The Planning Inspectorate

Costs Decision

Inquiry held on 25 & 26 April and 25 May 2012

by N P Freeman BA(Hons) Dip TP MRTPI DMS

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

Decision date: 9 July 2012

Costs application in relation to Appeal Refs: APP/P1940/C/11/2164949 & APP/P1940/A/11/2160486
Land Between Langlebury Lane, and Old House Lane, Langlebury Lane, Langlebury, Herts, WD4 9AA

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Jimmy Cash for a full or partial award of costs against Three Rivers District Council.
- The inquiry was in connection with an appeal (s174) against an enforcement notice alleging use of the land for mixed use for the stationing of caravans and mobile homes for purposes of residential occupation and for the storage of building materials and other miscellaneous items and another appeal (s78) against the refusal of planning permission for the use of the same land for the stationing of caravans for residential purposes for 2 no. gypsy pitches.

The submissions for the Appellant

1. The Council have failed to show why it was expedient to take enforcement action, contrary to the terms of paragraphs B32, B33, B34 and B40 of *Circular 03/2009 – "Costs awards in appeals and other planning proceedings"*[1]. They did not carry out the human rights balancing exercise or make the necessary enquiries of the appellant, pursuant the humanitarian duty, before serving the notice at odds with paragraph B39. They then used this lack of information on welfare and personal circumstances as arguments against the appellant in terms of a lack of very special circumstances. They also failed to produce the enforcement report in a timely fashion with a copy only being provided on request at the inquiry.

2. In terms of need, the Council reached unreasonable conclusions about the capacity of the Oaklands, Bedmond Road, Abbots Langley and Fir Trees, Dawes Lane, Sarratt sites in terms of pitch provision and wrongly concluded that temporary planning permissions on other sites can count towards the Regional Spatial Strategy (RSS) requirement for permanent pitches. There was no adequate prior investigation of what was available in terms of pitch availability contrary to the advice in national guidance.

3. They also failed to show clearly why the development could not be permitted or to substantiate each reason for refusal – *R v SSE ex parte North Norfolk DC 1994 [2 PLR 78]* applies – contrary to the advice in paragraphs B15 and B16. This included the lack of consideration of granting a temporary planning permission if a permanent permission was not permissible contrary to the

[1] The paragraph references that follow are all taken from this Circular (03/09) unless otherwise stated

transitional provisions applying in *Circular 01/2006 "Planning for gypsy and traveller sites"*, applying at the time notice was served and the planning permission refused – and subsequently having regard to the guidance in CLG "Planning policy for traveller sites" (PPTS). This is also at odds with the advice in paragraphs B25, B27 and B29 (10th bullet point) which require consideration of whether the development could be made acceptable by the imposition of conditions. This failure is even more unreasonable in the light of the findings in respect of the Toms Lane, Kings Langley appeal where costs were awarded for this very reason.

4. On the issue of sustainability, this was a new issue introduced late in the proceedings and not a reason cited for issuing the enforcement notice or refusing the planning application. Clarification had been sought by e-mail that this issue was not going to be pursued by the Council at the inquiry and this was the understanding based on correspondence leading up to the event.

5. Nevertheless, objections on this basis appeared in the proof of evidence of the Council's planning witness which were maintained at the outset of the inquiry. This led to a request for an adjournment to give to time to produce evidence to rebut the Council's arguments on this issue, which was acceded to by the Inspector. This also amounts to an example of unreasonable behaviour, as described in the 4th bullet point of paragraph B4, and has led to the appellant incurring unnecessary expense due to the time taken on the first morning of the inquiry and the subsequent lengthening of the sitting time by a day to deal with the evidence on sustainability.

6. For all these reasons the Council has acted unreasonably and this has led to the appellant incurring unnecessary expense. Having regard to the conditions justifying an award set down in paragraph A12 a full award of costs is sought or failing that a partial award in respect of the pursuit of the 'late' objections on the grounds of sustainability.

The response for the Council

7. Reliance is placed on paragraphs 5.10 to 5.14 of the enforcement report to the Development Control Committee which deal with the matter of need and the conclusion that there is no need for further pitches at this time. This stance was maintained by the Council in evidence and submissions made at the inquiry. The claim that the late submission of this report led to wasted expense is contested. The situation at the Oaklands site was dealt with by the Council's planning witness and in submissions and the position that 20 pitches are available there was substantiated. The situation concerning the Fir Trees, Dawes Lane site as to whether there are 1 or 2 existing pitches does not alter the need figure of 15 pitches. It is not accepted that temporary pitches cannot count towards the need requirement for the reasons presented in submissions.

8. The Council strongly rejects the claim that no substantive evidence was provided to support the reasons for refusal and the service of the notice. The evidence and submissions of the Council address the harm to the Green Belt and whether any very special circumstances exist to outweigh this harm as required in the relevant policies found in national guidance and the development plan. Prior investigation of whether the need figures set out in Policy H3 of the RSS were satisfied was undertaken before the notice was served and planning permission refused.

9. The Council took account of their humanitarian duty and the advice on the same in paragraph 9 of Circular 18/94, which includes the needs of the wider community as well as the rights and needs of gypsies. To discharge this duty it was necessary to know what the needs of the appellant and the site occupants were. Appropriate enquires were made about gypsy status and personal circumstances as explained in paragraphs 7.4.2 and 7.4.3 of the planning committee report dated 18 August 2011. Despite requests for details none were provided which led to the conclusion that no very special circumstances in the form of personal circumstances had been provided to the Council. The matter of the occupants' human rights was addressed in the opening submissions for the Council where the proportionality test is mentioned and the conclusion drawn that the balance lay in favour of rejection due to the harm to the Green Belt.

10. Consideration of whether to grant a temporary planning permission is addressed in the Development Plans Section consultation response on the planning application, set out in paragraph 3.1 of the committee report (18/08/11). This explains, having regard to the advice applying in Circular 01/06 at that time, that consideration should be given to granting a temporary planning permission if there is unmet need for gypsy sites. The Council maintains that there was no unmet need at that time and so there was no requirement to consider granting a temporary planning permission.

11. On the issue of sustainability, this was not a late introduction or a new reason for refusal. It was flagged up in explicit terms in paragraph 6.3.10 of the pre-inquiry statement in January 2012 and is a matter that is covered by Policy CP1 of the adopted Core Strategy (CS) which was cited in the reasons for issuing the enforcement notice and refusing planning permission. It was also addressed in Paragraph 31 of the evidence of the appellant's planning witness. Moreover the new National Planning Policy Framework (NPPF) states at paragraph 14 that the presumption in favour of sustainable development is the 'golden thread' running through both plan-making and decision-taking and the PPTS requires the issue of sustainability to be addressed when considering gypsy and traveller development (paragraph 11 in particular). This issue therefore had to be considered in the context of the policy advice applying at the local and national level.

12. It is also submitted that as the inquiry did not adjourn until 17.45 on Day 2 it would still have been necessary to continue onto a third sitting day to deal with planning conditions, closing submissions and costs submissions which remained outstanding. This took about 2 hours of inquiry time.

Counter-response for the Appellant

13. The amount of taken arguing about the sustainability issue on the opening day of the inquiry was about 2.5 hours. This needs to be added to time taken to deal with the evidence on Day 3.

14. The Council's explanation that the matters of human rights and whether temporary planning permission should be considered were addressed in closing submissions is not a defence. They should have been clearly addressed at the committee report stage before the planning permission was refused and the enforcement notice served.

15. The overall figure on pitch provision to 2011 flowing from the RSS is still 26. The absence of one pitch whether from what was claimed to exist in 2006 or what is needed from 2006-2011 does not alter this need requirement. Temporary consents cannot count towards permanent provision as confirmed by some Inspectors in previous appeal decisions. There has been no proper investigation of the Oaklands site to establish what actually exists or can be realistically provided by way of pitch provision. No counting has been undertaken and no proper assessment has been made against the guidelines in the Good Practice Guide for gypsy and traveller sites. To rely on the claim that 20 pitches are available is unsafe.

Inspector's Conclusions

16. C03/09 advises that, irrespective of the outcome of the appeals, 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.

17. I consider that the Council have demonstrated why they considered it expedient to take enforcement action and this is set out in committee report to the Development Control Committee dated 6 April 2011 which goes into considerable detail. It would have been helpful to have had sight of this at an earlier stage but it was not a report for general publication being 'restricted' and was produced at the inquiry when requested.

18. As regards the requests for information concerning the gypsy status and personal circumstances it is evident from reading the report of 6 April 2011 and the report on the planning application dated 18 August 2011 that the Council had requested information on these matters but none had been forthcoming (para 7.4.2 of 18 August 2011 report). I do not have the details of how these requests were made but from what is before me I do not accept that the Council made no attempt to obtain this information. It seems to me that they did seek to have regard to their humanitarian duty but were not provided with the information that subsequently has emerged at the appeal stage concerning gypsy status and personal circumstances. It may have been that more persistent enquires, such as the service of a Planning Contravention Notice, could have revealed this information but I do not find that the Council's behaviour in this respect was unreasonable.

19. In terms of the actual reasons given for issuing the enforcement notice and refusing planning permission, I am satisfied that the evidence provided by the Council was sufficient to discharge the requirement to substantiate each reason in line with the requirement of paragraph B16 of C03/09. This principally related to the harm to the Green Belt and the view that no very special circumstances have been demonstrated to overcome this cumulative harm. I consider that the Council's position was arguable and that written and oral evidence was provided to back up the stance taken.

20. Notwithstanding this overall finding, I agree with the submission for the appellant that the reports I have seen do not specifically address the matter of whether there was justification for the granting of a temporary planning permission, having regard to the transitional arrangements set out in paragraphs 45 and 46 of C01/06 which applied at the time the planning application was refused and enforcement action was authorised. Whilst I accept that paragraph 3.1 of the planning application committee report does

mention this as a general recital of government policy applying at that time in a consultation response, nowhere is this picked up and addressed in the 'Analysis' section which led to the decision to refuse planning permission.

21. The Council's defence on this matter seems to be that they took the view there was no unmet need and therefore it was not necessary to consider the transitional arrangements. Whilst it is true that the report does argue that there is no unmet need it is clearly evident that the period that is said to be satisfied only goes up to 2011 and that additional need is likely to arise after 2011 which would not be addressed for some time through the Allocations Development Plan Document (DPD) process. In this context I consider that overt consideration of the transitional arrangements should have been set out in order to inform the decision not to grant a temporary planning permission. Failure to do so was in my view an oversight.

22. The appellant has drawn my attention to the Costs Decision relating to the appeal on 59 Toms Lane, Kings Langley (APP/P1940/A/09/2097096) where costs were awarded. The failure to consider the possibility of granting a temporary planning permission was fundamental to that decision. The circumstances in that case are different in that the Inspector found that there was no evidence that the need for 15 pitches to 2011 was met and there was a pressing general need for additional gypsy sites[2]. In the present case it is more a matter of interpretation of figures as the decision on Oaklands, Bedmond Road to provide more pitches appears to postdate the Toms Lane decision. I therefore do not consider that the circumstances are directly comparable.

23. Nevertheless, it seems to me that the Council placed reliance on 20 pitches being available at Oaklands without seeking to verify whether this was so. If the situation is, as I have found in my Appeal Decision, that realistically there are not 20 pitches but considerably less then the Council's position that need to 2011 is met is undermined. Given the heavy dependence on Oaklands to meet need I would have expected this to have been clarified before reaching the conclusion that there is no unmet need. This coupled with the lack of a proper explanation at the report stage as to why the transitional arrangements were not engaged was a significant shortcoming, especially as this had led to a previous award of costs against the Council. A reasonable approach in the light of this previous award would have been to provide analysis on this matter which is plainly lacking. I consider this is at odds with the advice paragraphs B25, B27 and B29 to give consideration to whether the development could be made acceptable by the imposition of conditions.

24. Additionally, the reports seemingly fail to give any consideration to the appellant's human rights. Even if it was not accepted that the appellant and the co-occupants of the site enjoyed gypsy status at the time of the reports the rights conveyed under Article 8 and Article 1 of the 1st Protocol of the European Convention on Human Rights still apply as the enforcement notice would lead to interference with private and family life, homes and property. I do not accept that commenting on human rights in opening submissions is a sound defence against the claim made for the appellant. The human rights of the appellant and co-occupants should have been addressed as part of the decision-making process of the Council and the balancing exercise before planning permission was refused and especially before enforcement action was

[2] Para. 6 of the Appeal Decision

taken. Failure the properly consider these rights at the appropriate time amounts to unreasonable behaviour which cannot be redressed simply by relying on what was submitted at the inquiry.

25. There is also the issue of sustainability. I consider in the light of the advice in the NPPF and PPTS that I would have needed to address this anyway, because it is now the "golden thread" running through the planning system. To ignore it would fly in the face of government advice. Having said that, there does appear to have been considerable uncertainty over the stance the Council were going to adopt at the inquiry which to my mind only became clear on the opening day which is why I acceded to an adjournment to allow evidence to be provided for the appellant on this issue.

26. Whilst there is reference to Policy CP1 of the CS, which concerns sustainability, in both the reasons for refusing permission and serving the notice, there is no commentary in the actual text as to why the development is considered to be in an unsustainable location. Reasons for refusing planning permission and serving enforcement notices are expected to be complete on their face. To quote from paragraph B16 of C03/09 they should be complete, precise, specific and relevant. As far as the issue of sustainability goes I do not consider that this requirement is met simply by citing a policy. To contrast, the harm to the Green Belt is spelt out in terms as well as by reference to policy whereas the word 'sustainable' does not appear in either the reasons for refusing the planning application or issuing the notice. This in itself is unreasonable if it is then to be relied on as a significant basis for opposing the development.

27. The situation then appears to have been compounded by the lack of response to the appellant's agent over the position that will be taken at the inquiry on the sustainability issue. It is true that the Council's pre-inquiry statement raised objections on this basis. However there does not appear to have been any response from the Council to an e-mail from the appellant's agent, dated 30 March 2012, which states – "Following our phone conversation this morning in which you confirmed that the Council is not relying on sustainability as an additional reason for refusal we will not be dealing with this as an issue in our proof of evidence". I consider that in the absence of a response it was reasonable to conclude this would not be pursued. Nevertheless when the Council's planning agent's proof of evidence was submitted (received by PINS on 2 April 2012) it was clear that opposition on this basis was maintained.

28. I accept that no fresh, substantial evidence was introduced by the Council on this issue at a late stage (that is after the agreed date for the submission of proofs). However, I consider that the confusion that has arisen about this issue was primarily due to the Council's failure to set out their objections when refusing the planning application and issuing the notice and failing to clarify their position before the exchange of proofs. This did indeed lead to an adjournment and the need to set a date for resumption after evidence for the appellant on this issue had been compiled. This in my view amounts to unreasonable behaviour.

29. As to the point about whether a third day for the inquiry would have been necessary anyway, without hearing evidence on sustainability, I am not convinced this would have been so. It took about 1.5 hours (from 10.00 to 11.30) on the opening day to deal with the arguments about sustainability evidence and requests for an adjournment. This time would have been sufficient to deal with closing submissions and the costs application which took

about 1.5 hours (14.00 to 15.30) on Day 3. The conditions session only took about 0.5 hour and this could have been included at the end of Day 2 with a finish soon after 18.00. So there were reasonable prospects of completing the inquiry in two days rather than three without having to dwell on the sustainability objections raised by the Council.

30. The total inquiry time taken up by the sustainability issue was about 4.5 hours (1.5 hours on Day 1; 3 hours on Day 3 to hear evidence). Given the weight attached to sustainable development in national policy guidance I accept that some time would have been needed to address it even if it were not a significant ground of objection raised by the Council. However, I consider it would certainly not have taken up 4.5 hours of inquiry time.

31. Bringing these points together I find that, at the very least a partial award is justified because of the unreasonable behaviour of the Council on the sustainability issue which led to the unexpected prolonging of the inquiry and the consequent extra expense. However, given my conclusions on the failure to give proper consideration to the granting of temporary planning permission, the less than rigorous assessment of the actual level of pitch provision in the District and the seeming absence of any consideration of human rights of the appellant and the co-occupants of the appeal site at the decision stage that the Council have behaved unreasonably. I conclude that if these matters had been properly addressed there is certainly a prospect that temporary planning permission could have been granted having carried out the necessary balancing exercise and this would have led to the costs of the inquiry being avoided.

32. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/09, has been demonstrated and that a full award of costs is justified.

Decision and Costs Order

33. The application for an award of costs is allowed. In exercise of the 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 enabling powers in that behalf, IT IS HEREBY ORDERED that Three Rivers District Council shall pay to Mr Jimmy Cash the costs of the appeal proceedings described in the heading of this decision.

34. The applicant is now invited to submit to the Council 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.

N P Freeman

INSPECTOR