The Planning Inspectorate

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Your Ref:
4/0741/94
Our Ref:
APP/A1910/A/94/246910

Date: 16 October 1996

Dear Sir/Madam

TOWN AND COUNTRY PLANNING ACT 1990
APPEAL BY BERKELEY HOMES (NORTH LONDON) LTD
SITE AT HUDNALL LANE, EXPOTECHNIK WORKS, LITTLE GADDESDEN, HERTS.

The inquiry arranged for 12 February 1997 has been cancelled because the appeal has been withdrawn.

Please tell anyone you informed of the arrangements about the cancellation. I suggest that details of the cancellation are displayed at the venue.

Yours faithfully

P J HOWELL

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The Planning Inspectorate

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Ms Noele Pope
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Dacorum Borough Council
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Your Ref: NP/SGC/2525/551

Our Ref: APP/A1910/A/94/246910 (COSTS)

Date: 19 November 1997

Dear Madam

LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 78 AND 322A
LAND AT HUDNALL LANE, EXPOTECHNIK WORKS, LITTLE GADDESDEN
APPEAL BY BERKELEY HOMES (NORTH LONDON) LTD: APPLICATION FOR COSTS

1. I am directed by the Secretary of State for the Environment to refer to the Planning Inspectorate's letter of 16 October 1996, confirming withdrawal of the appeal by Berkeley Homes (North London) Ltd against Dacorum Borough Council's failure to determine, within the statutory period, an application for planning permission made on 3 June 1994 for the demolition of two houses and redevelopment of whole site for 15 houses, new access and amenity space at Hudnall Lane, Expotechnik Works, Little Gaddesden, Hertfordshire.

2. With apology for earlier delay at the procedural stage, this letter deals with the Council's application for a full award of costs against the appellant, made in your letters of 13 November, 19 December 1996 and 10 September 1997. The appellants responded in their letter of 15 August 1997. As the full text of all these representations has been made available to the parties, it is not proposed to summarise them. They have been carefully considered.

SUMMARY OF DECISION

3. The formal decision and costs order are set out in paragraphs 13 and 14 below. The application succeeds to the extent that a partial award is being made for the Council's costs incurred from 16 August 1995.

BASIS FOR DETERMINING COSTS APPLICATION

4. In planning appeals, the parties are normally expected to meet their own expenses, irrespective of the outcome of the appeal. Costs are awarded only on the grounds of "unreasonable" behaviour, resulting in unnecessary or wasted expense. Section 322A of the Town and Country Planning Act 1990 enables the Secretary of State to award costs

against any appeal party 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. Published policy guidance for such cases is in DOE Circular 8/93 (referred to below as the Costs Circular). The application for costs has been considered by reference to this guidance, the appeal papers, the parties' costs correspondence and all the relevant circumstances.

REASONS FOR THE DECISION

5. All the available evidence has been carefully considered. While the Council have sought a full award of costs, they have not claimed that it must have been obvious to the appellants that the appeal had no reasonable prospect of success from the outset. No good reason is seen to conclude that the appeal was unreasonable within the terms of paragraphs 1 to 5 of Annex 3 to the Costs Circular. The decisive issues in this case are considered to be whether or not the appellant acted unreasonably, and in turn caused the Council to incur unnecessary or wasted expense, by:

- failing to pursue the appeal in a reasonable manner; and

- withdrawing the appeal after an inquiry had been arranged.

Particular regard has been paid to the policy guidance in paragraphs 2, 3 and 5 to 10 of Annex 2 to the Costs Circular.

6. Paragraphs 2 and 3 of Annex 2 to the Costs Circular provide policy guidance on procedural conduct in appeal proceedings. Paragraph 2 states that both principal parties are expected to comply with the normal procedural requirements for inquiries, as specified in the Inquiries Procedure Rules, and that failure to do so may amount to unreasonable behaviour. You contend that the appellants acted unreasonably by failing to submit a pre-inquiry statement or proofs of evidence for any of the three inquiry dates which were arranged but then postponed or cancelled.

7. The appeal was lodged on 21 December 1994. The first inquiry, arranged for Tuesday 1 August 1995, was postponed by the Inspectorate when both parties agreed to a request from the appellants that the appeal be held in abeyance. Negotiations were apparently progressing on a second, similar application on which an agreement was expected; and, once planning permission had been granted, the appeal would not be needed. However, the Council did not issue a decision by the end of the abeyance period. A fresh inquiry date was therefore arranged for 5 March 1996. The parties were advised, by Inspectorate letters of 10 August 1995, that the revised timetable for submission of statements was 18 September 1995 for the Council and 9 October 1995 for the appellant.

8. In response to letters issued by the Council (December 1995, January and February 1996) and by the Inspectorate (February 1996), seeking the appellants' pre-inquiry statement or withdrawal of the appeal, the appellants' agents sought a second period of abeyance. They explained in their letter of 8 February 1996 to the Inspectorate that negotiations over the wording of a possible section 106 agreement, which was

intended to form an integral part of the planning permission sought on the second application, had not been finalised. They further explained that, although they expected the appeal to be withdrawn, their clients could not do so at present for contractual reasons. The Council did not agree to a joint request for a further period of abeyance. As no statement or proof of evidence was submitted, the Inspectorate decided to postpone the second inquiry date, as confirmed by letter of 15 February 1996.

9. After the inquiry had been postponed, the Inspectorate invited the Council to review their stance on a further period of abeyance. In their letter of 28 February 1996, which was copied to the appellants and their agents, the Council said they would be prepared to agree to a further abeyance period provided this would not prejudice any future application for costs. In the event, the further period was similarly unfruitful. A third date inquiry was then fixed (12 February 1997). The new timetable for submission of statements, as set out in the Inspectorate's letter of 6 June 1996, was 18 July 1996 for the Council and 8 August 1996 for the appellants. No statements were received. However, on 15 October 1996, the agents withdrew the appeal following the Council's grant of planning permission on the second planning application.

10. It is considered that the appellants' failure to submit a pre-inquiry statement was in clear breach of the Inquiries Procedure Rules. However, the failure to submit before the first inquiry date (1 August 1995) is considered excusable, in the light of both parties' agreement to a period of abeyance. However, a different view is taken of subsequent failures. It is clear that the Council did not favour a further period of abeyance; and the request for this was made after the Council had issued their pre-inquiry statement and started work on their proof of evidence.

11. It appears that the appellants, in resisting the preparation of work for the appeal inquiry, were relying on the progress of the draft section 106 agreement for the second application and their expectation that it would be approved, subject to any conditions and section 106 agreement. The Council have disputed the description of the second application as a "duplicate", although no particulars have been submitted. The available evidence indicates that the second application was subject to revised plans and was materially different from the appeal application which, it is noted, was for full planning permission. The agents' letter of 4 April 1995 to the Inspectorate refers to a "revised layout" and "minor elevational amendments". It is therefore concluded that the appellant was not negotiating with the Council on an identical application; and it has not been shown that the Council's approval of the second application amounted to a withdrawal of their case on appeal within the terms of paragraph 12 of Annex 2 to the Costs Circular.

12. The view is taken that after lodging the appeal, the appellants had a responsibility to pursue it in a reasonable manner - for example, complying with the stated timetable for submission of statements unless there were good reasons for not doing so. It is considered that, except for the period leading to the first postponement, the appellants did not have a good reason for failing to comply. It is also considered that they had ample opportunity to withdraw the appeal if they intended to pursue a materially different application, given that that application was for the Council to determine in the first instance and was not before the Secretary of State on appeal.

13. The evidence suggests that the appellants had no real intention of pursuing this appeal once they had received the Council's agreement, in principle, to development of the site on the basis of revisions to the second planning application. The appellants' argument that the appeal could not be withdrawn earlier for contractual reasons is not accepted in the light of the guidance in paragraph 9 of Annex 2 to the Costs Circular. The view is taken that was a commercial risk which had no bearing on the planning issues arising on the appeal.

14. Accordingly, it is concluded that the appellants acted unreasonably in withdrawing the appeal, when they did, with the result that the re-arranged inquiry date was cancelled. It is also concluded that the unreasonable behaviour caused the Council to incur quantifiable wasted expense in preparing to resist the appeal. A partial award to the Council is considered justified, as in paragraph 15 below.

FORMAL DECISION

15. For these reasons, it has been decided to make an award in favour of the Council for those costs incurred from 16 August 1995 (inclusive). This allows a period of three working days for postage and receipt of the Inspectorate's letters of 10 August 1995 (1) notifying the parties that the first period of abeyance had ended and (2) setting a revised timetable for submission of statements.

COSTS ORDER

16. Accordingly, the Secretary of State for the Environment, in exercise of his powers under section 250(5) of the Local Government Act 1972, and sections 78 and 322A of the Town and Country Planning Act 1990 (as amended), and of all other powers enabling him in that behalf, **HEREBY ORDERS** that Berkeley Homes (North London) Ltd shall pay to Dacorum Borough Council their costs of the proceedings before the Secretary of State, limited to their preparation costs incurred from 16 August 1995 (inclusive). Such costs in an amount to be taxed in default of agreement. The proceedings concerned an appeal against Dacorum Borough Council's failure to determine the application for planning permission for development described in paragraph 1 of this letter.

17. You are now invited to submit to Berkeley Homes (North London) Ltd, to whom a copy of this letter has been sent, details of those costs with a view to reaching agreement on the amount. A copy of the Department's guidance note on taxation procedure (referred to in Annex 5 to the Costs Circular) is enclosed.

Yours faithfully

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