CONSULTATION RESPONSE

Costs Awards in Appeals and other Planning Proceedings 17 Feb 2009

Theresa Donohue
Department of Communities and Local Government
Eland House Zone 1/J10
Bressenden Place
London
SW1E 0RS

Dear Madam

Consultation on Revised Circular on Costs Awards in Appeals and other Planning Proceedings

Thank you for consulting the Home Builders Federation (HBF) on the above draft Circular. The HBF is the principal trade federation for the private housebuilding industry with our members accounting for approximately 80% of housing completions in any one year. Consequently we have considerable experience of the planning process including appeals and costs awards. We trust, therefore, that our comments are given significant weight in the consideration of all representations made, being, as they are, the result of considerable discussion and consultation throughout the membership of our organisation.

We fully appreciate the limited scope of the current consultation and the fact that the proposed changes to the appeals process are contained within primary legislation on which there is no further scope to comment. We also recognise that the proposal to introduce charges for appeals will be the subject of a separate consultation document. However, we believe that the two processes (of charges and award of costs) are inextricably linked and thus some of our comments on the current consultation and Circular guidance may, inevitably, be resolved through further guidance on charges for appeals in due course.

Extension of costs to all appeal procedures

The HBF welcomes the proposed extension of the costs regime to all appeals and proceedings under the Planning Acts, irrespective of the appeals procedure adopted. It is also acknowledged that this means that withdrawal of an appeal at any stage in the process will risk an award of costs. However, it is not accepted that withdrawal in its own right is a

valid reason for seeking an award of costs and we go on to address this very serious issue in due course.

Principles of awards of costs

HBF supports the premise that in planning appeals "the parties involved normally meet their own expenses". We also recognise the fact that, as at present, an award of costs does not necessarily follow the outcome of the appeal. However, we consider that there is some scope for a wider discussion about this principle especially in the context of paying for appeals which will, in effect, impose an additional cost on appellants who may ultimately be granted planning permission, particularly in appeals made under S78(2) of the T&CPA 1990 (expiry of the determination period).

Parties able to claim costs

There is some confusion amongst our members over whether or not the Planning Inspectorate (and/or the Secretary of State) is considered to be a principal or third party in appeals and thus whether they are eligible to apply for costs. To avoid such doubt it would, therefore, be helpful to specifically clarify this point in the Circular itself. Obviously the introduction of charges for appeals may well negate any need for the Inspectorate to be reimbursed any abortive costs of the appeals process. Nevertheless, clarification would be of considerable comfort pending the introduction of charges for appeals

Unreasonable behaviour

The HBF has considerable concern over Part B of the draft Circular, in particular the definitions of what behaviour might be considered to be unreasonable in the determination of an award of costs.

It is accepted that non compliance with the relevant statutory requirements could be considered unreasonable behaviour. Similarly the HBF both recognises and endorses the premise that principal parties should make every endeavour to discuss and agree on as many outstanding issues as possible. However, the draft Circular makes a number of references to the fact that the very act of withdrawal of an appeal at any time *may* be considered to be deemed unreasonable behaviour. While it is accepted that the Circular does not state that withdrawal *will always* be considered to be unreasonable behaviour there are a number of references in the draft that should be reconsidered.

Paragraph B42 states that withdrawal for commercial reasons will run a risk of an award of costs. This should not be the case. A major part of planning considerations is commercial

viability of projects. Thus, changes in market circumstances may make a project commercially unviable and thus an appellant might wish not to pursue an application for development. If the proposal has reached the stage of an appeal (particularly on the very subject of commercial viability such as the level of S106 contributions) and the project is not to be pursued for commercial reasons, withdrawal of the appeal is both pragmatic and correct procedure. Viability is, of course, a reasonable planning consideration. The reference to withdrawal for commercial reasons as set out in paragraph B42 should, therefore, be deleted or replaced with an acknowledgement that commercial reasons may often be considered as a valid material change in planning circumstances.

Similarly paragraph B43 suggests that the use of the appeal process to progress amendments or alternatives to a scheme are not considered to be a material change of circumstances relevant to the issues arising on the appeal.

This is a fundamental misunderstanding of the role of the appeals process within the planning process, particularly with regard to appeals against the non determination of planning applications. Such appeals are frequently made in order to ensure that the local planning authority makes rational and justified decisions on realistic alternative development proposals. It is acknowledged that such practice creates difficulties for the business planning of the Planning Inspectorate but it is the very fact that there is a realistic alternative resolution process via the appeal system that ensures that some local planning authorities make timely and robust decisions. The introduction of payment for the appeals process will actually make it more attractive to applicants as an alternative decision making process, particularly if the fees for appeals are close to, or equivalent to, the costs of the planning application itself.

Once again, in this situation, the act of withdrawal of an appeal should not, in itself, be considered unreasonable behaviour; especially where an appellant (or other principal party) can demonstrate that there is no longer a need for the appeal to be heard (for example, where a satisfactory planning permission has been achieved through other processes. The appeal process is frequently used as a dispute resolution process and late withdrawal where the parties have reached mutually acceptable agreement is similar in context to settling of civil court cases “on the courtroom steps”. Both parties agree to meet their own costs in such agreements and a similar presumption should be applied to planning appeals.

Costs where the Inspectorate determines the method of appeal process

There appears to be no safeguard for an appellant against the potential increase of costs where the Planning Inspectorate dictates a particular appeal process against the wishes of the appellant. An appellant who wishes to minimise costs through opting for an appeal heard through written representations may be forced to make preparations for a public inquiry or

hearing at the insistence of the Planning Inspectorate. Coupled with the fact that the Circular currently does not accept commercial considerations as a reason for withdrawal (albeit that we have argued strongly above that this view should be amended within the Circular) such withdrawal might incur a greater costs award against an appellant (or indeed a local authority or other principal party) even though they had sought to minimise costs in pursuing the appeal. Paragraph B56 gives clear guidance on how partial costs may be awarded if an appeal procedure is downgraded but makes no comment on how additional costs might be claimed for if an appeal is "upgraded" against an appellants wish.

The solution to this manifestly unfair (and uncontrollable) situation is not clear. It does, however, need to be addressed before the provisions of both this Circular and the implementation of S200 of the Planning Act 2008 are implemented.

Summary

In summary:

- HBF supports the extension of the costs regime to appeals determined by written representations.

- Clarification should be made that the Planning Inspectorate is neither a principal nor third party, and, therefore, not entitled to make claims for costs

- HBF objects to the withdrawal of an appeal being, in its own right, a consideration for an award of costs.

- HBF objects to the suggestion that commercial reasons are not a legitimate change in planning circumstances to necessitate withdrawal of an appeal.

- The role of appeals in the wider planning process should be specifically recognised and respected, particularly when assessing whether or not behaviour has been unreasonable in order to make an award of costs against any party.

I trust that the above points of concern will be addressed prior to the issuing of the final Circular and thank you again for consulting the HBF on this important issue.

Andrew Whitaker
Planning Director