



Costs Decision

Hearing held on 2 February 2011

Site visit made on 2 February 2011

by L Rodgers BEng CEng MICE MBA

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

Decision date: 3 March 2011

Costs application in relation to Appeal Ref: APP/Q1445/A/10/2136372

41 Ladies Mile Road, Brighton BN1 8TA

- 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 Domino Pizza Group Ltd for a full award of costs against Brighton & Hove City Council.
 - The hearing was in connection with an appeal against the refusal of planning permission for a change of use from A2 to A5, erection of rear extension, new shopfront and extract duct.
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Decision

1. I allow the application for an award of costs in the terms set out below.

The submissions for Domino Pizza Group Ltd

2. The Applicant seeks a full award of costs considering that the Council failed to provide evidence to support its reasons for refusal contrary to Circular 03/2009 paragraphs A3, B16, B20, B21 and B22.
3. The only technical evidence submitted is that put forward by the Applicant in support of the proposal; none has been submitted by the Council. Instead, the Council relies on supposition and brief policy references put forward by Members and third parties, not officers. The application is therefore made on both procedural and substantive grounds.
4. In respect of highway matters the Committee report acknowledges that there is no technical objection to the scheme and Members were advised that previous technical objections had been overcome by the current scheme. Highway objections were voiced solely by Members and local residents.
5. The Environmental Health Officer did not object to the proposal on noise or amenity grounds and the only technical evidence before the hearing was the Cole Jarman report submitted by the Applicant. Nothing was said at the hearing that supports the reason for refusal in noise terms and it was not part of the case advanced at the hearing that there was an objection on amenity grounds.
6. Although the matter of anti-social behaviour has been raised the police have been consulted on two occasions but have not raised anti-social behaviour as an issue. It is not even clear that anti-social behaviour is an issue but in any case there is nothing to suggest that a Domino's pizza outlet would exacerbate any existing problem.

7. In terms of the health effects of the proposal the Committee report is quite clear that there are no local policies which support a refusal on health grounds; nothing said at the hearing contradicts that stance. Neither the community strategy nor the Patcham School Strategy refers to fast food outlets and consequently there is no policy basis supporting the Council's position.
8. The costs being sought are largely the professional costs in preparing for and attending the hearing.

The response by Brighton & Hove City Council

9. With reference to Circular Paragraph A3 the Council believes its reasons for refusal do stand up. Having regard to Paragraph B16, the refusal reasons make reference to planning policy - except in the case of the third reason which refers to a material consideration. The Tower Hamlets case clarified that fast food outlets were capable of being a material consideration in planning terms and the Council maintains that that is the situation here.
10. Paragraph B16 also says that the Council must produce evidence to support its stance - a matter that has been discharged both at the hearing and in the appeal statements. The traffic evidence benefited from the views of Members familiar with the area, including one who lives in it, as well as from the knowledge of local residents.
11. It is clearly the case that the proposed development would attract more vehicles than a vacant unit and the Applicant admitted that vehicle issues at St George's Place were the cause of some problems. The Council was not, at decision stage, aware of the new permission at London Road and until the hearing was not aware that the new unit (if implemented) would take the majority of deliveries from St George's Place. As the Council summing up noted, the numbers of vehicles involved continue to cause concern and there remain apparent discrepancies such as the use of 4 vehicles at times when only 2/3 parking bays are likely to be free.
12. In respect of anti-social behaviour the Council again takes advantage of the local knowledge of the Councillors and, albeit anecdotal, that of local residents including in respect of the creation of an Anti-Social Behaviour Control Area.
13. In terms of health effects, Patcham High School entrance is very close to the proposed outlet and the Councillors also referred to the presence of local community centres which will be open beyond the school opening times - when the pizza outlet would also be open.
14. The Council's evidence does therefore provide a respectable basis for its stance (Circular Paragraph B16) and the Council has not relied on vague, inaccurate or generalised assertions referred to by Paragraph B18. With respect to Paragraph B20, whilst the Council's decision was contrary to officer recommendation it was made on reasonable grounds. The Council gave relevant evidence to support its refusal and no costs should be awarded.

The rebuttal by Domino Pizza Group Ltd

15. In respect of the third reason for refusal and Paragraph B16 the Council refers to the Tower Hamlets case. However, and whilst the Applicant has never disputed that this is a material consideration, the Council has not provided any planning evidence to support its stance.

16. The Applicant disagrees that the evidence supplied by the Council is sufficient to provide a respectable basis for its stance and considers that, with respect to Paragraph B22, most came from third parties. The Council was able to benefit from Members' experience but the Applicant supplied clear professional and technical evidence to support its case.
17. Whilst there has been reference to the outlet at St George's Place, the issue is whether this location is acceptable. In respect of Councillor's reference to discrepancies in vehicle numbers, this did not form part of the reason for refusal and the Council has always been aware of the nature of the application.
18. Despite the Councillors' local knowledge in respect of anti-social behaviour it was acknowledged that the problem had 'moved around the corner' to the clock tower and there is no evidence to suggest that the proposed development would make matters worse.
19. The key sentence in Paragraph B16 in respect of whether the Council has provided a respectable basis for its stance refers to the evidence produced on appeal. In this case, the evidence was largely provided by third parties.

Reasons

20. I have considered this application for costs in the light of Circular 03/2009 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.
21. In determining whether the Council behaved unreasonably in refusing the application it is necessary to determine whether, on appeal, the Council was able to provide evidence to substantiate its reason for refusal with reference to the development plan and all other material considerations. Paragraph B16 of Circular 03/2009 says that the key test is whether evidence is produced on appeal which provides a respectable basis for the authority's stance and Paragraph B20 explains that whilst authorities are not bound to accept the recommendation of their officers they will need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the decision in all respects.
22. The first reason for refusal notes that the proposal would result in increased pressure on parking, increased traffic flow and resulting vehicle noise contrary to Policies SU9, SU10 and QD27 of the Brighton and Hove Local Plan 2005 (LP). All of these policies are concerned with development that may cause nuisance.
23. In support of its position the Council refers to the likely increase in traffic flow which it claims would result in increased parking pressure in the locality and increased noise. However, although the Council suggests that a hot food takeaway of the type proposed would attract customers collecting food by car and delivery vehicles would be arriving and departing on a regular basis, these concerns were expressed only in a very general way. In contrast the Applicant presented professional reports into the noise and transport implications of the development. These concluded that the proposed use would not cause significantly increased disturbance to neighbouring residents or generate a material increase in traffic flow. Despite noting that the Applicant's reports were based on findings at other Domino's outlets the Council's officers found no reason to believe the reports incorrect and raised no objections to the proposal.

24. Although the Applicant refers to the lack of technical evidence on behalf of the Council I would not expect the Council to commission its own experts as a matter of course and the absence of any technical reports does not itself make the Council's stance unreasonable. However, the Council's hearing statement contains no substantive evidence to show why the conclusions of the noise and traffic reports should be seen as erroneous.
25. At the hearing itself the Council did refer to residents' complaints in respect of the Domino's outlet at St George's Place pointing to the consultation response of Sussex Police. However, the police raised no objections to this application and I saw on my visits that the two locations are clearly different. Although it emerged during the hearing that there were some apparent discrepancies in the number of vehicles involved this did not form part of the Council's statement and is unlikely to give rise to significant harm.
26. Paragraph B18 makes it clear that even where an appeal involves a matter of judgement, vague or generalised assertions about a proposal's impact, unsupported by any objective analysis, are more likely to result in a costs award. Even taking account of the local knowledge of some Members, the weight of evidence on this first issue is distinctly unbalanced and in respect of the first reason for refusal, the Council's evidence does not provide a respectable basis for its stance nor has it shown reasonable planning grounds for taking a contrary decision to that of its officers.
27. In respect of the second reason for refusal concerning anti-social behaviour, the Council again went against the recommendation of its officers. In doing so it relied on the local knowledge of some Members and residents. However, whilst I have no reason to doubt their statements concerning historic anti-social behaviour problems I was also told that these problems have since moved away from the parade. Although it was also said that the area has been designated as an Anti-Social Behaviour Control Area, this remained an anecdotal statement. I was given no cogent evidence to demonstrate that the proposed use would be particularly prone to attracting anti-social behaviour and I am conscious that, despite being formally consulted, Sussex Police raised no objections to the proposal.
28. Whilst I do not doubt that the concerns of residents and Members in respect of anti-social behaviour are genuinely held, Circular Paragraph B20 makes it clear that if officers' professional advice is not followed authorities will need to produce relevant evidence on appeal to support the decision in all respects. In my view the Council has failed to produce such evidence.
29. Turning to the third reason for refusal, all parties accepted that the proximity of a fast food outlet to a school is capable of being a material consideration. That said, the weight to be assigned to it in any planning balance is then a matter for the decision maker. Although the officer's report considered it should be given only limited weight, the Council is entitled, based on the particular circumstances and within the bounds of reasonableness, to assign it more weight.
30. The Applicant points out, and the Council accepts, that there are no directly relevant local plan policies. However, the Council does refer to Patcham High's Healthy School Status and the efforts being made to encourage healthy eating as part of the National Healthy Schools Programme - as well as to wider community strategies aimed at improving health and well being. It is a matter of judgement as to whether a pizza takeaway (or indeed any other type of

takeaway) close to the school gates would prove attractive to pupils. It is also a matter of judgement as to whether any such attraction would encourage eating patterns that would undermine the school's stated objectives on healthy eating and if so, how important that is seen in the overall planning balance.

31. In proffering a condition restricting counter sales before 16.00 the Applicant clearly recognised the sensitivity of the location. Based on the information before me I have found in my decision letter that such a condition would be both reasonable and necessary and in so doing I have thereby acknowledged that in its absence the appeal should be dismissed. However, I have also acknowledged that such a condition would not prevent all sales to pupils or to users of the community facilities. Whilst this would not, in my view, lead to material harm that is my judgement on the information before me. The Council must be entitled to conclude otherwise.
32. For these reasons it is my view that the Council has, in respect of the third reason for refusal and despite the absence of any directly relevant development plan policy, demonstrated reasonable planning grounds for taking a contrary decision to that of its officers, has supported its position with sufficient relevant evidence and has provided a respectable basis for its stance.

Conclusion

33. I have found in respect of reasons for refusal 1 and 2 that the Council has failed to produce evidence on appeal to substantiate its reasons for refusal and as such has behaved unreasonably. However, in respect of the third reason for refusal the Council did substantiate its position and its behaviour was not unreasonable. The Applicant was not, therefore, compelled to contest the appeal unnecessarily and whilst the Applicant is seeking a full award of costs, any award should be limited to those costs specifically incurred in appealing against reasons for refusal 1 and 2. I therefore conclude that, in accordance with paragraph A20 of Circular 03/2009, an award of partial costs is justified.

Costs Order

34. 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 Domino Pizza Group Ltd, the costs of the appeal proceedings limited to those costs incurred in contesting refusal reasons 1 & 2, 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.
35. 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.

Lloyd Rodgers

Inspector

