for Planning and Environmental Appeals

Claim for an Award of Expenses Decision Notice

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The Scottish Government

Decision by Janet M McNair, a Reporter appointed by the Scottish Ministers

- Appeal reference: PPA-200-242
- Site address: Lower Kilmardinny/Westpark, Milngavie Road, Bearsden G61 3DH
- Claim for an award of expenses by CALA Management Ltd and Stewart Milne Holdings Ltd against East Dunbartonshire Council
- Dates of inquiry: 17-29 August and 15-16 December 2008

Date of decision: 28 July 2010

Decision

I find that the council has acted in an unreasonable manner resulting in liability for expenses. Accordingly, in exercise of the powers delegated to me and conferred by section 265(9) as read with section 266(2) of the Town and Country Planning (Scotland) Act 1997, I find the council liable to the appellants in respect of a proportion of the expenses equivalent to 3½ days of the public local inquiry. Normally parties are expected to agree expenses between themselves. However, if this is unsuccessful, I remit the account of expenses to the Auditor of the Court of Session to decide, on a party/party basis, applying the Sheriff Court scale. I also sanction the employment of Senior Counsel and certify Mr Douglas Bisset, Mr Gary Kyle and Mr Tom McInally as necessary experts for the appellants. If requested, I shall make an order under section 265(9) read with section 266 of the Town and Country Planning (Scotland) Act 1997.

Reasoning

1. Parties are normally expected to meet their own expenses in planning appeals. SODD Circular 6/1990 makes clear that awards of expenses do not follow the decision on the planning merits of a case and are made only where each of the following tests is met:

- The claim is made at the appropriate stage of the proceedings; and
- The party against whom the claim is made has acted unreasonably; and, if so
- This unreasonable conduct has caused the party making the application unnecessary expense, either because it was unnecessary for the matter to come to appeal, or because of the way the party against whom the claim is made conducted its case.

2. There is no dispute that this claim was made at the appropriate stage of the proceedings, prior to the conclusion of the inquiry.

3. The appellants' submissions on the other tests fall under two separate headings. They submit, firstly, that they should be awarded the expenses of the entire inquiry because the council's Planning Board behaved unreasonably in refusing the application without sound planning reasons for doing so; that it gave undue weight to local opposition to the proposal; and that the council failed to defend all the reasons for refusal. Alternatively, if the decision on the appeal upholds some of the reasons, a partial award should be made. Secondly, the appellants submit that they incurred unnecessary expense because of the unreasonable manner in which the council conducted its case in relation to the A81 Corridor Strategy and a replacement sports centre. In these respects, they assert that the council failed to make its position clear, introduced new matters at a late stage, and departed from a substantive line of argument, resulting in a waste of inquiry time. The appellants argue that they should be awarded expenses for the 5½ additional days they estimate were taken up due to the council's behaviour on these matters. Sanction for the employment of Senior Counsel, certification of the relevant witnesses as experts, and an award on the Court of Session scale, on an agent/client basis, with client paying, are sought.

4. In response, the council maintains that the report by the council's Head of Planning and Road Services provided a sufficient basis for the Board to be entitled to refuse the application for the reasons that were given, and that the council adequately supported the 6 reasons it elected to defend. The council also denies that it conducted its case in an unreasonable way, introduced new matters at a late stage, or changed its position as the appellants allege. While agreeing that the case is suitable for the employment of Senior Counsel, the council submits that any award made should be on the Sheriff Court scale.

5. Dealing with the appellants' submissions in turn, I agree that the Planning Board was not obliged to accept the recommendation by the Head of Planning and Road Services that the appeal proposal should be granted outline planning permission. However, paragraph 7 of Circular 6/1990 includes reaching a decision without reasonable planning grounds for doing so among possible examples of unreasonable behaviour by a planning authority. It also indicates that giving greater weight to public opinion, irrespective of the planning merits of a case, is likely to amount to unreasonable behaviour.

6. Against that background, the Board was obviously aware of the controversial nature of the application. However, I have no clear evidence that it gave undue weight to local opposition. Determining a complex application such as this involves balancing a range of advantages and disadvantages, and the exercise of judgement, including in assessing technical appraisals by council officials and consultees. The report made clear, among other things, that the application did not accord with the development plan in some respects and that further testing was required to confirm the effectiveness of the appellants' traffic solutions.

7. There is nevertheless an onus on a planning authority to adequately support its reasons for refusal at appeal. In this case, the council sought to defend 6 of the 7 reasons. It made clear in its outline statement of case that it did not intend to defend the sixth reason,

which related to flood risk. The appellants therefore had early notice of this matter, and do not argue that, on its own, it caused them unnecessary expense.

8. I am also satisfied that the council adequately defended the first, second and fourth reasons. In relation to the first reason, the Board report stated that the traffic mitigation that the appellants proposed would require to be tested against current roads standards and practical deliverability. Council witnesses set out their concerns on these matters. I concluded that some uncertainties remained regarding the development's traffic effects and that additional measures were required. The witnesses also adequately defended the council's criticisms of the masterplan to which the second reason refers, including in relation to the local plan Glossary definition. The council's position on the third reason, that the proposal did not guarantee continuous operation of the Allander Sports Centre, was clearly explained.

9. The fifth reason indicates that the council regarded it as unacceptable that significantly more than 300 houses were being proposed, albeit that this figure is not a local plan allocation, but an estimated capacity. As this estimate reflects the development mix in Schedule UC 2C, the fifth reason is linked to the second and third reasons. The latter of these reasons asserts that the proposal fails to comply with Policy UC 2 of the adopted local plan in 5 of the respects listed in Schedule UC 2C, namely (a), (b), (c), (e) and (g). Two of these, (c) and (e), are statements of fact, while (g), that the proposal did not provide for a clear separation between Milngavie and Bearsden, is a matter of judgement. Respects (a) and (b) are that the proposal did not provide adequate land for an effective rail halt and for a park and ride facility.

10. In relation to these, the council did not argue that it would be impractical to reserve sufficient land on the site for a rail halt. I consider that it also failed to adequately support its contention that the minimum of 150 parking spaces for which the appellants proposed to reserve land were insufficient. The 500 car parking spaces that the council's transportation witness suggested as an appropriate figure appeared to be derived from a bus-based park and ride facility, although the council had previously agreed that a park and ride facility should relate to a rail halt. He also conceded that none of the transportation studies for the area supported the provision of 500 car parking spaces; and that the only parking demand projections before the inquiry suggested that about 90 spaces would be needed initially, and that it would be prudent to provide at least 150 spaces to allow for growth in demand.

11. The seventh reason for refusal, that "the scale of material planning objections from the community indicates that the developers have not engaged with the community and that the proposal does not enjoy public support" is not drafted in terms that represent a reasonable ground for refusing planning permission. Applications have to be determined on their planning merits, on the basis of section 25 of the Act, irrespective of the level of public opposition. However, I consider that the council would probably have refused planning permission even if it had not given this as a reason for refusal. In any event, as this reason did not add materially to the length of the inquiry, it did not cause the appellants unnecessary expense.

12. In relation to the appellants' first heading, I conclude that the council's behaved unreasonably in failing to adequately support its claim that the proposal did not provide enough land for an effective rail halt and park and ride facility. As this matter also featured in the case put forward by local objectors, the appellants are likely to have felt obliged to address it, irrespective of the council's position. However, responding to the council's argument and cross-examining its transportation witness took up significant time.

13. Turning to the appellants' second heading, it was agreed at the pre-inquiry meeting on 27 May 2008 that the council would discuss with the appellants the terms of any section 75 agreement it proposed. It was also agreed that the council would lodge a draft of any such agreement as an inquiry document, by 15 July. However, the council did not lodge a draft Minute of Agreement (CD31) until the inquiry opened on 19 August. The e-mail it sent to the appellants on 1 August outlining the type of obligations that were likely to be included in an agreement did not specify the financial contributions the council was seeking. As the council acknowledged at that time, the e-mail was also too late to be factored into the appellants' precognitions, which were due to be lodged by 5 August.

14. The council accepted at the inquiry that it was not desirable to produce a document such as CD31 when it did, but claims that this was unavoidable primarily because the A81 Corridor Strategy was not made public, or considered by the council, until 12 August. However, as the council had taken a view on the Strategy then, the council's transport witness ought to have been able to explain, on 25 August, the basis for the £1.4 million contribution that CD31 revealed the council was seeking, how this related to the package of transportation measures that the council had approved on 12 August, and the availability of funding. He was unable to do so.

15. The other matter raised in relation to CD31 is the council's position on a replacement sports centre. In that regard, the council's position as the owner of land on the site has to be distinguished from its role as the planning authority. However, the council ought to have made its position as planning authority clear prior to the inquiry, both on the principle of including a replacement sports centre in the development, and on whether the £10 million contribution that the appellants had offered towards the cost of a replacement should be treated as "planning gain". While it intimated in its statement of case that it intended to argue that it was unreasonable to treat office/business development or the provision of land for a rail halt and park and ride facilities as developer contributions, references to a replacement sports centre mentioned only continuity of provision. Its planning witness referred in his precognition to a "planning gain package" that included a £10 million contribution. It was therefore understandable that the appellants were surprised when the council stated, during cross-examination of their first witness, that it did not regard the contribution as "planning gain" and that the £12 million sought in CD31 was intended as payment for the council's land. While CD31 is likely to have been discussed at the inquiry, irrespective of when it was produced, its timing, the council's failure to give fair notice of its position regarding a replacement sports centre, and the events on 25 August described above, all took up inquiry time that is unlikely to have been necessary if CD31 had been lodged timeously.

16. The appellants' submission that that the council departed from a substantive line of argument relates to its position regarding the provision of sustainable transport in place of a rail halt. In that regard, the council's statement of case stated that, as that there was no prospect of a rail halt in the short to medium term, shorter-term alternatives to deliver significant public transport improvements should be considered. Despite this, and the fact that Schedule UC 2C requires development on the site to "contribute to the creation" of a rail halt and park and ride facility, the council's planning witness insisted in his precognition that the "entire package" of measures in Schedule UC 2C (which include a rail halt) had to be delivered in order for the council to support the application. While he soon departed from this position in cross-examination, he ought to have confirmed the outcome of the council's consideration of the local plan inquiry report (CD27) before drafting his precognition. If he had done so, the "error" of which the council informed the inquiry on the penultimate day of the August session is likely to have emerged much sooner. As this was to the effect that the council intended the schedule to refer to "sustainable transport provision" rather than a rail halt, the witness is unlikely to have advanced the argument he did. The fact that the council felt able to reconcile his initial insistence on the delivery of a rail halt with a "sustainable transport solution" in the light of the Atkins report was fortuitous, but beside the point.

17. Drawing these matters together, I conclude that the council behaved unreasonably in failing to adequately support its claim that the appeal proposal did not provide adequate land for an effective rail halt and park and ride facility; in not giving fair notice of its position regarding a sports centre contribution; in failing to make clear its position on the A81 Corridor Strategy when it ought to have been able to do so; and in the manner in which it conducted its case regarding the delivery of a rail halt and sustainable transport provision. This behaviour added materially to the length of the inquiry and caused the appellants expense they would not otherwise have incurred. I therefore find the council liable to the appellants for this expense.

18. Some of the matters on which the council behaved unreasonably are related to each other, and thus overlap. They are also related to other aspects of the case not included in the claim. It is therefore not possible to calculate precisely the additional time that was taken up. However, I estimate that the first instance of unreasonable behaviour took up about half a day at the August session; that the council's behaviour regarding the sports centre contribution and the A81 Corridor Strategy took up a day and half a day respectively; and that the manner in which the council conducted its case regarding the delivery of a rail halt and sustainable transport provision accounted for a further 1½ days. The August session of the inquiry therefore lasted about 3½ days longer than it would otherwise have done. As the two days in December on which the inquiry had to be reconvened would otherwise have taken place in August, adding these days would amount to double-counting. I therefore find the council liable to the appellants for a proportion of the expenses they incurred equivalent to 3½ days of the inquiry.

19. I have no difficulty in certifying this case, which was not straightforward, as suitable for the employment of Senior Counsel. I also have no difficulty in certifying Mr Douglas Bisset, Mr Gary Kyle and Mr Tom McInally as expert witnesses for the appellants. The 3½ day proportion of expenses allows for time taken up in cross-examination of the

appellants' company witness on issues on which the council behaved unreasonably. However, I do not regard the case as so complex as to justify departing from the Sheriff Court scale, which normally applies to planning inquiries. As I also do not find the council's behaviour to be so unreasonable as to justify an award on an agent/client basis, a party/party award is appropriate.

This is a true and certified copy of the decision issued on 28 July 2010.

JANET M McNAIR
Reporter