The Planning Inspectorate

Costs Decisions

Site inspection on 24 November 2010

by Graham Self MA MSc FRTPI

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

Decision date: 8 December 2010

(1) Costs application in relation to Appeal Reference: APP/Q1445/C/10/2129041 Land 8 Pavilion Parade, Brighton BN2 1RA

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by The Baron Homes Corporation Ltd for an award of costs against Brighton and Hove City Council.
- The appeal was against an enforcement notice alleging: without planning permission the conversion of B1(a) office floorspace on the basement, ground, first and second floors to residential use.

(2) Costs application in relation to the same appeal

- The application is made by Brighton and Hove City Council for an award of costs against The Baron Homes Corporation Ltd.

Reasons

1. I have considered the applications for costs in the light of Circular 3/09 and all the relevant circumstances. The circular advises that irrespective of the outcome of appeals, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expenditure unnecessarily.

Application by The Baron Homes Corporation Ltd

2. The appellant's costs application has three main arguments: first, that the council failed to substantiate their objection relating to local plan policy EM6, thereby causing the appellant to waste expense rebutting this matter; secondly, that the council failed to carry out diligent investigation, which would have shown that policy EM6 was not applicable; thirdly, that the council did not consider similar cases in a similar and fair manner and used policy EM6 as a spurious additional reason for refusal, as the change of use of No 12 St George's Place was permitted despite that property having been marketed for less time than No 8 Pavilion Parade.

3. As I have commented in my appeal decision, policy EM6 of the local plan has some relevance to the appeal, because it refers to business premises of 235 square metres or less and the appeal premises could be occupied as separate units within this size limit, and have apparently been marketed on that basis. The term "business premises" includes not just small workshops, as suggested

in one of the appellant's submissions, but also offices, as is confirmed by the reference within the policy to Use Class B1. Therefore, even though the council appear to have changed their mind about the applicability of policy EM6, for reasons which are not clear to me, the appellant did not waste any expenditure in commenting on this aspect of the case because the comments were relevant to my decision.

4. I do not know the full history of the site at 12 St George's Place; but as again I have explained in my appeal decision, the development there has not set a precedent for the decision relating to the appeal site. The council were at least consistent in refusing planning permission for the change of use of both properties. In this respect the appellant's reference to "the notes drawn up by the LPA when ruling the change of use at 12 St George's Place to be permissible" is difficult to understand: the local planning authority did not rule that the change of use at 12 St George's Place was permissible, they refused planning permission and opposed the resulting appeal.

5. Part of the appellant's case for a costs award is that the report submitted on the company's behalf on 18 August 2010 included new evidence "as requested by the LPA". I have two comments on this point. First, under the written representations procedure the submission on 18 August (which was an opportunity for final comments) should not have included any new evidence. Secondly, the local planning authority cannot be blamed for not considering evidence which was not submitted earlier.

6. I conclude that although there may have been an element of unreasonableness in the way the council changed their minds about the relevance of policy EM6, the council's conduct was not such as to justify an award of costs.

Application by Brighton and Hove City Council

7. The basis of the council's costs application is that the representations and evidence submitted for the appeal do not vary significantly from those submitted for the previous appeal, and that the appeal on ground (a) had no reasonable prospect of success. The previous appeal referred to here is an appeal against the refusal of retrospective planning permission for the change of use of the basement, ground, first and second floors at the appeal property from offices to residential. The appeal was dismissed in March 2010.

8. Circular 3/09 advises that appellants are at risk of an award of costs against them if, on the basis of the available evidence, the appeal plainly had no reasonable prospect of succeeding on the basis of the application submitted to the planning authority. The circular goes on to say that this may occur when the appeal follows a recent appeal decision in respect of the same, or very similar, development on the same site where an inspector has decided that the proposal is unacceptable and circumstances have not changed in the intervening period.

9. In this instance, the appeal against the enforcement notice under Section 174(2)(a) relates to the same development on the same site as the appeal under Section 78 against the refusal of planning permission. The Section 78 appeal decision was issued on 15 March; the enforcement appeal was made on 20 May. The events between those dates included initial steps to require residential tenants to leave, and the engagement (in about early April) of three agents to market the property as offices; but bearing in mind the short period of this marketing it is difficult to find any material change in circumstances

between those dates which would have made the planning merits of a change to residential use differ from the appeal decision.

10. An email sent to the council on the appellant company's behalf on 6 April 2010 confirmed that: "We have instructed Stiles Harold & Williams to start marketing these units as offices". This message reflects a point in the appellant's written statement which says that following the serving of the enforcement notice in March 2010, the appellant instructed three agents to begin marketing the property as office space. The words "start" and "begin" cast doubt on whatever previous attempts may have been made to let or sell the premises as offices, but even assuming that they meant "re-start", it appears that the recent marketing effort would only have been started after the enforcement notice was issued and would only have been carried on for about six to seven weeks before the appeal was lodged.

11. The council did not issue any written warning of their intention to apply for costs. However, on 27 May 2010 a casework manager in the Planning Inspectorate sent an email to the appellant's agent referring to the continuation of the enforcement appeal on ground (a) only, pointing out that the Section 78 planning appeal had been dismissed and that planning permission had not been granted by the inspector for the change of use alleged in the enforcement notice, and adding: "You may therefore wish to consider whether to continue with this appeal (though this is a matter for you to decide)". This message should have alerted the appellant to the risk being taken in pursuing an appeal concerning the same development as had recently been the subject of an appeal decision.

12. The appeal decision relating to 12 St George's Place, which is quoted in support of the appellant's case, was not issued until 11 June 2010, and so, even setting aside considerations about whether it was directly relevant, could not have counted as a change in circumstances at the time the enforcement appeal was made.

13. In support of the enforcement appeal, the appellant submitted a letter from Stiles Harold & Williams (SHW) to support the contention that this firm had marketed the appeal property between September 2004 and March 2006. One of the grounds of appeal was that this letter appeared not to have been submitted at the time of the Section 78 appeal. In the decision on that appeal, the inspector referred to submitted evidence "from which it would seem that No 8 was marketed from September 2004 until October 2005 when the appellant company purchased it". So it appears that the inspector did not have the letter from SHW now submitted by the appellant.

14. However, this letter provides rather vague and partly conflicting information. In it, SHW say that "we have not been successful in letting of any suites at the above property since your purchase. Prior to your purchase we also carried out all necessary marketing since September 2004…" The letter does not state that the property was actively marketed as offices after the purchase. Moreover, a letter written by SHW in May 2009 (addressed to Mrs N Blencowe, Baron Homes) stated that the firm "have advised on this property for many years and were involved in the marketing of the property from September 2004 until the sale to Baron Homes in October 2005". This later letter does not mention any marketing after the purchase in October 2005, and I would have thought that if marketing had been carried out between October 2005 and when they wrote to their client in May 2009, SHW would have mentioned it.

15. There is evidence that another firm (Graves Son & Pilcher) were instructed to market the entire building at a rent of £25,000 per annum exclusive in about September 2008, and that their marketing was continuing in April 2009. But this was all in the period which would have been taken into account when the Section 78 appeal was decided, and appears to have been affected by the internal building work and by the residential occupation, although the appellant's evidence about the site's history does not make clear when the refurbishment or conversion work started and ended or when the residential use started.

16. I am aware that continuity of work on this appeal for the appellant was affected by serious illness. Although I have natural personal sympathy for all those involved, it would not be right to let my personal feelings alter the fact that the council have a sound case for their costs application, which is mainly related to the initial making of the appeal rather than to its later conduct.

17. In summary, when the appeal was made it followed a recent appeal decision relating to the same development on the same site, in respect of which an inspector had decided that the development was unacceptable; and circumstances had not significantly changed in the relevant period between March and May 2010. This is the type of situation described in Circular 3/09, where it should have been plain that the appeal had no reasonable prospect of success, so appealing against the enforcement notice on ground (a) constituted unreasonable behaviour and caused the council to incur expenditure which should not have been necessary. I conclude that the council's application for an award of costs is justified.

Decision on Application by The Baron Homes Corporation Ltd

18. I refuse this application.

Decision on Application by City Council, and Costs Order

19. I allow this application.

20. In exercise of my powers under Section 250(5) of the Local Government Act 1972 and Schedule 6 to the Town and Country Planning Act 1990 as amended, and all other powers enabling me in that behalf, I HEREBY ORDER that The Baron Homes Corporation Ltd shall pay to Brighton and Hove City Council their costs of responding to the appeal. Such costs are to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under Section 174 of the Town and Country Planning Act 1990 as amended against an enforcement notice issued by the City Council alleging: "Without planning permission, the conversion of B1(a) office floorspace on the basement, ground, first and second floors to residential use" at 8 Pavilion Parade, Brighton.

21. Brighton and Hove City Council are now invited to submit to The Baron Homes Corporation Ltd, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement on 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.

G F Self

Inspector