Costs Decision

Inquiry held on 2, 3, 4 & 5 March 2010
Site visit made on 5 March 2010

by John Papworth **DipArch(Glos) RIBA**

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

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Decision date:
1 April 2010

Costs application in relation to Appeal Ref: APP/Q1445/A/09/2111696
Park House, Old Shoreham Road, Hove, East Sussex BN3 6HU

- 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 Brighton & Hove City Council for a full award of costs against Hyde Martlett.
- The inquiry was in connection with an appeal against the refusal of planning permission for redevelopment of the site to provide a mixed tenure development of 72 residential units.

Summary of Decision: I refuse the application for an award of costs.

Costs application in relation to Appeal Ref: APP/Q1445/A/09/2117222
Park House, Old Shoreham Road, Hove, East Sussex BN3 6HU

- 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 Brighton & Hove City Council for a full award of costs against Hyde Martlett.
- The inquiry was in connection with an appeal against the refusal of planning permission for redevelopment of the site to provide 72 residential units.

Summary of Decision: I refuse the application for an award of costs.

The Submissions for Hyde Martlett

1. These were made in writing and are at Document A/15 of the accompanying Appeal Decision, with annotations. In addition, with regard to timing, the new Circular does emphasise this more than the old one, but the requirement is that the application is to be made at the Inquiry. The application arises from concessions made by Mr Wright in cross examination and it should be no surprise to the Council that the appellants are aggrieved at the need for the appeals. It has been shown that there is cause and effect, something went wrong in both processes, the second more starkly than the first with the likelihood of a positive recommendation. Regarding the need to make both appeals, the deadline for the first appeal had almost run out and the appeal was just in time. The appellant asked for a Hearing.

The Response by Brighton & Hove City Council

2. This was made in writing and is at Document C/6 of the accompanying Appeal Decision, with annotations. In addition, with regard to housing land supply, it is the Council's case that a 5 year supply can be shown, with the addition of windfalls, and therefore paragraph 71 is not applicable. This is reasonable and plausible and no case law has been put forward saying otherwise. Considering the appeal decision at Highcroft Villas, this was as a result of the assessment

not being up-to-date and it was reasonable not to have referred to paragraph 71 in the Committee Report.

Conclusions

3. 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 or wasted expense in the appeal process.

4. On the matter of the timing of the application, the 2009 Circular states that costs will normally be awarded when, among other considerations, a party has made a timely award of costs. At Inquiries the application is to be made at the event before closing, with the principle of early disclosure; surprise should not be a tactic. As good practice, advance application should be made in writing unless the decision to make the application is triggered by events at the Inquiry. From that I take it that while early disclosure is desirable, it is not mandatory, and that the requirement to make the application at the event was complied with. I can see that there were issues still at large during the hearing and cross examination of the evidence and that a decision whether or not to apply for costs might well have been left open. Disclosing the intention the evening before is better than it being a surprise at the close and there is no indication to me that the timing of the disclosure was a tactic. I do not turn this application away as being untimely.

5. With regard to the chronology of events and the consultation that occurred between the appellant and an officer of the Council, I acknowledge firstly the extent of those discussions and the degree to which changes were made in response to the officer's comments, and secondly the expertise of that officer in the subject of those discussions. I acknowledge also though, that the officer is a member of a team and reports to another more senior officer as head of the section.

6. The report to Committee on the first scheme included the comment that increasing the height of the roof features is not considered to be an effective design and there was criticism of the height and modelling of the top floor, suggesting that the top storey be removed or modified. There were in addition various comments praising the scheme or in favour of particular aspects. The appellant confirms in Appendix 6 to Mr Carter's Proof of Evidence that the Urban Design Officer's comments were included in full in the report.

7. The Case Officer's planning commentary talked about the scheme being at odds with the prevailing character and of the impact on the sense of enclosure and openness along Old Shoreham Road, saying that it may be considered overbearing. There was reference to the building *'dwarfing adjoining buildings*'. Residents responding to the original application made similar comments. There was felt to be a need for a corner feature, and the conclusions of the report, where I would expect all conflicting views to be balanced, made clear the criticism of the scheme and *'in particular the structures on the top floors'*.

8. On this scheme I am of the view that the Council members were given a fair and reasonable report on which to base their views. There was a clear conclusion, much of which stemmed from the comments of the Urban Design

Officer and it was reasonable for the Case Officer, as a professional person and member of the RTPI, to augment those views. It was clear from the report where that had occurred and the members would have had access to the drawings, other visual information and the site. The Committee resolved to refuse permission on reasonable planning grounds.

9. Further discussions took place and the second application was made in the belief that all the reasons for refusal had been addressed and overcome, that belief resulting from the comments of the Urban Design Officer and the Case Officer. It later transpired that there was an internal difference of opinion on the degree to which the reasons for refusal had been addressed. An e-mail from the leader of the Design and Conservation Team to the Head of Development Control was passed to the appellant containing objections. The appellant's response was that *'it is clear that further discussions concerning the design of the scheme are no longer appropriate and it must now be for the planning authority to consider the conflicting views of Officers within the Council and to reach a decision as to the acceptability of the form of development proposed for the site'*. The appellant received a reply *'as you say the issues will need to be addressed in the report which is written for planning committee. I do understand your position on this and will make sure that the circumstance you have outlined is set out clearly in the report'*.

10. In the Committee report for the second scheme the internal consultation contained the views as expressed by the leader of the Design and Conservation Team but notwithstanding the statement quoted above, I do not see any reference to the other views of the Urban Design Officer. The question here is whether the conflicting advice should have been detailed to members, which was what the appellant took from the e-mail from the Head of Development Control. My view is that this would not have been reasonable and hence failing to detail it would not have been unreasonable. The Council employs officers in different capacities and at different levels of responsibility and accountability. I do not consider it the role of the elected members to pick and choose between the views of one officer against those of her manager or what became the corporate response of that section.

11. There appear to be areas where the management of the Council could have acted differently. On the basis that the leader of the Design and Conservation Team had the responsibility to put his team's views forward, he might have been more involved in the progress of discussions or to have held case reviews at times to ensure that the views being expressed could be ratified as being the team's corporate response. As it was this case review appears to have taken place late in the process. I also consider that the Head of Development Control was wrong to have given the undertaking to set out the circumstance clearly in the report if that was not to occur, and as stated, it is my view that it did not need to occur, as the report should be a statement of a section's corporate advice. Had the appellant felt aggrieved at the content of the report, they had the opportunity of speaking at the Committee, drawing member's attention to this perceived conflict. These matters appear to me to come within the scope set out in paragraph B9 of the 2009 costs Circular; the appellant may well feel aggrieved but cause and effect needs to be addressed.

12. The decision to make the first appeal was taken prior to the determination of the second scheme. That was due to the pressure of the time limit for making

an appeal. Had the second scheme received approval it may be the case that the appeal would then have been withdrawn. As it was, the second scheme was refused permission, the second appeal was lodged and the two appeals were co-joined. The Council chose to produce two separate proofs of evidence, whilst the appellant combined them and I attached no real significance to this.

13. With regard to the second scheme, I am of the view that the Urban Design Officer may have addressed the reasons for refusal but may not have 'stood back' and considered the effect of the changes being made to the design in the process. These are changes that I have identified in the Appeal Decision and which lead me to conclude that the second scheme fails to reach an acceptable standard. Those changes and their effect were identified by the team leader and whilst I may criticise his late involvement, a fresh pair of eyes often sees things that those close to the scheme, in this case the architect and the Urban Design Officer, do not.

14. I can only conjecture on the member's view had they been presented with both sides of the internal difference of opinion. My own view is that they would have been likely to have placed more weight on the opinion of the senior officer expressed as a corporate response. I attach significant weight to the fact that the differences were not on matters of fact, but on matters of judgement. There is a tendency to seek to quantify design matters, reducing the scope for subjectivity, and time was spent during the Inquiry on the precise levels of the proposed building and the surrounding structures. But, there remains the need for judgement as to the significance of these quantifiable effects. I am of the view that the members had all the information on the second scheme on which to base their own decision, of which the 'final comments' of officers were only a part. I do not find that the required cause and effect has been shown to the point where I consider unreasonable behaviour has caused unnecessary expense.

15. I look now at the question of housing land supply. I have come to a conclusion in my Appeal Decision that a five year supply cannot be shown without the need for windfall sites. Paragraph 71 contains advice to consider favourably planning applications for housing, having regard to the policies in the PPS including the considerations in paragraph 69. I do not take that to mean that housing schemes that fail to achieve an acceptable standard of building and urban design in line with paragraphs 16 and 69 should, nevertheless, be granted permission. The members must be aware of the general position on housing need and land supply, and the Committee report contained favourable comments under the heading *'Housing Strategy'.* Here again I am unable to make the clear connection between cause and effect to the extent that members would have put aside their views on the design of the building if the matter of land supply and paragraph 71 had been spelt out in the report.

16. In conclusion, on a scheme of this size and one generating this level of local objection the views of an officer of the Council are without prejudice to the decision of the elected members. Those views on the first scheme were reported to the Committee, and with a mind to the process adopted for the second scheme, should have been the corporate response of the section even if the views of a single officer were reported word-for-word. With the second scheme that officer's views were modified by those of her manager to become the corporate response. That appears to me a reasonable management role. I

have been critical of the timing of this, and also of an undertaking by the Head of Development Control that should either have been carried out or not made in the first place. However, paragraph B9 of the costs Circular states *'The procedures adopted by a planning authority for determining planning applications are generally a matter for the authority within the context of local government accountability. The process followed by the planning authority may be open to criticism in a particular case; but cause and effect need to be addressed in deciding an application for costs.'* Whilst I have been critical I have not been able to identify this essential link between the cause and the effect in this case sufficient to justify a conclusion that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has been demonstrated in either appeal. I therefore conclude that an award of costs is not justified.

Formal Decision Appeal A

17. I refuse the application for an award of costs.

Formal Decision Appeal B

18. I refuse the application for an award of costs.

S J Papworth

INSPECTOR