The Planning Inspectorate

An Executive Agency in the Department of the Environment and the Welsh Office

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Development Land & Planning
Consultants
Oakley Lodge
Westfield Road
Oakley
Bedford
MK43 7ST

Your Ref: 4/1575/93EN.
SBJ/LS/H28
Our Ref:
APP/C/93/A1910/631399

Date: 26 April 1994

Dear Sirs

TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 174
APPEAL BY EBBERNS PLUMBING AND HEATING MERCHANTS
SITE AT HEADLOCK WORKS, EBBERNS ROAD, HEMEL HEMPSTEAD

I am writing to inform you that the fee which you have paid under Regulation 10 of the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations in respect of the above appeal is due to be refunded because the Enforcement Notice has been withdrawn.

The fee of £60.00 is enclosed.

A copy of this letter has been sent to the local planning authority.

Yours faithfully

S M EVANS (MRS)

CC: Dacorum Borough Council

PLANNING DEPARTMENT
DACORUM BOROUGH COUNCIL
Ref.
Ack.
DoP | T.C.P.M. | D.P. | P.O. | File
Received 16 MAY 1994
Comments
£60 Refunded 20-6-94.

The Planning Inspectorate

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Director of Planning
Dacorum Borough Council
Civic Centre, Marlowes
HEMEL HEMPSTEAD
Herts.
HP1 1HH

Your Ref:
4/1575/93EN
Our Ref:
APP/C/93/A1920/631399

Date: 11 April 1994

Dear Madam

TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED) - SECTION 174 (AS AMENDED) - SECTION 174 APPEAL BY EBBERNS PLUMBING & HEATING MERCHANTS
LAND AT HEADLOCK WORKS, EBBERNS ROAD, HEMEL HEMPSTEAD

1. I am writing to tell you that the local inquiry arranged to be held at the Civci Centre, Marlowes, Hemel Hempstead on Tuesday 21 June 1994, at 10.00 am, has now been cancelled.

2. You are requested to try to bring this cancellation to the notice of people who may have taken note of the arrangements previously made.

3. Please note that all correspondence and any queries should be addressed to the case officer.

Yours faithfully

K Taylor

MRS K M TAYLOR
CASE OFFICER

E14

PLANNING DEPARTMENT
DACORUM BOROUGH COUNCIL
Ack.
Ref.
DoP | T.C.P.[illegible] | D[illegible] | [illegible]C | Admin. | File
JK LK
Received 12 APR 1994
Comments No letters sent originally - LK

Copy Team 1

Department of the Environment

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4/1575/93EN

The Director of Law and Administration
Dacorum Borough Council
Civic Centre
HEMEL HEMPSTEAD
Hertfordshire
HP1 1HH

Your ref NP/DD/2447/453

PLANNING DEPARTMENT
DACORUM BOROUGH COUNCIL
Ref.
Date
Received 23 NOV 1994
Comments

Our ref APP/C/93/A1910/631399 (COSTS)

7 November 1994

Dear Sir

LOCAL GOVERNMENT ACT 1971 - SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 - SECTIONS 174 AND 322A
PLANNING AND COMPENSATION ACT 1991
APPEAL BY EBBERNS PLUMBING AND HEATING MERCHANTS
LAND AT HEADLOCK WORKS, EBBERNS ROAD, HEMEL HEMPSTEAD
APPLICATION FOR COSTS

1. I am directed by the Secretary of State for the Environment to refer to the above mentioned appeal, and to the application for costs made on behalf of the appellants against the Council.

2. I enclose a copy of the Secretary of State's decision on the application. You will see that it has been decided that no award of costs would be justified, and the claim has been refused.

Yours faithfully

J D GARDNER
Planning Division 4

Department of the Environment

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Development & Planning
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MK43 7ST

Your ref SBJ/LS/H28

Our ref APP/C/93/A1910/631399(COSTS)

Date 17 NOV 1994

Dear Sir

LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 - SECTIONS 174 AND 322A
PLANNING AND COMPENSATION ACT 1991
APPEAL BY EBBERNS PLUMBING AND HEATING MERCHANTS
LAND AT HEADLOCK WORKS, EBBERNS ROAD, HEMEL HEMPSTEAD
APPLICATION FOR COSTS

1. I am directed by the Secretary of State for the Environment to refer to the Planning Inspectorate's letter of 11 April 1994, confirming withdrawal of Dacorum Borough Council's issue of an enforcement notice on 18 October 1993. The enforcement notice alleged an unauthorised breach of planning control on land at Headlock Works, Ebberns Road, Hemel Hempstead, as follows:

> "On 24 November 1983, planning permission was granted for the use of this land as follows:
>
> > Application number 4/1271/83 - Change of use of part of ground floor from industrial to wholesale distribution of plumbing materials.
>
> Condition (2) on planning permission 4/1271/83 provides that "the use hereby permitted shall be restricted to the storage and wholesale distribution of plumbing goods and materials and for no other purpose whatsoever (including any other purpose within Class X of the Town and Country Planning (Use Classes) Order 1972)".
>
> It appears to the Council that this condition has not been complied with fully, because that part of the ground floor of the premises is being used for wholesale and retail sale of plumbing goods and bathroom fittings.
>
> In respect of the remainder of the ground floor of the premises it appears to the Council that there is a breach of planning control in that the use has changed from

industrial use to a mixed use for industrial and wholesale and retail sale of plumbing goods and bathroom fittings.

In respect of the first floor of the premises it appears to the Council that there is a breach of planning control in that the use has changed from wholesale distribution of decorating materials to wholesale and retail sale of plumbing goods and bathroom fittings."

2. This letter deals with the appellants' application for an award of costs against Dacorum Borough Council made in your letters of 12 and 19 April, 23 June, 10 August and 12 September 1994. Account has also been taken of the letter dated 12 August 1994 from the appellants' former agents, Coxell and Associates. The Council's reply is stated in their letters dated 26 May, 26 July and 26 August 1994. 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.

BASIS FOR DETERMINING COSTS APPLICATION

3. In enforcement appeals the parties are normally expected to meet their own expenses, irrespective of the outcome of the appeal. Costs are awarded only on grounds of "unreasonable" behaviour. The provisions of section 322A of the Town and Country Planning Act 1990 enable the Secretary of State to award costs against any party in planning appeal 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. Relevant policy guidance for such cases is in DOE Circular 8/93. The application for costs has been considered by reference to this guidance, the appeal papers, the correspondence on costs and all relevant circumstances.

REASONS FOR THE DECISION

4. All the available evidence in this case has been carefully considered. Particular regard has been paid to the policy guidance in paragraph 6 of Annex 1, paragraphs 12 to 17 of Annex 2, and paragraphs 21 to 25 of Annex 3, to DOE Circular 8/93. For avoidance of doubt, the view is taken that an award of appeal relates to costs reasonably and necessarily incurred in the proceedings. The view is also taken, by reference to paragraph 10 of Circular 8/93, that, when an enforcement notice is withdrawn at any stage in the proceedings, the Secretary of State may make a full or partial award of appeal costs; and the power to award costs is the same whether the award is made under section 322A of the 1990 Act or under the provisions inserted by Schedule 4 to the Planning (Consequential Provisions) Act 1990. The decisive issue in this case is considered to be whether the Council had "reasonable" grounds for considering it "expedient" to issue, and then exercise their discretion to withdraw, the

enforcement notice. The sequence of events, as documented, has been carefully examined.

5. The view is taken that the subsequent withdrawal of an enforcement notice may, in some circumstances, amount to an admission that it was not "expedient" to have issued it in the first place. Planning authorities are expected to take great care to ensure that enforcement notices are correctly and accurately worded in all respects, and specify correctly the matters alleged to constitute a breach of planning control. It follows that enforcement notices should not be issued without careful attention to detail. In this case, it is noted that the appeal was made on legal grounds (c) and (d), in addition to (a), in section 174(2) of the 1990 Act; and, because the grounds indicated facts in dispute, it was considered necessary for evidence to be heard at a public inquiry. Letters confirming this procedure were sent by the Planning Inspectorate Executive Agency, on 23 December 1993, to the Council and the appellants' then agents, Coxell and Associates. Further letters were sent to the parties on 30 March 1994, confirming the arrangements for the inquiry on 21 June 1994. In a letter dated 7 April 1994, the Council informed the Planning Inspectorate that the enforcement notice, the subject of the appeal, had been withdrawn and had been superseded by the issue, on that date, of a revised enforcement notice. Their letter "looked forward to hearing [from the Inspectorate as to] the cancellation of the public inquiry due to take place on Tuesday 21 June 1994." A subsequent appeal (DOE Ref: APP/C/94/A1910/633886) against the second notice has yet to be determined. Cancellation of the inquiry into the first notice appeal was confirmed by the Inspectorate's letter of 11 April 1994.

6. Shortly after submission of the appeal, the Council and Coxell and Associates began negotiations as to the possibility of submitting a planning application to continue using the premises for wholesale and retail sales during Saturdays. The fixing of an inquiry date was deferred, at both parties' written request, at the start of February 1994. Subsequently, on 28 February, Coxell and Associates wrote to the Inspectorate, stating they had been told by the Council's Planning Department that, if an application were submitted on the basis proposed, it would be refused. The proposal had been to open on Saturdays, for trade from the side entrance to the premises between 8 am and 2 pm, and for the general public between 10 am and 2 pm utilising the main front showroom entrance only. The premises would not have been open for business at any other time during the weekend. There followed a period in which the Inspectorate proceeded to arrange an inquiry and write to the parties about the timetable for submission of the respective pre-inquiry statements. On 14 March, Coxell and Associates sought an extension of time for submission of their statement because of "lost time" over the intended planning application. By letter of 16 March, the Inspectorate asked the Council whether they would agree to an extension, bearing in mind that an inquiry date was likely to be fixed for June or July. On 21 March, the Council's

Planning Department replied expressing some concern, referring to discussion with the Council's Solicitor, that they would have less time to prepare their proofs of evidence; and local residents would wish to inspect the appellants' case in preparing to give evidence at the inquiry. They agreed to a 3-week extension to 29 March 1994 for submission of the appellants' pre-inquiry statement. On 29 March you wrote to the Planning Inspectorate, stating that you had been instructed to act on behalf of the appellants; the timetable for submission of the appellants' pre-inquiry statement was noted; and any further appeal correspondence should be sent to you. You did not state that your letter had been copied directly to the Council, or that you had informed them separately of the change of agent. The Council's Enforcement Officer, meanwhile, notified the appellants' former agents, on 30 March 1994, that they had received further complaints about the amount of traffic generated at the premises on Saturdays and had "had the value of the extant notice queried". Their letter stated that the Council "may be minded to alter or vary the said notice, in order to take account of just such a problem". Coxell and Associates were invited to contact the Council's Solicitor if they sought further clarification.

7. Although they have denied that they felt compelled to withdraw the notice, in the sense discussed in paragraph 22 of Annex 3 to Circular 8/93, the Council, nonetheless, appear to have formed the view that the notice was insufficiently precise and could not be altered or varied by the Planning Inspector, on appeal, as they then wished, without prejudice to the appellants' interests. Paragraph 5 of Annex 2 to DOE Circular 21/91 (*Planning and Compensation Act 1991: Implementation of the Main Enforcement Provisions*) explains that the new power in section 176(1) (a), to correct, on appeal, any misdescription in the enforcement notice, does not extend to correction of notices which are so fundamentally defective that their correction would result in a substantially different notice which would cause injustice to the appellant or planning authority. In this case, while the Secretary of State has no further jurisdiction in the matter, since the notice has been withdrawn, it is not considered obvious that the notice was fundamentally defective or had no reasonable prospect of being upheld on appeal; or that, if upheld, it would not have achieved the Council's stated planning objective.

8. In any event, issues arising remain to be determined in the context of your clients' appeal against the further notice (DOE ref: C/94/A1910/633886); and it is noted that the Council's stated reasons for taking enforcement action were the same in both cases. The second notice, issued on 7 April 1994 is more compressively worded than the first notice. In particular, it is noted that the requirements to remedy the alleged breach of planning control stated in the first notice were as follows:

> " Cease using the ground and first floors of the premises for retail sales except on Mondays to Fridays (other than

on public holidays) between the hours of 8 am and 6 pm."

In contrast, the requirements of the second enforcement notice state:

> " Cease using the part of the ground floor of the premises shown edged blue on the attached plan marked "A" for retail sales except on Mondays to Fridays (other than public holidays) between the hours of 8 am and 6 pm.
>
> Cease using the whole of the fist floor of the premises for the use as a showroom for the display of types of plumbing goods and bathroom fittings in respect of which sales are conducted on the ground floor of the premises except on Mondays to Fridays (other than on public holidays) between the hours of 8 am and 6 pm."

The second notice is therefore different to the first in that, among other things, the alleged breach does not extend to "the remainder of the ground floor" as stated at 3.2 of the withdrawn notice. Instead, the allegation was revised in the second notice and expressed in terms of the first floor, with associated changes in wording. That notice may also be taken to imply that the former reference to retail sales on the first floor was not sufficiently accurate, in the absence of any evidence that activities at the appeal site materially changed since issue of the notice.

9. While no evidence is seen of any material change in planning circumstances to account for the sudden withdrawal of the enforcement notice, and its replacement with a substantively altered notice, it is concluded, nonetheless, that the Council's action did not amount to a concession that it was not "expedient" to have issued it at the outset, given that their stated reasons for taking enforcement action remained unchanged for the second notice; and, in any event, the outstanding appeal remains to be determined. It is considered regrettable that the withdrawal occurred some 6 months after issue of the notice, and some 2 weeks after the Council had expressed concern about slippage in the timetable for submission of the appellants' pre-inquiry statement. Nevertheless, while the Council's conduct in the proceedings is not considered to be entirely beyond reproach, no reason is seen to conclude that the Council acted "unreasonably" and caused your clients to incur unnecessary or wasted expense in the proceedings. The Council have explained the statutory basis for excluding the public from the Development Control Committee meeting of 31 March 1994. Evidence not submitted or revealed to date will be relevant to the Council's defence against the outstanding appeal cited above. While you have drawn attention to abortive discussion about a possible planning application, the view is taken that it was nonetheless open to the appellants, directly or via their agents, to submit a formal application to the Council; and to appeal separately against their anticipated refusal of permission, conditionally or otherwise. It is noted that there was no delay between the Council's withdrawal of the

notice and their issue of the amended version. While it is accepted that your letter of 29 March to the Inspectorate was most positive, indicating intention to provide a pre-inquiry statement by 29 April 1994, the Council had, until then, been dealing with the former agents, Coxell and Associates, who had deferred work on the appeal, pending negotiations on a possible planning application, and then sought an extension of time. Your letter confirming instructions to act on the appellants' behalf was copied to the Council by the Planning Inspectorate's letter of 5 April, immediately after Easter; you did not apparently contact the Council before Easter to forewarn them of your involvement; and your letter's receipt would have coincided with the Council's withdrawal letter of 7 April. It is therefore concluded that any expense in preparatory work for the inquiry would have been minimal. It is also concluded that initial documentation submitted with the appeal would have been re-useable for the further appeal, in respect of which it remains open to your clients to apply separately for an award of costs. For avoidance of doubt, this decision should not be taken to imply any view as to the merits of such an application.

FORMAL DECISION

10. Accordingly, for these reasons, the Secretary of State has decided that an award of costs against the Council, on grounds of "unreasonable" behaviour in these proceedings, resulting in unnecessary or wasted expense, is not justified, in the particular circumstances. Your clients' application is therefore refused.

11. A copy of this letter has been sent to the Director of Law and Administration of Dacorum Borough Council.

Yours faithfully

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