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Your Ref: SN/CW/676001

Our Ref: APP/K5600/V/07/1201828
APP/K5600/V/07/1201859
APP/K5600/V/07/1201860

Date: 10 June 2008

Dear Sir

LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 - SECTIONS 77 AND 322A
PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) ACT 1990
LAND AT HOLLAND PARK SCHOOL, AIRLEE GARDENS, CAMPDEN HILL ROAD, LONDON W8 7AF: "CALLED-IN" APPLICATIONS BY THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA: APPLICATION FOR COSTS BY CAMPDEN HILL RESIDENTS' ASSOCIATION

1. I am directed by the Secretary of State for Communities and Local Government to refer to the Planning Inspectorate's letter of 23 November 2007 confirming the withdrawal of the applications[1] by the Royal Borough of Kensington & Chelsea (referred to below as RBKC or "the applicants"). The applications were made by the Education Department of RBKC to the Royal Borough as local planning authority for "Council's own development" as described in the Annex to this letter.

2. With apology for the delay, this letter deals with your application on behalf of your clients, the Campden Hill Residents' Association (referred to below as CHRA) for an award of costs against RBKC, made in your letters of 17 December 2007 and 30 January 2008. The application seeks an award for wasted expense in connection with the cancelled "call-in" inquiry. The applicants responded in their letters of 11 January and 8 February 2008. As these representations have been made available to the parties to the costs application, it is not proposed to summarise them in detail. They have been carefully considered.

Summary of decision

[1] The applications were called-in for the Secretary of State's decision by letter of 13 July 2007 from the Government Office for London (GOL). The applications had been referred to the Secretary of State on 22 June 2007 under the terms of the Town and Country Planning (Development Plans and Consultation (Departures) Directions 1999.

3. The formal decision and costs order are set out in paragraphs 28 and 29 below. The application succeeds and a partial award of costs is being made in the terms below.

Basis for determining the costs application

4. In planning, including conservation area consent, proceedings the parties are normally expected to meet their own expenses irrespective of the outcome. Costs are only awarded on the grounds of "unreasonable" behaviour, resulting in any wasted or unnecessary expense. Published policy guidance for such cases is in DOE Circular 8/93 (referred to below as the "Costs Circular"). As CHRA are considered to have been a third party in these proceedings, the guidance in Annex 4 to the Costs Circular applies.

5. In the case of planning applications called-in for decision by the Secretary of State, the Costs Circular states that all the parties involved in such a case are differently placed than they would be at an appeal inquiry. Paragraphs 8 and 9 of Annex 1 make this distinction. The participation of the parties in a called-in case is primarily to assist the Secretary of State in the process of determining the relevant planning issues. The local planning authority are not defending a decision to refuse planning permission, while the applicant pursuing their application is exercising their right to apply for planning permission.

6. In these circumstances, as stated in the guidance, it is not normally envisaged that a party will be at risk of an award of costs relating to the substance of the case or action taken prior to the application being called-in. However, a party's failure to comply with the normal procedural requirements of inquiries may involve them in the risk of a partial award of costs should that amount to unreasonable behaviour.

7. The view is taken that the power to award costs in this case derives from section 322A of the Town and Country Planning Act 1990. This enables the Secretary of State to award costs against any party in planning proceedings whose unreasonable behaviour directly results in the late cancellation of an inquiry or hearing, so that expense incurred by any of the other parties is wasted. Although the Costs Circular guidance at Annex 2 refers to the withdrawal of appeals, it is considered to apply, by analogy, to called-in planning applications in accordance with paragraph 9 of Annex 1.

8. Accordingly, the application for costs in this case has been considered in the light of guidance in the Costs Circular, the call-in papers, the parties' correspondence on costs and all the relevant circumstances.

Reasons for the decisions

9. All the available evidence has been carefully considered. Particular regard has been paid to paragraphs 9, 12, 13 and 14 of Annex 1, 6 to 10 and 16 of Annex 2 and paragraphs 4 and 5 of Annex 4 to the Costs Circular. The decisive issue is considered to be whether or not the applicants for planning permission and conservation area consent acted unreasonably in withdrawing their applications when they did, with the result that your clients incurred wasted expense in preparing for an abortive inquiry.

10. The view is taken that, in any particular case, the involvement of a third party will need to be carefully assessed in the light of the policy guidance in paragraphs 4 and 5 of Annex 4 to the Costs Circular.

11. In this case, RBKC were the principal parties in the proceedings as both applicants and local planning authority. The view is taken that all other parties are to be regarded as third parties in terms of the published guidance, acting on their own initiative. Paragraph 2 of Annex 4 states that awards of costs either in favour of, or against, third parties, will be made only in exceptional circumstances. In general, third parties will not have costs awarded to, or against them, where unreasonable behaviour by one of the principal parties relates to the substance of the case. However, where unreasonable conduct causes the cancellation of an inquiry (or hearing), for example, as a result of unreasonable withdrawal of the appeal (or in this case, by analogy, called-in application), it is considered that third parties may be awarded costs in their favour, although it is accepted that Annex 4 does not expressly refer to called-in applications. In such circumstances, the guidance in paragraphs 4 and 5 of Annex 4 indicates that, for an award of costs to be made, a third party would need to demonstrate that:-

(1) both principal parties had been forewarned of the third party's intention to take part in the inquiry before incurring any expense on preparatory work;

(2) they had first enquired of the planning authority (and kept in close touch with them) about any discussions between the principal parties which would have forewarned them that the proposed inquiry might be cancelled; and

(3) unreasonable behaviour caused the inquiry to be cancelled.

12. The sequence of events leading to the withdrawal of the applications has been fully examined. The applications were submitted in September and October 2006. On 17 July 2007 the applications were called-in for the Secretary of State's own determination. The principal parties were notified on the 20 July 2007 that an inquiry would be arranged and a time-table was set for submission of pre-inquiry statements. The Inspectorate's letter to DP9 Planning Consultants, who were representing the applicants, warned that withdrawal without good reason after the inquiry date had been fixed would place the applicant at risk of an award of costs. On 25 July Sport England (SE) were invited to be a Rule 6 party and DP9 Planning Consultants were informed accordingly. It was not until 7 September that SE clarified that they were unable for resource reasons to appear at the inquiry as a separate party in their own right as distinct from providing a statement, but could provide a witness for other parties.

13. You requested Rule 6 status for CHRA on 2 August 2007 and stated your clients' wish to appear at the inquiry. Rule 6 status was granted by the Inspectorate on 3 August 2007 and the principal parties were informed on the same day. The Inspectorate's letter of 19 October 2007 informed the parties that an inquiry had been arranged for 5 February 2008. The Inspectorate wrote to the parties on 5 November 2007 advising that it had been decided to hold a pre-inquiry meeting (PIM) on 29 November 2007. Notification of withdrawal of the planning and conservation area consent applications was received by the Inspectorate on 26 November 2007.

14. **You contend that** the late withdrawal of the application caused your clients to incur significant wasted expense. It was unreasonable for the Council to withdraw from the inquiry more than 4 months after the applications were called-in and 2 months after the inquiry had been arranged. There was no change in circumstances

to justify the withdrawal at that point. CHRA were always of the view that the applications were deficient in a number of respects. CHRA had no way of knowing that a withdrawal was imminent and the contact with the principal parties strongly indicated that the inquiry would go ahead. The Council had always known of CHRA's involvement in the matter. Correspondence continued between CHRA and the principal parties after the applications were called-in and CHRA even liaised with them in setting a date for the inquiry. You refer to paragraph 13 of Annex 1, paragraph 9 of Annex 2 and paragraphs 2 and 5 of Annex 4 of the Costs Circular in support of the application for costs.

15. **In response, the applicants deny acting unreasonably.** Discussions with SE led to the decision to withdraw these applications and work up a further application. CHRA and SE had specifically initiated and requested the applications to be called-in and scrutinised by the Secretary of State at a public inquiry. Therefore, CHRA would have expected to incur expense. An applicant has a right to seek planning permission and each party should bear their own costs. Paragraph 9 of Annex 1 to the Costs Circular makes it clear that *it is not envisaged that a party may be at risk of an award of costs for unreasonable behaviour relating to the substance of the case or action taken prior to the call-in decision.* It was entirely reasonable once the applications were called-in to allow the applicants to receive and consider all the representations made before deciding how to proceed. The withdrawal avoided unnecessary costs being incurred by all parties in attending the PIM on 29 November 2007. In any event, CHRA's costs could be re-used when the fresh applications were submitted. Their application failed on both grounds of paragraph 5 of Annex 4 to the Circular. No costs application had been made by SE, the other third party.

Conclusions

16. The Secretary of State considers that the application for costs turns on an examination of the facts and particular circumstances, in the light of the guidance cited in paragraph 9 above. She is satisfied from the file evidence that CHRA were involved from the early stages of the call-in proceedings, becoming a Rule 6 party within three weeks. However, the applicants argue that CHRA failed the first of the two tests stated in paragraph 5 of the Circular's Annex 4.

17. With regard to the first, the Secretary of State has taken into account the particular circumstances of this case. From the outset the principal parties were limited to the same local authority acting in a dual capacity, and the Greater London Authority (GLA) had expressed the Mayor of London's overall support for the scheme, on balance, in response to the decision to call-in the applications. This is not a case where the third party wished to make representations in support of either principal party, or indeed the GLA's stance. In the case of SE, they were evidently not opposed to redevelopment of the school site, but only to the loss within the scheme of open space for sport. In their costs representations CHRA maintain that they kept in touch with the applicants' solicitor following the call-in decision, although there are no particulars supported by documentary evidence. Nevertheless it is undisputed that the applicants liaised with Indigo Planning to agree a mutually convenient date for the inquiry, writing to the Inspectorate on 28 September confirming an agreed date of 5 February 2008. Prior to the applicants' letter of 23 November to the Inspectorate, there is nothing in the file papers to indicate good reason for CHRA to suspect that the inquiry might not go ahead as arranged.

18. Overall the Secretary of State is satisfied that your clients' costs application sufficiently meets criteria (1) and (2) of paragraph 11 above, taking into account the particular circumstances of the case.

19. Turning to the third criterion[2], that is whether or not the applicants acted unreasonably in withdrawing their application when they did, the reasons given for the withdrawal have been carefully considered. The view is taken that once the applications had been called-in by the Secretary of State and a timetable set by the Inspectorate it was for the applicants to proceed with them, or to withdraw, if that action were to be taken, in good time before other parties incurred unnecessary or wasted expense in addressing the issues identified in the Secretary of State's Rule 6 statement of 13 July 2007. The applicants' decision to withdraw the applications when they did needs to be weighed against the risk of an award of costs, in accordance with the principles referred to in paragraph 9 of Annex 1 to the Costs Circular. The last sentence of that paragraph states that a party's failure to comply with the normal procedural requirements of inquiries risks a partial award of costs for unreasonable behaviour in such a case. In this case, RBKC have argued that they have not been shown to have failed to meet the normal procedural requirements of an inquiry. However, the view is taken that the work undertaken by parties to comply with the relevant requirements was rendered abortive by the withdrawal of the applications; and the issue whether the applications were reasonably or unreasonably withdrawn should be considered on the facts of the case.

20. The Secretary of State accepts that, prior to withdrawal, the applicants complied with the normal procedural requirements in terms of submitting a Rule 6 statement, although this would have indicated to other parties that the applications were being taken to inquiry. The key issue is therefore the circumstances around the withdrawal of the applications, and timing of the withdrawal, resulting in abortive costs. These circumstances are irrespective of the planning merits of the applications, which have not been addressed by any decision on the called-in applications after examination of the evidence at a public inquiry.

21. Paragraph 5 of the Circular's Annex 4 states that *"consistently with paragraph 16 of Annex 2, an award of costs in favour of a third party is unlikely to be made, after the Department's cancellation of an inquiry (or hearing), in circumstances where discussions between the appellant and the planning authority have resulted in a mutually acceptable solution to the planning issues on which the appeal turns."*. In this case, the proceedings concerned called-in applications, not appeals; and the LPA and the applicants for planning permission, the latter being owners of the School, are both the Royal Borough of Kensington and Chelsea, acting in different capacities.

22. The applicants contend that they withdrew the applications in order to pursue revised applications after considering all the objections received and after discussions with SE. It appears to the Secretary of State that the nub of SE's objection was clear from an early stage, while the decision to accommodate that objection and work up revised applications could well have been taken earlier also. No evidence is seen of any material change of circumstances relevant to the planning issues arising on the applications which satisfactorily explains the lateness of the decision to withdraw in favour of alternative applications. The circumstances appear to have remained substantially unchanged since the decision to call-in the applications and confirmation of CHRA's Rule 6 status. Nevertheless, RBKA have argued that it was entirely reasonable for them to have decided how to proceed only after receiving and considering all the representations on the called-in applications. CHRA's statement of

[2] and the second of the two tests stated in paragraph 5 of the Circular's Annex 4

case was evidently received on 7 September 2007 together with SE's, plus a supplementary statement from SE on 3 October. Even then the applications were not withdrawn until 23 November.

23. The applicants acknowledge that they liaised with yourselves, on behalf of CHRA, when attempting to agree a mutually convenient date for the inquiry in late September. Given that statements from RBKA and SE had been received, the applicants have not explained when it was decided at officer level to seek approval for withdrawal of the applications and why it took until 22 November for that approval to be obtained. It is considered unfortunate that the applicants did not put you and the Inspectorate on notice that they were likely to withdraw the applications in favour of revised schemes, or at least did not seek a joint approach to the Inspectorate to have the matter put into abeyance pending a formal decision on withdrawal. In all the circumstances, it is concluded that your clients reasonably continued preparing for the inquiry in accordance with the set timetable as there was no indication that the applications would be withdrawn, and they arguably had a legitimate expectation that the inquiry would go ahead.

24. Although it is accepted that the withdrawal saved the parties further expense in the process, such as attending both the inquiry and the pre-inquiry meeting, it is concluded that CHRA incurred quantifiable expense in preparing to resist the applications as a result of an unreasonably late decision to withdraw, which was delayed for no evidently good reason.

25. The overall conclusion reached is that the applicants acted unreasonably in withdrawing the applications when they did, some 5 weeks after being notified of the inquiry arrangements. An award of costs is therefore considered justified.

26. As to the extent of the award, the decisive issue is the unreasonableness of the withdrawal when it occurred, which has resulted in wasted costs of preparation for a major public inquiry time-tabled to last around 10 days. It is concluded that an award of costs is justified from the date of the Inspectorate's letter of 3 August 2007, which informed the applicants that CHRA had Rule 6 status thus indicating that they would be incurring expense as a result. A partial award will therefore be made from 6 August 2007 (inclusive), which allows a nominal period of three days for receipt of the Inspectorate's letter of 3 August 2007.

27. It has been argued by the applicants that once fresh applications are submitted CHRA will oppose them and therefore much of their preparatory work can be re-used. However, that is considered to be a matter for negotiation on the amount of wasted costs in the context of the next stage of detailed assessment, in the light of whatever circumstances may apply to any discussions about re-usable costs. At this point in time there is no evidence of further applications or call-in proceedings before the Secretary of State and the matter can only be one of speculation. The award is made taking into account the guidance in paragraph 5 of the Circular's Annex 5.

FORMAL DECISION

28. For these reasons, it is concluded that a partial award of costs against the Royal Borough of Kensington and Chelsea on grounds of "unreasonable" behaviour resulting in unnecessary or wasted expense, is justified in the particular circumstances as set out below.

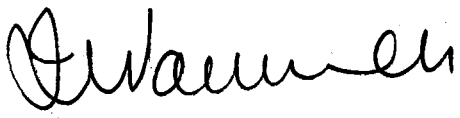
COSTS ORDER

29. Accordingly, the Secretary of State for Communities and Local Government in exercise of her powers under 250(5) of the Local Government Act 1972, and sections 77 and 322A of the Town and Country Planning Act 1990, and all other powers enabling her in that behalf, **HEREBY ORDERS** that the Royal Borough of Kensington and Chelsea shall pay to Campden Hill Residents' Association their costs incurred in the called-in applications proceedings before the Secretary of State, limited to those costs incurred from 6 August 2007 (inclusive); such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned the called-in applications more particularly described in the Annex to this letter.

30. You are now invited to submit to Heidi Titcombe of the Royal Borough of Kensington and Chelsea details of those costs with a view to reaching agreement on the amount. A copy of this letter has been sent to her. In the event that the parties cannot agree the amount, a copy of the guidance note on how to apply for a detailed assessment by the Supreme Court Costs Office is enclosed.

31. There is no statutory provision for a challenge to a decision on an application for an award of costs. The procedure is to make an application for a judicial review. This must be done promptly.

Yours faithfully



JOHN PARNELL
Authorised by the Secretary of State
to sign in that behalf

ANNEX TO COSTS DECISION

Reference APP/K5600/V/07/1201828

Planning application 02742 – Erection of temporary classrooms and buildings in association with redevelopment of site to provide new school and residential development.

Reference APP/K5600/V/07/1201859

Planning application 02743 – Demolition of existing school in the form of a single six storey building and associated hard surface playing grounds, landscaped teaching area and parking; erection of 24 key worker residential units and erection of residential development comprising 95 units with associated landscaping and parking.

Reference APP/K5600/V/07/1201860

Conservation Area Consent application 02744 – Demolition of School.

The Planning Inspectorate

Award of appeal costs:

Local Government Act 1972 - section 250(5)

How to apply for a detailed and independent assessment when the amount of an award of costs is disputed

This note is for general guidance only. If you are in any doubt about how to proceed in a particular case, you should seek professional advice.

If the parties cannot agree on the amount of costs to be recovered, either party can refer the disputed costs to a Costs Officer or Costs Judge for detailed assessment[1]. This is handled by:

The Supreme Court Costs Office
Clifford's Inn
Fetter Lane
London EC4A 1DQ
(Tel: 0207 9477124).

But before this can happen you must arrange to have the costs award made what is called an order of the High Court[2]. This is done by writing to:

The Administrative Court Office
Royal Courts of Justice
Strand
London WC2A 2LL.

You should refer to section 250(5) of the Local Government Act 1972, and enclose the original of the order of the Secretary of State, or his Inspector, awarding costs. A prepaid return envelope should be enclosed. The High Court order will be returned with guidance about the next steps to be taken in the detailed assessment process.

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[1] The detailed assessment process is governed by Part 47 of the Civil Procedure Rules that came into effect on 26 April 1999. You can buy these Rules from Stationary Office bookshops (formerly HMSO) or look at copies in your local library or council offices.

[2] Please note that no interest can be claimed on the costs claimed unless and until a High Court order has been made. Interest will only run from the date of that order.