APPEAL REF: APP/C1570/A/14/2221494

RE: LAND NORTH AND SOUTH OF THAXTED ROAD, SAFFRON WALDEN

RESPONSE TO APPLICATION FOR COSTS ON BEHALF OF UTTLESFORD DISTRICT COUNCIL

INTRODUCTION

1. There is no justification for requiring the Council to pay the Appellant's costs in this case. In summary this is because:

   i. The Council's conduct, when considered as a whole, simply cannot be characterised as unreasonable;

   ii. In any event, it is clear that it was not the Council's refusal of the planning permission which *directly* caused the Appellant to incur the costs involved in preparing for and attending a four-day planning inquiry;

   iii. To award costs in such a case would set a dangerous precedent.

THE NPPG COSTS GUIDANCE

2. The NPPG explains that the default position is that *"parties is planning appeals…normally meet their own costs"* (para 16-028). The conditions which must apply for a cost award to be made against a party are as follows:

   "Costs may be awarded where:

   - *a party has behaved unreasonably; and*
   - *the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process."* (para 16-030)

3. Three points should be noted about this test. First, it is a necessary, although not sufficient, condition for the award of costs that there is a finding that the relevant party's behaviour was unreasonable. This is, of course, a matter of judgement, but in coming to that judgement it is self-evident the party's conduct must be looked at in the round. Secondly, a finding of 'unreasonable behaviour' alone does not justify an award of costs. The costs regime is not punitive: it is only where the unreasonable behaviour has directly caused unnecessary or wasted expense that an award can be made. This represents a tightening of the test

previously found in Circular 03/2009.[1] Thirdly, even where the two conditions are satisfied, the power to award costs is discretionary (this is evident from the word "may" in the passage cited above, but see also para 16-031 of the NPPG where it is expressly confirmed).

RESPONDING TO THE COSTS APPLICATION

No unreasonable behaviour

4. When considered as a whole – as it must be - it is clear that the Council's conduct has not been unreasonable.

5. As explained in opening, following the lodging of the appeal the Council acted extremely quickly to review its case. The appeal form was dated 2 July 2014 and the start date for the appeal was set as 18 July 2014. Within one month the Council had convened two extraordinary meetings of its full Council to review the appeal and on 19 August 2014 the Full Council resolved not to defend the appeal. The Planning Inspectorate and the Appellant was informed of this position by 21 August 2014. This was 8 days prior to the Statements of Case being due[2], almost 3 months prior to the deadline for exchange of proofs of evidence[3] and nearly 7 months before the Inquiry opened.

6. There can be no dispute that the Council acted in an expeditious and responsible manner by reviewing its case following the launch of the appeal. It was the antithesis of unreasonable behaviour.

7. What is more, an early review of its case following the launch of an appeal is, at least implicitly, required by government guidance. The NPPG which provides that a local planning authority is at risk of an award of costs if they fail to:

> *"…review… their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination)… as part of sensible on-going case management."* (para 16-049)

8. This guidance would be meaningless if, notwithstanding an expeditious review of their case following the lodging of an appeal followed by a decision not to contest the appeal, a local planning was then fixed with the full costs of an appeal, in respect of which which it had

[1] The tightening arises from the addition of the term 'directly'. This change in wording of the policy must have some meaning. It was clearly amended to ensure that costs are only awarded when the unnecessary or wasted costs are the direct result of unreasonable behaviour, not simply where there was unreasonable behaviour which can said to be somehow causally connected.
[2] Deadline 29 August 2014
[3] Deadline 11 November 2014

little or no control as to forum, the issues in dispute, its conduct or duration. There would be simply no point in a local planning authority ever reviewing a case following refusal.

9. The Council was following NPPG guidance by reviewing its case as part of 'sensible ongoing case management', did so extremely expeditiously and informed all parties of its decision not to defend the appeal before any substantial appeal costs can have been incurred by any party. This behaviour was far from unreasonable.

No <u>direct cause</u> of unnecessary or wasted expense of Inquiry

10. Even if, contrary to its primary case, the Inspector concludes that the Council's behaviour, taken as a whole, was unreasonable, it patently did not *directly* cause the Appellant to incur the unnecessary or wasted expense of the Inquiry.

11. The Council accepts that, if its behaviour is considered to be unreasonable, this behaviour will have directly caused any expenses incurred up to 21 August 2014 (when the Planning Inspectorate and Appellant were informed of the Council's decision not to defend the appeal). This would include the costs of lodging the appeal and, arguably, the costs of preparing the Appellant's Statement of Case.

12. In contrast, the Council's behaviour patently did not cause – let alone *directly* cause – the costs of 4 proofs of evidence served 3 months after the decision not to defend, 4 addendum proofs served around 6 months later, 2 technical transport notes or 4 days' worth of Inquiry time (at which, at times, the Appellant had 7 professionals in attendance). Rather, these costs were incurred due to the decision of Saffron Walden Town Council and We Are Residents to apply to become a Rule 6 party and advance substantive evidence objecting to the appeal.

13. Had the Rule 6 party not decided to object - and advance substantive evidence in support of its position – the costs listed above simply would not have been incurred. The Council does not suggest that the Rule 6 party's conduct was unreasonable, however the costs caused by position taken by a third party cannot be laid at the door of the Council.

14. It will no doubt be said that 'but for' the Council's refusal the Appellant would not have incurred any appeal costs, and it is irrelevant - and the Council's bad luck - that these appeal costs were vastly increased by the need to respond to the Rule 6 party's case and participate in a 4 day Inquiry.[4] However, this would be to overlook the fact that, in lieu of the Rule 6

[4] There is a limit in the usefulness of the 'but for' test when considering whether action x has "directly caused" event y. It could be said, for instance, that "but for" the Appellant making the original planning application they

party's objection and advancement of substantive evidence, the appeal would have taken a very different route. It would have most likely been dealt with either by way of written representations, a hearing or, at most, a very short undefended Inquiry, with minimal costs consequences for the Appellant. Certainly there would have been no need for the production of substantial proofs of evidence or to spend 4 days in a planning inquiry, with the associated cost consequences.

15. This, therefore, gives lie to the contention that it was the unreasonable behaviour of the Council that 'directly caused' the full costs of the appeal. Clearly it did not. At the time the Council made its decision there were a number of routes by which the appeal could have proceeded. It was the involvement of the Rule 6 party that led to the Inquiry route that has been taken, and which 'directly caused' the costs associated with that route to be incurred.

16. The Council has no control of the conduct of the Rule 6 party nor the evidence it has produced in support of its case. Nevertheless, had the Appellant considered the Rule 6's evidence did not reasonably substantiate its case – and had they considered that the costs of the appeal truly been 'wasted' or 'unnecessary' - its recourse was to make an application for costs against the Rule 6 party.[5] It is telling that no such costs application has been made.

17. It is entirely inappropriate for the Appellant to attempt to affix the costs of responding to the case made by the Rule 6 party on the Council whilst, at the same time, not contending that the Rule 6 party failed to bring reasonable evidence to substantiate their case.

Failure to mitigate

18. Furthermore, and in any event, the Appellant has singularly failed to mitigate its costs. Once the Council had reviewed its position on the appeal and decided not to defend, it was open to the Appellant at any time to resubmit the application. It choose not to do so. If and when that application was approved by the Council (as was bound to happen given the Council's positon on the appeal), the appeal could have been withdrawn and the costs avoided.

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wouldn't have incurred the costs of the appeal. There is undoubtedly a causal link between the two, but no-one would sensibly suggest that the making of the original planning application directly caused the Appellant to incur the costs of the appeal. The intervening act of the Council refusing permission would no doubt be prayed in aid. But likewise, whilst there is undoubtedly a link between the Council refusing permission and the Appellant incurring the full costs of the inquiry, there is similar an intervening act: the decision of the Rule 6 party to oppose the application, bring forward substantive evidence and necessitate detailed proofs of evidence and a 4 day planning inquiry.

[5] One of the consequences of becoming a Rule 6 party is that costs orders can be made against them if their behaviour is unreasonable. Unlike other interested parties this is not restricted to exceptional circumstances (para 16-056)

19. Such course of action is foreshadowed by the NPPG which provides that:

> *"If the local planning authority grants planning permission on an identical application where the evidence base is unchanged and the scheme has not been amended in any way, they run the risk of a full award of costs for an abortive appeal which is subsequently withdrawn"* (para 16-049)

20. This guidance clearly envisages situations arising in which applications are re-submitted following a refusal decision, once the local planning authority had reviewed its position. This is not an uncommon scenario. In such cases the Council is liable only for the costs of the abortive appeal which is withdrawn. There was no reason why such a course of action could not have been taken in this case. If the Appellant had done so, the vast majority of the costs occasioned by this appeal would largely been avoided.

21. The option of the Appellant's resubmitting the application in this case – and thus avoiding the costs of the appeal – is not simply a hypothetical. Discussions were had between the Council (a the highest level – including their Chief Executive, Mr John Mitchell, the Assistant Director of Planning and Building Control Mr Andrew Taylor and Mr Roger Harborough, the Director of Public Services) and the Appellant (represented by their Chief Executive, Managing Director and Planning Director) following the refusal of permission during which the Council Officer's encouraged a resubmission of the application. As can be seen from the email attached to this costs response on 10 September 2014 – after the Council had resolved not to defend the appeal -Mr Ian Mitchell explained that the Appellant had elected not submit a further application.

22. Accordingly there were at least two intervening events between the Council's decision to refuse permission and the Appellant incurring the costs of this Inquiry. Firstly, the Rule 6 party's decision to object and produce substantial evidence in support of its objection. Secondly, the Appellant's decision not to resubmit their application. Even if the Council's behaviour was unreasonable, it patently did not *directly cause* the vast majority of expenses incurred in relation to this Inquiry.

Wider Implications

23. If cost awards are made in such cases it would remove any incentive for local planning authorities to review their cases once an appeal is refused. Rather than encouraging responsible and reflective behaviour, it will create a perverse incentive for local planning authorities to defend appeals whatever the merits. 'In for a penny, in for a pound' will be the only (and entirely justifiable) prevailing mentality amongst local planning authorities

following refusal of permission. This would be directly contrary to the objectives of the costs regime.

24. To award costs in this case would therefore set a dangerous precedent. This factor is undoubtedly relevant to the Inspector's discretion as to whether to make a costs award and, the Council submits, should weigh heavily against the award of full costs.

Miscellaneous Points

25. Two further points need to be made. First, on any account, any costs award cannot cover those matters which would have been incurred in any event (eg negotiations on the section 106 agreement). Secondly, as the costs application is made on substantive and not procedural grounds, if the Inspector refuses permission the costs application must necessarily fail.

CONCLUSIONS

26. The Council submits that, when considered as a whole, its behaviour has not been unreasonable. Far from it: the expeditious review of its position was the conduct of a reasonable and responsible local planning authority.

27. Even if this is wrong, it is patently clear that it is not the Council's behaviour which has directly led to the vast majority of the costs of the appeal. These have been caused by the joining of the Rule 6 party and their continued objection (supported by substantial evidence). It is telling that no costs application has been made against them. Moreover, it was open to the Appellant to resubmit the application and avoid the vast majority of the costs of the appeal. They have chosen not to so. All in all, it is plain that the Council's behaviour has not 'directly caused' the Appellant's costs of the appeal

28. Finally, awarding costs in this instance would set a precedent which would dissuade local planning authorities form taking reasonable and responsible positons on review of their case. It would thus be contrary to the objectives of the costs regime.

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