Costs Decision

Hearing held on 18 October 2005
Site visit made on 18 October 2005

by J G Roberts BSc(Hons) DipTP MRTPI

an Inspector appointed by the First Secretary of State

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Date
16 DEC 2005

Costs application in relation to Appeal Refs: APP/L2820/C/05/2000768 & APP/L2820/A/05/2001189
Land rear of 10 Barlows Lane, Wilbarston, Market Harborough, Leicestershire LE16 8QY

- 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 Messrs W W Brown & Sons for a full award of costs against Kettering Borough Council.
- The hearing was in connection with an appeal against (1) an enforcement notice alleging the erection of a brick built building and (2) the refusal of planning permission for the erection of a 2-storey detached dwelling and garage (substitution of house type).

Summary of decision: the application is allowed and an award of costs is made.

Submissions for the appellant

1. The appellant refers to the general principles governing awards of costs as set out in Circular 8/93 and the circumstances in which local planning authorities are at risk, including by failure to provide evidence, on planning grounds, to substantiate each reason for refusal of planning permission or to demonstrate good grounds for considering it expedient to issue an enforcement notice. They are expected to produce evidence to show *clearly* why a development cannot be permitted (Annex 3 paragraph 8). They are not bound to accept the professional advice of their officers but are expected to demonstrate reasonable grounds for taking a decision contrary to it (paragraph 9). It is unreasonable for an authority to issue an enforcement notice to remedy a breach to which the Secretary of State finds there is no significant planning objection.

2. The decision to refuse planning permission was taken by members of the Council against the advice of officers. It was in respect of a development (including the building as so far constructed) that officers found to be an improvement on that previously approved, providing a more balanced and symmetrical house. Officers' notes of the committee meeting make no reference to the form of the roof as a concern of members. At the hearing Miss Willatts confirmed that she had notes of the meeting but they contained no reference to the matter. There is no evidence of how the amended roof form would cause material harm contrary to officers' specific recommendations.

3. Secondly, the local planning authority now accepts a combination of brick and stone walls, but not the disposition of these materials. Members of the committee had included in their objection such a combination, preferring stone only. The members had one view. The authority's case as put to the hearing was another.

4. Against this confusing picture the authority prays in aid the existing dwelling on Plot 2, arguing that it neither preserves nor enhances the Conservation Area. Yet it took no enforcement action against it, even though it was well aware of its presence. It is now an established part of the Conservation Area and a part of its character about which the local planning authority can do nothing (and has said that it will not). Other than factually there is no reference to it as a material consideration. It is now perverse of the authority to invite the Secretary of State to agree that it was a mistake and that it should be rectified by action against the development on Plot 1.

5. The reasons for refusal of planning permission have not been substantiated by the local planning authority. An award of costs is justified under Annex 3 paragraphs 7, 8 and 9. Construction of the walls of the house began in the autumn of 2002. It took nearly 2 years for the authority to decide to enforce against it. Its decision to do so was prompted not by pro-active investigation but by the submission of a planning application (for a revised proposal) by the appellant. Meanwhile, the house on Plot 2 had been occupied since June 2001 but no action was taken against it. A full award of costs is justified.

Response by the local planning authority

6. This is a straightforward case of an application refused and enforcement action taken. The application had been recommended for approval but it was refused on the greater negative weight given to the choice of materials by members. In connection with the appeal the authority put forward a case to explain this. An acceptable scheme might include some brick. Details of proposed materials had been given but their disposition should have been agreed prior to commencement of the building.

7. The dwelling on Plot 2 now appears to be lawful but it is not a good example to be followed in neighbouring development. Within the Conservation Area not every building is taken as a desirable precedent.

8. The decision not to take enforcement action against the house on Plot 2 related to the human rights implications of the demolition of an occupied dwelling. The appellant's criticism of the local planning authority relates in practice to questions of resources and its ability to monitor development. The appellant had failed to discharge conditions precedent. The responsibility for doing so rested with him.

Reply by the appellant

9. This is not a case where the appellant is hiding behind failure to comply with such conditions. He had met with a planning officer on site in June 2002 to talk specifically about the proposed materials. In the case of Plot 2 it is hard to accept that officers were not aware of its construction and completion when visiting Plot 1 during that period. There is no written evidence at all that the authority had considered enforcement action in relation to Plot 2. The only reference to it is in the Council's appeal statement. The matter had never been brought to the committee's attention.

Conclusions

10. I have considered the application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeals, costs may only

be awarded against a party that has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

11. It seems to me that the Council had a point, which it substantiated with evidence both before and at the hearing, concerning the disposition of the combination of brick and stone on the building both as constructed and as proposed to be completed. It is quite clear (and admitted) that the appellant failed to comply with conditions precedent subject to which planning permission was granted in January 2001. The building was constructed up to wall plate level, using facing materials that had been approved in principle but the distribution of which had not. That is why the structure that has been erected was in breach of planning control. In my appeal decision I did not agree with the authority's stance entirely, but on the issue of the distribution of the facing materials the authority's position (as it was stated to be at the hearing) was not an unreasonable one for it to have taken.

12. However, the reason for refusal of planning permission was not, in the decision notice, related to that matter. It concerned size, massing and form. No evidence of substance was presented to justify the stated reason for refusal. Nor was any creditable evidence put forward to justify the view initially put forward that the building should have been, or should be, constructed wholly with stone facing; that was not the local planning authority's case at the hearing. The appellant was put to the expense of rebutting both these points unnecessarily.

13. It would have been open to the local planning authority, if dissatisfied with the disposition of brick and stone facing about the building, to have granted planning permission subject to conditions. One approach would have been that contained in the officers' report to committee of the planning application, involving a requirement for formal approval of the distribution before the start of any further operations. As an alternative, given that samples of materials approved in principle by the Council were by then available on the uncompleted and unauthorised building, such conditions could have included a requirement to reconstruct specified parts of the building with different facing materials and a detailed specification of what the finished result should be by reference to the operations carried out hitherto. It did not do so.

14. I consider that the local planning authority's behaviour in refusing to grant planning permission subject to conditions amounted to unreasonable behaviour. Such a conditional planning permission would have remedied the breach of planning control that the local planning authority had identified and the injury to amenity caused thereby. The issue of the enforcement notice was unnecessary. Therefore the appellant was put to the expense of the appeals unnecessarily. The application is allowed in the terms set out below in the Formal Decision and Costs Order.

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 Kettering Borough Council shall pay to Messrs W W Brown & Sons the costs of the appeal proceedings, such costs 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 Kettering Borough Council alleging the erection of a brick

built building and an appeal under section 78 of the Act against the refusal of Kettering Borough Council to grant planning permission for the erection of a two storey detached dwelling and garage (substitution of house type).

16. The applicant is now invited to submit to Kettering Borough 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 Supreme Court Costs Office is enclosed.

Inspector