, in that the award should only cover the cost of unnecessary work in respect of unreasonable conduct. Work here has been undertaken unnecessarily – both of the appellants' witnesses dealt with health matters, which is not a concern that was raised by the Council. The appellants also referred to numerous appeal decisions, the relevance of which needs to be considered, with many referring to health grounds.

25. It is a general principle that parties should seek to mitigate their costs, whilst the appellants appear to have done the opposite. Accordingly, and without prejudice, any award of costs should be partial and exclude costs arising out of health considerations.

Conclusions

26. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

27. The application for a full award of costs concerns the substance of the Council's case. Paragraph 8 of Annex 3 of the Circular requires planning authorities to produce substantial evidence to show why a development could not be permitted. I consider that the Council's case did not fully analyse the character and appearance of the area. Whilst it made reference to development plan policies it did not fully explain how the proposal was alleged to have conflicted with them. At the inquiry, and contrary to the reason for refusal, the Council conceded that the specific policy relating to telecommunications development was complied with.

28. Whilst there are clear differences in opinion between the main parties about the character of the area, there was insufficient explanation from the Council as to how that character would be harmed. I accept that there is an element of subjectivity in arriving at that assessment, and on its own, I consider that the Council's evidence on harm was not so poor as to amount to unreasonableness.

29. It is an important plank of PPG8 that the need for telecommunications development, the lack of alternative sites and technical constraints should be weighed in the balance. The need to carry out this balancing exercise is also referred to in the explanatory text to Policy EN7. Paragraph 8 of Annex 3 says that reasons for refusal will be examined for evidence that the provisions of the development plan, and relevant advice in Departmental planning guidance were properly taken into account; and that the application was properly considered in the light of these and other material considerations.

30. Although the Council claimed to have taken into account the need for the development and the lack of suitable alternative sites, there is no evidence in the delegated report that led to the decision to refuse permission that this was done, or indeed from the Council's evidence at the inquiry. I consider that it is insufficient to say after the event that account was taken of these important considerations, without any evidence to show it. I regard this as being unreasonable.

31. I am satisfied that had the appropriate balancing exercise been carried out, the development should have been permitted. I therefore find that the appellants incurred unnecessary costs in bringing the appeal.

32. I have had regard to the Council's arguments that the appellants failed to mitigate their costs. I accept that the appellants needed to produce evidence on alternative sites; the Council's late introduction of concerns about alternative sites reinforced that need. Although no-one raised health grounds as a concern, my own experience, reinforced by the appeal decisions referred to in the appellants' evidence, is that such grounds are frequently invoked by members of the public, and it is not unwarranted for the appellants to anticipate such concerns. I am satisfied that it was dealt with in a proportionate manner.

33. As work to deal with these concerns arose directly out of the Council's decision to refuse permission, which I have found to be unreasonable, it is proper that these costs should be covered in my award. As I have found in favour of the appellants' application for an award of full costs, it follows that I need not rule on the application for a partial award.

34. I therefore conclude that the Council's behaviour was unreasonable and led the appellants to incur unnecessary costs. A full award of costs is therefore justified, and the application succeeds.

JP Roberts

INSPECTOR