The Planning Inspectorate

Costs Report to the Secretary of State for Communities and Local Government

by Antony Fussey JP BSc(Hons) DipTP MRTPI

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

Date: 6 August 2012

TOWN AND COUNTRY PLANNING ACT 1990

MOLE VALLEY DISTRICT COUNCIL

APPEALS BY

MR ROY AMER, MS SUSAN KING, MR SIMON DOHERTY, MRS ROSE DOHERTY AND MR CHARLIE DOHERTY

Inquiry opened on 12 June 2012

River Lane, Leatherhead, Surrey, KT22 0AY

Appeal Refs: APP/C3620/A/12/2169062, 2169066 and 2169068; APP/C3620/C/12/2172090, 2172094, 2172095, 2172099, 2172104, 2172106, 2172116 and 2172145

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- The application is made under the Town and Country Planning Act 1990, sections 78, 174 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Roy Amer, Ms Susan King, Mr Simon Doherty, Mrs Rose Doherty and Mr Charlie Doherty for a partial or full award of costs against Mole Valley District Council.
- The inquiry was in connection with appeals against 3 refusals of planning permission for the permanent use of the land as a Gypsy and Traveller caravan site and the retention of specified buildings and works, and against 2 enforcement notices requiring the use of the land to cease and various specified items to be removed.
- The inquiry sat for 4 days on 12 – 15 June 2012, inclusive.

Summary of Recommendation: The application for a partial award of costs be granted.

1. The written application for costs appears briefly at the end of the appellants' closing submissions [37][1], and refers to points previously made in them. It says that the application is for a full and/or partial award. The Council's response was made verbally; it also referred to points made in closing submissions [35].

The Submissions for the Applicants

2. The Council acted unreasonably in terms of paragraph B15 of Circular 03/2009. The development could clearly be permitted "*having regard to the development plan, national policy statements and any other material considerations*".

3. The Council failed to produce evidence to show clearly why it could not be permitted, and none to substantiate its reasons for refusal. There was no respectable basis for its stance. There is therefore a breach of paragraph B16.

4. The officers' report [10] was long and comprehensive. Its advice includes that from the EIA; this was required to be carried out by the Equality Act 2010 and sets out the appellants' circumstances and educational and health needs. It found that it would not be proportionate to move them outside the north of the District. The Council did not seek to impeach it and had no reasonable grounds to disagree with the extensive search for an alternative site, derived from it. This found that any new site would be likely to be in the Green Belt, and that the existing one is better than the others identified.

5. It is not sufficient just to assert that councillors are entitled to reject the officers' recommendation. The Circular requires that, "*if officers' professional or technical advice is not followed, authorities will need to show reasonable planning grounds for taking a contrary decision and produce relevant evidence on appeal to support the decision in all respects*". There was no detailed justification for such a rejection, and no reasonable planning grounds to take a decision contrary to the professional advice. As well as rejecting the recommendation, the Council failed to adequately consider relevant advice – in this case the EIA – and gave no

[1] References in [] are to appeal documents, listed at the end of my main Report. Those in () are to paragraphs in the Report.

"clear and rational explanation of the position taken". This breaches paragraph B23.

6. The Council accepts that the only issue is the weight to be given to the various matters in the balancing exercise; this is the central issue of the costs application. There is no evidence in planning terms to justify the rejection of its officers' professional recommendation. In these circumstances, paragraph B20 is breached.

7. Given the slippage of 5 years beyond the time promised in 2007 to prepare a DPD, the possibility of a temporary permission should have been paramount, and could have allowed the development to proceed. However Cllr Aboud and Mr Carr confirmed that this was not discussed at the committee (118, 130). The belief that a temporary permission could not be granted was derived from a Counsel's opinion, but this was not provided to the Inquiry - or even to its own witness.

8. The Council did not even suggest a temporary condition at the Inquiry despite the clear indication in Mr Cunnane's evidence that this could be appropriate. This shows that the Council had not properly considered the possibility of imposing relevant conditions. This failure further breaches paragraphs B25 and B29.

9. The Council relied on Cllr Aboud's evidence but did not choose to call him as a witness. Paragraph 11 of his statement - that no special consideration should be given to Gypsies' needs over those of the settled population - can be interpreted as being consistent with PPTS. However PPTS was not published until after the decision. His understanding of what was government policy, communicated to the Committee, varied from what PPTS actually says. His view at the time was based on a letter from an MP, which he refused to put in evidence; he would not even name its author. He agreed that *Chapman* contradicted this understanding; at the Inquiry he sat for 20 minutes looking through PPTS, but still could not explain how his understanding and the MP's letter accorded with it.

10. Cllr Aboud also confirmed that matters of human rights or proportionality were not discussed by members when considering refusing the application, despite being drawn to their attention [10 page 32]. In fact the Council carried out no welfare or personal enquiries when it decided to take enforcement action only 6 weeks after the refusal. This breaches advice in Circulars 18/94 and 10/97, and case law in *Kerrier* and *Chapman*. Indeed, the enforcement report did not refer to such matters at all.

11. As a result of the Council's unreasonable behaviour, the appellants incurred unnecessary expense in pursuing the appeals.

The Response by Mole Valley District Council

12. The EIA usefully identified the personal circumstances involved, but there was no statutory duty to undertake one. It assessed the impact of moving the occupiers, and the Council accepted its recommendation that an alternative site should be about 1.2ha in size, be in the north of Mole Valley and sought for on the basis of a single extended household,. The weight given to the EIA and to the results of the subsequent search was a matter for members, and it was perfectly proper for them to take issue with the search parameters.

13. The appellants' advocate agreed that the issue is one of planning judgement about the Green Belt balancing exercise. The evidence before the Council showed that this balance did not clearly lie with the appellants. Members exercised a planning judgement, and balanced the harm to the Green Belt with that to the occupiers; it was for them to assess what weight to give to the various factors. The fact that they did not accept that the site had to be in the search area does not go against the planning judgement; members just gave less weight to this matter than their officers did. The weight they gave showed that the development should not go ahead, so there was no breach of paragraph B15.

14. There was a single question – whether other considerations outweighed the harm caused. Mr Cunnane's substantial professional evidence endorsed members' view that they did not; there was no breach of paragraph B16. He shows that members had reasonable planning grounds to attribute different weights to the various material considerations than their officers did. Accordingly, the decision contrary to their advice did not breach paragraph B20.

15. "*Consideration*" is not the same as "*endorsement*". The Council took account of professional advice in the form of the officers' report and the EIA. Cllr Aboud's evidence shows that he paid great attention to it, so it was clearly "considered", as paragraph B23 requires. The criticism of his statement is misplaced; despite the MP's letter, it is not inconsistent with the "fair and equal treatment" promoted by PPTS's paragraph 3. Cllr Aboud wants equality of treatment.

16. The possibility of a temporary permission <u>was</u> before members – the officers' report referred to it and also advised members of the guidance in Circular 1/06 [10: page 31]. The fact that it was not specifically discussed did not mean that it was not considered. On the information before members, they were entitled to agree with their officers that a temporary permission could not be granted when the applications specifically sought permanent use. Accordingly it was reasonable to refuse permission, as no condition could make the developments acceptable. There was therefore no breach of paragraphs B25 or B29.

17. Circular 18/94 is directed specifically to situations where a council is seeking to evict peremptorily, which is not the case here. While *Kerrier* says that it is equally applicable to decisions on enforcement action, it also says that precise steps will depend on the circumstances of a particular case. Here, the appellants were originally represented by a planning consultant with a long experience of this type of development. He provided details of relevant circumstances; they were set out in the officers' report [10]; the report on enforcement action [6: A23] expressly referred back to that report, in paragraphs 1.1 and 7.3. There was no reason to believe that any information had been held back by the appellants, and no reason to ask for more. The additional circumstances now advanced had not been disclosed until well into the appeal process.

18. For the above reasons, there is no basis for an award.

Conclusions

19. Circular 03/2009 advises that, irrespective of the outcome of the application, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.

20. The appellants clearly accept (63) that there is harm to the Green Belt by reason of inappropriateness, impact on openness and on visual amenity. Against these they advance certain material considerations, to which varying amounts of weight need to be given, in order to assess whether they clearly outweigh the identified harm so as to amount to the very special circumstances necessary to justify the development. Both parties agreed that a balancing exercise is involved. It is not in my view unreasonable for different people to attribute different weights to the various factors in carrying out that exercise; these may legitimately produce different outcomes.

21. In this case there was a comprehensive and well-written report from the Council's officers, which weighed the various considerations and, on balance, recommended approval of the 3 applications. However, by a close vote (107) members did not accept the recommendation. Mr Cunnane provided substantial planning evidence to justify the different amounts of weight given by the members to the various considerations. Cllr Aboud, while perhaps surprisingly appearing as a third party rather than a Council witness, amplified his evidence.

22. I am not persuaded that the interpretation of government policy, apparently conveyed to Cllr Aboud through a MP's letter not provided to the Inquiry, and which did not completely accord with the subsequent PPTS, directly led to the eventual decision. Of more import was the questioning of the parameters of the search for alternative sites. I have endorsed the concerns expressed (184) and I do not consider that it was unreasonable for members to give less weight to the results of the search than did the officers.

23. In my opinion, Mr Cunnane and Cllr Aboud substantiated the Council's decision and its view that the development should not be permitted. In my opinion they demonstrated that there was a respectable basis for disagreeing with the officers' recommendation. This indicates that the Council did not act unreasonably in terms of paragraphs B15, B16 or B20.

24. Circular 10/97 says that "*the personal circumstances, including such matters as health, housing needs and welfare, of persons suspected of acting in breach of planning control must be taken into account when deciding whether to take enforcement action*". It refers back to *Kerrier*, which in turn cites Circular 18/94 on the type of information to be taken into account.

25. There is no requirement for a specific investigation before enforcement action is considered. In this case, the committee report advising on enforcement action expressly referred members back to the report on the applications, which set out the personal circumstances provided by the appellants, and supplemented by the education authority [10: pages 8-10]. I do not consider that the Council acted unreasonably by resolving to take enforcement action in the light of this information, rather than carrying out a separate investigation.

26. In the light of the above, I do not consider that the Council's actions warrant a full award of costs.

27. The officers' report did address the possibility of granting a temporary planning permission, but recommended against it on the basis of a Counsel's opinion. However members were considering the application in the context of a failure of policy to provide any sites, and a delay in the DPD process to well beyond the

date promised to the previous Inspector. At the meeting, Cllr Aboud alerted members to the deficiencies in the parameters of the search for alternatives, and it seems to me that this produced the rejection of the officers' recommendation.

28. Despite this, the applications were not adjourned for a more realistic search to be carried out. Moreover the continuing delay in the DPD process clearly meant that no alternative site would be identified through it in the near future. The personal circumstances – as notified by the appellants' agent – were clearly known by the members, who would have been aware of, for example, the number of children whose education would be disrupted by a roadside existence.

29. In these circumstances, members should have been particularly alert to the possibility of a temporary permission, but Cllr Aboud's evidence was that this matter was not even discussed. I would have expected at least some discussion of this important point. Instead, some 6 weeks later, enforcement action was authorised with a wholly unrealistic compliance period.

30. The argument that a temporary permission would not be legally possible when the applications sought permanent use was based on advice in a Counsel's opinion. However this was not provided to the Inquiry, preventing the Secretary of State or the appellants from considering it. It was not even shown to the Council's witness – and in his evidence he clearly did not rule out a temporary permission. At the Inquiry, the Council's advocate did not seek to pursue this argument – nor indeed were there significant efforts to argue against a temporary permission.

31. These points lead me to the view that, when rejecting the recommendation before them, members did not adequately consider the possibility of imposing an appropriate condition. This was unreasonable in terms of paragraphs B23, B25 and B29.

32. As set out in my report, on balance I consider that even a temporary permission would have been inappropriate because of the continuing impact of dispersed development on the 3 application sites (209). However, the Council clearly did not consider this possibility – which, as the appellants say, may have avoided the appeals. Despite my views on the planning merits of the applications, the Council may have felt able to grant temporary permissions for them, perhaps with conditions requiring significant changes to the layouts. Failure to adequately consider such a step was unreasonable. It involved the appellants in unnecessary expense in addressing this point at the Inquiry.

33. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 3/2009, has been demonstrated in relation to the failure to adequately consider the possibility of granting temporary planning permissions in respect of the 3 applications. I therefore conclude that a partial award of costs is justified in respect of this matter only.

Recommendation

34. I recommend that the application for a partial award of costs be granted.

Antony Fussey

INSPECTOR