



Costs Decisions

Inquiry held on 18 and 19 May 2010

Site visit made on 20 May 2010

by **David Prentis BA BPI MRTPI**

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

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Decision date:
18 August 2010

Costs application in relation to Appeal Ref: APP/Q1445/A/09/2119295 Covers Yard, Melbourne Street, Brighton BN2 3LH (Application A)

- 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 Hyde Housing Association for a partial award of costs against Brighton & Hove City Council.
- The Inquiry was in connection with an appeal against the refusal of planning permission for *residential development of 39 units comprising: 3 storey terrace along eastern boundary of site, 4 and 7 storey apartment building along northern boundary of site, cycle and car parking to rear.*

Costs application in relation to Appeal Ref: APP/Q1445/A/09/2119295 Covers Yard, Melbourne Street, Brighton BN2 3LH (Application B)

- 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 Housing Association.
- The Inquiry was in connection with an appeal against the refusal of planning permission for *residential development of 39 units comprising: 3 storey terrace along eastern boundary of site, 4 and 7 storey apartment building along northern boundary of site, cycle and car parking to rear.*

Application A

Decision

1. I allow the application in the terms set out below.

The submissions for Hyde Housing Association

2. The costs application was submitted in writing. At the Inquiry the applicant confirmed that the application related to Paragraph A12 of Circular 03/2009. The application was for a partial award in respect of the Council's stance on each of 4 matters: (1) the current use of the site; (2) the Code for Sustainable Homes; (3) children's play space; and (4) overlooking.

Response by Brighton & Hove City Council

3. The response was submitted in writing.

Reasons

4. 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.

The current use of the site

5. It was not disputed that the site has been used as a Builders' Merchant for many years. To my mind the ordinary meaning of Builders' Merchant is a place where construction materials can be bought. Whilst not definitive, in planning terms, I consider that the term is indicative of a use which includes a retail component. The appellant had provided the Council with a copy of Counsel's opinion together with the instructions and evidence on which that opinion was based. The opinion set out clear reasoning as to why the use of the site should be regarded as sui generis.
6. The Council did not provide any contrary evidence or convincing argument as to why a different view should be taken. Indeed, at the Inquiry it emerged that the Council had obtained its own Counsel's opinion which had confirmed the appellant's view, at least in respect of the period for which detailed sales figures were available. The Council's case depended on the possibility that the nature of the business had changed in some material way prior to the period for which sales figures were available. However, there was no evidence that such a change had taken place.
7. Furthermore, the Council's approach to this matter was to place a substantial burden of proof on the appellant. I find no basis in development plan policy for that approach. The effect of Policy EM3 is that the decision maker must first form a view as to whether or not the subject site is to be regarded as "industrial land" for the purposes of the policy. I consider that there was sufficient evidence for the Council to conclude that the use should be regarded as sui generis and that, in the absence of any contrary evidence, it was unreasonable not to do so.
8. The Council's unreasonable behaviour on this point resulted in the unnecessary expense of preparing evidence in response to the 3rd refusal reason and also to additional Inquiry time, which I estimate to be about 2.5 hours, spent discussing the issue of employment land.

Code for Sustainable Homes (CSH)

9. The scheme was originally designed to meet CSH Level 3. Whilst the appellant subsequently agreed to meet Level 4, this offer was conditional on the scheme as a whole being approved by the Council. Consequently, the appellant's position at the Inquiry, which was to accept a condition requiring the achievement of Level 3, should have come as no surprise. In my appeal decision I have commented that there was no development plan policy support for the Council's stance. The Supplement to Planning Policy Statement 1: *Planning and Climate Change* is clear that local requirements for sustainable buildings must be set out in development plan documents.
10. At the Inquiry the Council asserted that it had always accepted that the recommendations contained in its Supplementary Planning Guidance did not have the status of adopted development plan policy. However, the Council argued that the appellant had failed to justify an "exception" from the recommendations. It appears to me that, for all practical purposes, the Council

treated the recommendations as if they were adopted policy. That approach was unreasonable. It should have been possible for the Council and the appellant to agree on a planning condition requiring the achievement of CSH Level 3. Failure to agree on this point caused the appellant to incur the unnecessary expense of preparing to deal with this issue at the Inquiry. Additional Inquiry time, which I estimate to be about 30 minutes, was taken in discussing the matter.

Children's play space

11. In my appeal decision I have commented that, whilst I have taken account of the views of the Inspector who considered the previous appeal on this site, based on the evidence before the Inquiry I have come to a different view. I have agreed with the Council that the lack of on site play space is a disadvantage of the scheme, albeit that I have found this to be outweighed by other considerations. I do not consider that the Council was unreasonable to pursue this concern.

Overlooking

12. The appellant relies on the comments of the Inspector who considered the previous appeal on this site. However, the design of that scheme was quite different to the scheme before the Inquiry and in my view the Council was entitled to revisit this issue. Whilst I have not found in the Council's favour on this point, I consider that its stance was a reasonable exercise of planning judgement.

Conclusions – Application A

13. I find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has been demonstrated in relation to the Council's approach to the current use of the site and the Code for Sustainable Homes. A partial award of costs is therefore justified.

Formal Decision and Costs Order (Application A)

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 Brighton & Hove City Council shall pay to Hyde Housing Association the costs of the appeal proceedings, so far as they relate to reason for refusal No 3 and to the matter of the Code for Sustainable Homes, 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
15. The applicant is now invited to submit to Brighton & Hove 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 Senior Courts Costs Office is enclosed.

Application B

Decision

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

The submissions for Brighton & Hove City Council

17. The costs application was submitted in writing. At the Inquiry the Council confirmed that it was seeking a full award on the basis that it was unreasonable to have made the appeal. It was submitted that the scheme had not overcome the reasons why the previous appeal had been dismissed. Alternatively, it was argued that a partial award should be made in respect of each of two matters: (1) the late submission of evidence regarding the suitability of the site for modern employment needs; and (2) the appellant's action in agreeing to achieve CSH Level 4 only if the Council granted planning permission.
18. Whilst the Council drew attention to Paragraph B4 of Circular 03/2009, in response to my question it was confirmed that there was no allegation of any procedural failing by the appellant. It was argued that, had information about the suitability of the site for employment been available sooner, this may have led to further discussions which may in turn have removed the need to address Policy EM3 at the Inquiry.

Response by Hyde Housing Association

19. With regard to the merits of the appeal as a whole, the appellant had provided substantial evidence in response to every matter raised by the Council.
20. The appellant had made clear in its statement of case that evidence would be called regarding the suitability of the site for continued employment use. If the Council had wanted further information it could have been requested at any stage. Whilst the costs application held out the prospect that agreement might have been reached, in fact the Council had dug its heels in on this issue and maintained its stance that the use of the site should be regarded as Class B8.
21. With regard to the CSH, it could not be wrong for an applicant to offer, as part of a discussion, a scheme enhancement over and above what was strictly required by policy. Overall, there was no basis for any award of costs.

Reasons

22. 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.

Merits of the appeal as a whole

23. For the reasons given in my decision, I have decided to allow the appeal. It follows that the making of the appeal was not unreasonable.

Late submission of information

24. There is no suggestion of any procedural failing by the appellant. The appellant's intention to call evidence on this issue was identified in its statement of case and the Council therefore had the opportunity to seek further information or enter into further discussions at that stage. In any event, for the reasons given in my appeal decision, I do not consider that further information on this issue was necessary because Local Plan Policy EM3 was not applicable.

Code for Sustainable Homes (CSH)

25. The scheme was originally designed to meet CSH Level 3. As noted above, whilst the appellant subsequently agreed to meet Level 4, this offer was conditional on the scheme as a whole being approved by the Council. In effect the applicant offered an enhancement to the scheme with a view to "tipping the balance" of the Council's overall assessment. It was a matter for the Council to decide how much weight to attach to that offer. In my opinion making the offer was not in itself unreasonable behaviour. For the reasons given in my appeal decision, I have agreed with the appellant's position at the Inquiry which was that a condition should be imposed requiring the achievement of CSH Level 3.

Conclusions – Application B

26. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has not been demonstrated.

David Prentis

Inspector

