Costs Decision

Hearing held on 1 and 2 July 2009
Site visit made on 2 July 2009

by P W Clark MA MRTPI MCMI

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

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date:
30 July 2009

Costs application in relation to Appeal Ref: APP/Q1445/A/09/2097917
Gala Bingo Hall and adjacent car park, Portland Road, Hove, East Sussex BN3 5JB

- 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 Downland Housing Association Ltd for a partial award of costs against Brighton & Hove City Council.
- The hearing was in connection with an appeal against the refusal of planning permission for demolition of the existing building and redevelopment of the site to provide a new GP surgery at part ground, part first floor, a new D1/D2 unit at ground floor and 38 (revised to 37) residential units above in a part 3, part 4 and part 5 storey building, including 16 affordable units (40%) (revised to 42%) with surface car parking and landscaping at rear.

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

Procedural matter

1. The application was made with reference to paragraphs B16, B25 and B29 of Circular 03/2009 but that does not apply to appeals made at the time this appeal was made. I have therefore translated the references to their equivalents in Circular 8/93 (Annex 3, paragraphs 8, 11 and 20), which applied at the time, although now cancelled.

The Submissions for Downland Housing Association Ltd

2. The application is made for a partial award of costs in respect of refusal reasons 3 & 4 (loss of indoor recreation and loss of community facility), the first part of refusal reason 8 (external walkways causing overlooking to neighbours) and refusal reasons 9 & 12 (noise and disturbance).

3. The Council confirms that reasons for refusal 3 & 4 were principally based on an insufficiency of information, including marketing information, to justify an exception to the policies. The appellant produced detailed evidence, concerning the marketing of the property and concerning the need and demand for indoor recreational, sporting and D2 uses, including aerial photographs. The evidence is not challenged by any technically expert rebuttal evidence from the Council but only by unsubstantiated assertion. The Council's position is wholly undermined by its decision in respect of its own Ice Rink site.

4. At the hearing, the Council specifically confirmed that there is no in principle objection to housing, yet reasons 3 & 4 in effect raise objection in principle unless certain criteria are met. For the recreation use the Council was unable to give any evidence to demonstrate that there was not an excess of provision

within the catchment area of the bingo hall. It accepted that the facilities had been replaced elsewhere and that they were as close as possible to existing users without any rebuttal or contrary evidence. For the community use, the Council accepted that the scheme incorporated a replacement use and also confirmed that there was no evidence to contradict marketing evidence which showed no demand for this or other types of community use, so the criteria of the policies were met.

5. In the circumstances, the evidence produced by the Council to substantiate these two reasons for refusal falls woefully short of providing a respectable basis for its stance. Therefore the Council's behaviour is unreasonable. Unnecessary costs have been incurred in commissioning the work of two expert witnesses to rebut these reasons for refusal.

6. Concerning reason for refusal 8, it was accepted by the Council that the provision of a louvred screen to the walkways could eliminate overlooking and loss of privacy to neighbours. Such a matter is one that is capable of being dealt with by condition. Paragraph 11 of Annex 3 of Circular 8/93 is relevant.

7. Reasons for refusal 9 & 12 concern noise and disturbance to neighbours and to potential occupants. In response to a question the Council confirmed that it had no technical or expert evidence to support its reasons for refusal. The appellants were said not to have produced evidence but paragraph 8 of Annex 3 to circular 8/93 expects the authority to produce evidence to substantiate each reason for refusal.

8. Revisions to the scheme had been submitted informally to the Council but advice was received that they would still lead to a refusal, so no revised application was made. The Council has been put on notice at an early stage concerning these issues. There is no excuse for a failure to produce relevant evidence or, as invited, to withdraw the refusal reasons. This constitutes unreasonable behaviour and has incurred unnecessary costs in challenging these points at the hearing.

The Response by the Council

9. The Council determined the appeal in November 2008, based on the plans as originally submitted in August 2008. It withdrew refusal reason 11 once the error on the plans was acknowledged. It is the Council's right to pursue other reasons despite an invitation to withdraw.

10. At a hearing, as opposed to an inquiry, it is normal for non-experts to give evidence. The appellant's evidence missed the point of the policies which are concerned with need, not with redundancy or viability. The claimed replacement facilities replaced others in the Brighton area, not the site in question. The policy is designed to retain uses unless their replacement is considered through the plan-making process, so it places the burden of proof on the appellant, whose evidence remains insufficient. The Council's advice concerning its own ice rink is that lack of marketability is not a sufficient ground on its own to come to a decision and so does not undermine its position on this appeal.

11. The acceptability of housing in principle does not undermine the case for retaining recreational or community uses in a mixed use scheme.

12. At the time of determination of the application, there was no proposal to screen the walkways. The proposals were only put forward at a late stage and are a contrived solution.

13. The Council accepts that it has not put forward technical evidence in support of reasons 9 & 12 but it is difficult to do so. The appellants have also not produced technical evidence in challenging these reasons. Nevertheless, the Council has real and justified concerns with noise from the car parking and from other aspects of the development.

14. The Council was put on notice only in April. The decision was made in November last year. The developer had time to put forward a revised application and gain a decision which might have avoided the necessity of an appeal.

Conclusions

15. I have considered this application for costs in the light of Circular 8/93 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.

16. It is fair to say that policy SR21 sets high hurdles for its criteria to be met but there is nothing within the policy itself which puts the burden of proof on the applicant. In contrast, Paragraph 8 of Annex 3 of Circular 8/93 places the burden of proof clearly on the local authority. As ever, it remains the responsibility of the local planning authority to make its own evaluation of an application in the light of the policies in the development plan and other material considerations. If a local authority considers that insufficient information is provided for it to determine the application, a procedure exists under Article 4 of the Town and Country Planning (Applications) Regulations 1988, not used in this case.

17. The information provided by the applicant may not have been sufficient to meet the punctilious and exacting standards of the local authority's own evaluation processes but that does not excuse the local authority from the responsibility of producing its own evidence to justify its decision. The material submitted with the application, incomplete and partial though it may be, clearly indicates a probability that the requirements of policy SR21 would be met. Corroborating evidence has been supplied during the appeal. In the face of that, it is not reasonable for the local authority simply to repeat a mantra of insufficient information.

18. In the case of policy HO20, the hurdles are lower, so the same arguments apply more forcefully. Furthermore, in this case, the local authority appears to have overlooked the fact that the existing and proposed uses both appear in the same list of community facilities for which the Council is trying to preserve accommodation. Within the policy itself, criterion (d) specifically provides for the needs of one use in the list to be substituted for another. I conclude that the Council has been unreasonable in refusing permission for reasons 3 & 4 and that unnecessary costs have been incurred in challenging those reasons for refusal.

19. The revisions to the application demonstrate that a louvred screen, attached to the walkways proposed, would provide privacy without loss of light to rooms along the walkway and could be required by a condition. The screen would be an ingenious device, a testimony to the skill of the applicant's architect. It is a device new to my experience and, as the Council freely admitted, new to it. In these circumstances it is not unreasonable for the Council to have failed to anticipate the possibility of its design and so, not unreasonable for it to have failed to use a condition to meet this objection to the scheme. I conclude that refusal reason 8 is not unreasonable.

20. Refusal reason 9 was simply answered by the provision of an acoustic fence in the revised scheme. Such devices are commonly used and should be within the experience of the local planning authority, so I agree that it was unreasonable to have refused permission on this ground when a condition could require its use. Unnecessary costs have been incurred insofar as any evidence was prepared for the appeal but on the basis of the brief time (15-20 minutes) spent on this point at the hearing, I would expect the costs to be small.

21. Refusal reason 12 is based on an allegation of insufficient information, so my previous comments about the burden of proof and the applicability of paragraph 8 of Annex 3 of circular 8/93 apply. It was unreasonable to refuse permission on this ground but I would expect the unnecessary costs incurred to be small, given that the point was dealt with at the hearing in a matter of minutes by a simple assurance that no plant or machinery was intended which could give rise to noise.

Formal Decision and Costs Order

22. 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 Downland Housing Association Ltd the costs of the appeal proceedings limited to those costs incurred in challenging reasons for refusal 3, 4, 9 and 12, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under section 78 of the Town and Country Planning Act 1990 as amended against the refusal of planning permission for demolition of the existing building and redevelopment of the site to provide a new GP surgery at part ground, part first floor, a new D1/D2 unit at ground floor and 38 (revised to 37) residential units above in a part 3, part 4 and part 5 storey building, including 16 affordable units (40%) (revised to 42%) with surface car parking and landscaping at rear on land at Gala Bingo Hall and adjacent car park, Portland Road, Hove, East Sussex BN3 5JB.

23. 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 Supreme Court Costs Office is enclosed.

P. W. Clark Inspector