Costs Decision

Inquiry opened on 3 September 2008
Site visit made on 10 March 2009

by B J Juniper **BSc, DipTP, MRTPI**

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

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Decision date:
20 April 2009

Costs application in relation to Appeal Ref: APP/Y1110/A/08/2062069
Land at the junction of Belmont Road and Western Way, Exeter, EX1 2HF

- 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 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 an application for planning permission for the installation of a 12.5m monopole with 3 No. antennas, a radio equipment housing and ancillary development.

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

The Submissions for O2 (UK) Ltd

1. Applications for costs are made on three bases on which partial costs should be awarded and one on which full costs should be awarded.

2. An application is made in relation to the costs arising from the adjourned Inquiry on 3 September 2008 pursuant to Annex 2 of Circular 8/93 regarding the Council's procedural conduct in causing the Inquiry to be adjourned unnecessarily. The Council was required by the Planning Inspectorate to erect a site notice 14 days before the Inquiry opened, this responsibility arising because the land which was the subject of the appeal was not controlled by the appellants. They wrote to the Council's Appeals Officer to remind him of his duty but he failed to erect the notice. The appellants' visit to the site at which it was established that the site notice was not displayed was for other purposes. There can be no doubt that the adjournment arose solely as a result of the Council's failure to display the notice and an application for costs is therefore justified in relation to the preparation for the hearing on 3 September and attendance thereat.

3. A partial award of costs is sought in relation to the Council's failure to produce any evidence in support of reason for refusal No.2. Paragraph 8 of Annex 3 to the Circular requires planning authorities to produce substantial evidence to show why the development could not be permitted. No evidence whatsoever was produced to support this reason for refusal and, in particular that the proposal was contrary to the provisions of PPG8. Indeed, the evidence of Dr Shepherd contained no reference to PPG8 whatsoever. Neither he nor the Council's witness produced evidence that the occupiers of nearby properties would be exposed to a continuous electromagnetic beam thereby unacceptably increasing their perception of health dangers.

4. The Council stated that it had left Dr Shepherd to support reason for refusal No.2 but he indicated under cross examination that his proof addressed an entirely separate issue, i.e. the validity of the ICNIPR certificate. He explained that he considered that the reason for refusal had been wrongly drafted by the planning officer but produced no evidence that the scheme would expose residents to a continuous electromagnetic beam. This was acknowledged in pre-inquiry correspondence between the Council and its advocate and the Council retracted all of its own evidence in relation to reason for refusal No.2 before the Inquiry opened.

5. Given that Dr Shepherd's evidence addressed an entirely new point, it was necessary for Mr Holt to produce a rebuttal proof. This need only arose because of the Council's unreasonable behaviour in permitting Dr Shepherd to put forward evidence which not only failed to address reason for refusal No.2 but introduced an entirely new issue. Mr Holt's initial proof had established that there would be a very high degree of ICNIRP compliance at nearby residential premises and an Inspector had previously dismissed an appeal concerning a nearby site at which a similar line of argument was used by the Council. This unreasonable behaviour entitles the appellants to a partial award of costs.

6. A third application for a partial award of costs is made in relation to the work incurred in addressing additional alternative sites. The Council introduced this issue in its pre-Inquiry statement and pursued it through correspondence, introducing the issue of insufficient information being supplied in relation to the discounting of alternative sites, including the Vodafone facility, together with those listed in its letter of 10 March. There was no reason for refusal in relation to alternative sites and the planning officer dealing with the application had raised no such concerns. Article 22 of the Town & Country Planning (General Development Procedure) Order 1995 makes it clear that notice of refusals should be precise and comprehensive.

7. The Council sought to excuse its introduction of the issue of alternative sites by claiming that the last sentence of paragraph 3 of the grounds of appeal suggested that there was an onus on the Council to identify alternative sites but its witness accepted under cross examination that there was no such reference. He also accepted that this sentence was the same as that pleaded at an appeal (Ref: APP/Y1110/A/08/2062116) relating to a site at the Exbridge Centre and that the appellants had been informed verbally in both cases by the Council that it could not identify any alternative sites. The Council's witness should never have introduced the issue of alternative sites and acknowledged in pre-inquiry correspondence with its advocate that it was potentially vulnerable to a claim for costs on this point.

8. Finally, a full application for costs is made based on the Council's failure to undertake the balancing exercise required by PPG8 and Local Plan Policy EN7. The situation is the same as that at the Exbridge Centre Appeal where the Inspector stated in his Costs Decision that '*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 exercise is also referred to in 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. 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. I am satisfied that if the appropriate balancing exercise had been carried out the development should have been permitted. I therefore find that the appellants incurred unnecessary costs in bringing the appeal'.

9. The facts of the present case are the same. The delegated report was silent on the issue of need and on the balancing exercise. The Council's proof identifies the principal issues but makes no reference to need or the balancing exercise. In any event, it was too late to state after the event that account was taken of these important considerations without any evidence to show it. At the inquiry the Council accepted that there were no alternative sites and that the balancing exercise had not been addressed in any report to the Council or in any evidence to the inquiry, either written or oral.

10. On this basis a full award of costs to the appellants is justified.

The Response by Exeter City Council

11. So far as the site notice is concerned, it is necessary to examine the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedures) (England) Rules 2000 and in particular Rule 10(5). This says that the Secretary of State may in writing require the local planning authority to take one or more of three specified steps; (a) to publish a notice in a local newspaper, (b) to send notice to specified persons or (c) to put a notice up on the land. The Planning Inspectorate's letter of 8 July 2008 instructed the Council to take step (b), not step (c) and in fact the site notice enclosed with the letter was wrong (in that it indicated a different venue).

12. This was corrected by a second letter on 15 July which attached an amended document described as a 'site notice' but which still required the Council to write to local people, which it did. The appellants had clearly noticed that the Planning Inspectorate's letter of 15 July did not require the Council to display a notice since they wrote to the Planning Inspectorate on 18 July asking them to request the Council to display the notice. The Council did not put the notice up by 19 August, and advised the appellants that they would not do so. It was not until 22 August that the Planning Inspectorate explicitly asked, for the first time, for a notice to be displayed, but again sent an incorrect one. The Council put up the notice at about 16:00 on that day (with the correct wording) but not before the appellants had noted that it was not displayed at about 14:40.

13. Thus the Council was not explicitly required by the Secretary of State to display a site notice until after it should have gone up. It is not reasonable for the appellants to send someone to check that a notice had been displayed rather than simply do it themselves. Similarly, it was unreasonable of the appellants not to air their views about the failure to display the notice, something they had known since 14:40 on 22 August, until the opening of the Inquiry on 3 September.

14. Turning to the late withdrawal of reason for refusal No.2, this was based on a perception of health dangers fuelled by the failure of the appellants to provide further technical data. Specifically Dr Shepherd was concerned about the exposure to electromagnetic radiation at 11 Parr Street. The necessary information was provided in Mr Holt's rebuttal proof received by the Council on 2 September, enabling the Council to withdraw reason for refusal No.2. It cannot have been unreasonable for the Council to have requested this information since it was provided by the appellants, albeit at the last minute.

15. On the matter of consideration of alternative sites, this was not at any time a reason for refusal of the application and the statement of common ground acknowledges that no alternative sites are available. Paragraphs 66 and 67 of PPG8 make it clear that applicants should show evidence that they have explored the possibility of erecting antennas on existing buildings and that the Council should decide whether that information is satisfactory. There the matter would have rested were it not for the appellants' grounds of appeal which suggested that the Council had been unable to suggest any other suitable locations available to the appellants where it would be willing to grant permission.

16. PPG8 does not place the burden of finding alternative sites on the Council. The concern was raised in the Council's Rule 6 statement as a comment on the grounds of appeal so as to make it clear that it was not to be confused with a reason for refusal. The Inspector at the Exbridge Centre appeal made it clear that he did not consider that planning authorities should not challenge claims by appellants that other sites were not available or to seek further information at the application stage so as to judge the appropriateness of the information before it. He expressed a similar view in his Decision on an appeal in Woking (Ref: APP/A3655/A/07/2039013), commenting that he found it surprising that the Council had not asked for details of alternative sites '*at the time of the application or indeed subsequently*'. The Council was following that procedure and cannot be criticised for it.

17. Dealing finally with the application for a full award of costs, the delegated report was abbreviated but does refer to and summarise the appellants' justification document which addresses the need, the matter of alternative sites and the technical constraints. The summary was not challenged as being inadequate. It also refers to LP Policy EN7 and its reasoned justification which deals with these matters. It could just as easily be inferred from this report that these matters were considered as that they were not.

18. It is clear that the Council's witness undertook a balancing exercise in his evidence. He balanced the impact the mast would have on the visual amenities of the area, the adjacent conservation area and the setting of the nearby listed buildings against the acknowledged need for the mast and the lack of alternative sites. These matters were clearly set out in the statement of common ground together with a summary of the relevant parts of PPG8.

Conclusions

19. 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.

20. Local planning authorities are required by paragraph 3 of Annex 3 to Circular 8/93 to take into account the development plan, government guidance and any relevant judicial authority and to '*produce evidence to show clearly why the development cannot be permitted*'. Paragraphs 74 and 75 of PPG8 note the special siting and design concerns which may arise in designated areas such as conservation areas but advise that authorities should take technical constraints into account. The delegated report on which the decision to refuse permission was based refers to these technical constraints and the lack of alternative sites only in the summary of the supporting information supplied by the applicant. The brief section headed '*Observations*' describes the visual prominence of the proposed mast and states that it would have a detrimental effect on the nearby conservation area and the setting of the listed buildings in Belmont Road. There is no mention of the technical requirements of the operator having been considered.

21. The report also lists the relevant development plan policies and I have no doubt that the correct policies were referred to. However, the LP policy of most direct relevance to telecommunications development, EN7, requires that permission will be granted where the siting and design of the apparatus will minimise their visual impact and where there are no practicable alternatives. The supporting text makes specific reference to need to balance the benefits of enhanced telecommunications services against the impact on urban surroundings and residential amenity. There is no mention of this exercise having been undertaken in reaching a decision on the application.

22. In its evidence to the Inquiry the Council accepted that there was a need for the proposed development and set out in some detail why it considered the visual impact of the proposal was unsatisfactory. It was silent, however, on what weight had been given to these factors. Whilst there is a presumption in national policy against development which could be harmful to historic buildings and areas, preclusion of new development cannot be absolute. In this case, where the site is not itself within a conservation area and the mast would not immediately adjoin a listed building or its curtilage, there is clearly a balanced judgment to be made. Whilst the Council indicated that such a judgement had implicitly been made, I have come to the view that, without any evidence to demonstrate that this had been done, to have refused the application and pursued the appeal process amounts to unreasonable behaviour. A full award of costs is therefore justified. Given this conclusion, I do not need to rule on any of the applications for awards of partial costs.

Formal Decision and Costs Order

23. 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 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 an application for planning permission for the installation of a 12.5m monopole with 3 No.

antennas, a radio equipment housing and ancillary development on land at the junction of Belmont Road and Western Way, Exeter.

24. 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.

B J Juniper

INSPECTOR