Costs Decision

Inquiry held on 23 March 2010

Site visit made on 23 March 2010

by J O Head BSc(Econ) DipTP MRTPI

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

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Decision date:
26 April 2010

Costs application in relation to Appeal Ref: APP/Y3940/Q/09/2115524
Land adjacent to Hackett Place, Hilperton, Wiltshire BA14 7GN

- The application is made under the Town and Country Planning Act 1990, sections 106B, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Marston's PLC for a full award of costs against Wiltshire Council.
- The inquiry was in connection with an appeal against the refusal of the Council to modify a planning obligation dated 6 February 2004, made between West Wiltshire District Council (1), Marshgate Investments Ltd (2) and Gallagher Estates Ltd and Heron Land Investments (3), by the discharge of clauses 1.5.1, 5.2 and 5.3 of the obligation.

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

The Submissions for Marston's PLC

1. On behalf of the applicant, Mr Tait submitted a written application for an award of costs. This is on the grounds that the Council has behaved unreasonably by refusing to discharge the relevant clauses, failing to substantiate that refusal by producing evidence and failing to take the course open to it to avoid the appeal.

2. Additionally, at the inquiry, Mr Tait drew attention to paragraphs A2 and A3 of Circular 03/2009, which refer to behaviour that can delay or frustrate the efficient resolution of outstanding matters and advise that all those involved in the appeal process should behave in an acceptable way and follow good practice, in terms of the quality of the case.

3. Mr Tait said that Mr Clark, speaking for himself at the inquiry, was aware of no new facts in the period 2009-2010 relevant to the decision process. It is, therefore, quite clear that there should never have been a refusal in the first place. Paragraph 6 of the written application refers to the course suggested by the Council's officers. There has been a fundamental misunderstanding of the purpose of holding public inquiries. It is entirely unreasonable for the Council not to take the steps suggested by its officers. That compounds the original unreasonableness.

4. Furthermore, Mr Tait submitted that although the Council provided early evidence of its intention not to give evidence and this has saved the Council cost, it has not saved the applicant anything because witnesses still had to be called. In his opinion, a full award of costs is therefore justified in as clear a case as can be envisaged, putting an end to a long and sorry history.

The Response by Wiltshire Council

5. In response, Mr Taylor said that the Council accepts that it is in some difficulty here. However, paragraph B56 of Circular 03/2009 puts an obligation on the Council to keep its position under review. It says that the Inspectorate's case officer and the appellant should be notified immediately if it is concluded that the reasons for refusal cannot be supported. This is what happened here. The officers referred the matter back to the Planning Committee and they instructed not to continue with the reasons for refusal. The Circular guidance was followed and attention is drawn to the last section of paragraph B56.

6. As to what happened subsequently, Mr Taylor said that the Council was aware of public and press interest and that people expected an inquiry to be held on the date fixed. The appellant decided to proceed. The Council thought that to agree to discharge the clauses by letter would not be appropriate. The appellants did not indicate that they would be prepared to postpone the inquiry to enable the Council to publicise and consult interested persons before reaching a decision. The Council has acted appropriately to minimise costs.

Applicant's Reply

7. In reply, Mr Tait said that the inquiry would not have proceeded if the Members had agreed with their officers' recommendation. The procedure was not "fast-tracking" but a legitimate procedure under S106A(1). If the appeal had been withdrawn it is likely that the proposal would have been refused again.

8. As to paragraph B56, Mr Tait submitted that it can well operate for individual reasons in a multi-reason refusal, but that is nothing like these circumstances. The applicant was bound to call its witnesses. There were no savings. The behaviour of the Council in February and March is an additional point. Costs are justified anyway. The expression of interest from the public is not enough to justify putting the applicant to the expense of an inquiry.

Conclusions

9. 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.

10. Paragraph B56 of Circular 03/2009 says that planning authorities can minimise the risk of an award of costs by notifying the Inspectorate and the appellant immediately if any reasons for refusal are not to be supported. By letter and e-mail on 28 January 2010 the Council gave such a notification, stating that "the Council will not be defending the appeal and will not be presenting evidence at the inquiry." This should have been sufficient to result in a cancellation of the inquiry, which would have minimised any unnecessary work and wasted expense for both the Council and the applicant.

11. Paragraph A15 of Annex A to Circular 05/2005 *Planning Obligations* explains that S106A(1) of the Town & Country Planning Act 1990 provides that a planning obligation may be modified by agreement between the authority and the person or persons against whom it is enforceable and that the Secretary of State considers the variation of obligations by agreement to be preferable to

the formal application and appeal procedures. Following the Council's notification of 28 January, I consider that it would have been entirely reasonable for the applicant to expect that the clauses in dispute would, by mutual agreement under S106A(1), be deleted from the obligation. However, on 9 March 2010 the Council declined this course of action, on the grounds that it would deny third parties the right to be heard by an Inspector.

12. In the absence of any guarantee that the clauses would be discharged, it seems to me that the applicant had no alternative but to attend the inquiry and present evidence. I consider that the lack of any evidence given by the Council at that inquiry to substantiate its reason for refusal amounts clearly to unreasonable behaviour, contrary to the advice at paragraph B16 of Circular 03/2009. Some third parties attended the inquiry and made brief statements, but nothing new arose from this. Paragraph B22 of Circular 03/2009 advises that planning authorities will be at risk of an award of costs for unsubstantiated objections where they rely on local opposition from third parties, through representations and attendance at an inquiry, to support the decision.

13. I agree with the applicant that it is not a function of the appeal process to hold public inquiries into proposals where the authority considers that its decision cannot be defended and proposes to present no evidence, yet declines to follow the procedure open to it to resolve the outstanding matters. Having regard to the advice at paragraph A2 of Circular 03/2009, such behaviour is not a proper use of the right of appeal and should be discouraged by the costs regime.

14. Although the Council's early notification that it would not be defending the reason for refusal is in compliance with the spirit of the Circular, I consider that the subsequent failure to resolve the outstanding matters (leading to the necessity of a public inquiry), the failure to present any evidence at that inquiry and the reliance on third party objections all amount to unreasonable behaviour. That unreasonable behaviour has caused the applicant to incur the unnecessary expense of contesting the Council's decision at the inquiry. Accordingly, I conclude that a full award of costs is justified.

Formal Decision and Costs Order

15. 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 Wiltshire Council shall pay to Marston's PLC the costs of the appeal proceedings, 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.

16. The applicant is now invited to submit to Wiltshire 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.

John Head

INSPECTOR