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## Costs Decision

Site visit made on 25 April 2012

**by John Papworth DipArch(Glos) RIBA**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 30 May 2012**

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### **Costs application in relation to Appeal Ref: APP/T1410/A/12/2170342 78 Terminus Road, Eastbourne BN21 3LX**

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Instant Cash Loans Ltd for a full award of costs against Eastbourne Borough Council.
  - The appeal was against the refusal of an application for planning permission for change of use of ground floor from Class A1 (Retail) to A2 (Financial and Professional Services).
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### **Decision**

1. I allow the application for an award of costs in the terms set out below.

### **Reasons**

2. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The Appellant's costs application was made at the same time as their final comments on the Council's case and the Council's rebuttal was received by e-mail subsequently. The application accords with the requirement of Paragraph A12 of the Costs Circular with regard to the timing of applications.
3. The reason for refusal stated that the proposed change of use would result in more than 35% of non-retail uses in Secondary Shopping Area 9 and would therefore be contrary to Policy TC6 of the Eastbourne Borough Plan 2001 – 2011. That policy however is permissive and contains five areas for consideration. The supporting text says at paragraph 10.24 that '*in interpreting Policy TC6 the Council will have regard to the proportion of non A1 frontages...and the proportions sought are as set out in Table A over.*' It is in the table that the 35% figure is stated.
4. It is clear that the 35% figure is something to which regard is to be had, as an aid to interpreting the policy, and that the policy requires consideration of the effect and any benefits or harm. The overall aims are stated in the heading to the policy section of the town centre and the introduction of the National Planning Policy Framework during the currency of the appeal has not changed those aims with regard to the vitality and viability of town centres, and their role in the shopping hierarchy.
5. The reason for refusal results from a delegated report which, under the heading 'Appraisal' expresses the view that the Council's approved policy states that there should be no more than 35% non-retail uses, that the proposed change

of use breaches that figure and hence is contrary to the policy. The appraisal finishes with the statement that the change of use to A2 office would thus have an adverse impact on the vitality and viability of this part of the Secondary Shopping Area and that it is considered that there are no overriding circumstances that would justify any exception to policy.

6. Although the words 'no more than 35%' are used in the table, paragraph 10.24 describes the figures as being 'sought' and the policy provides for the further considerations as set out. There is no indication in the report that these have been addressed, or what the result of that addressing might have been. If the 35% figure was decisive, there would be no need in a permissive policy for any further considerations to be set out, as the policy would be a straightforward one of a proposal either complying or being contrary and this is how the Council appear to have approached their policy. Whilst little might be read into the Council's use of the word 'office' in the report, it is an indication that no further consideration was given to the nature of the use, as required under section d) of the policy wording, or to the use of conditions limiting the type of use within Class A2. In addition to these matters within policy, there is no real appraisal either of the material considerations mentioned in Section 38(6) of the 2004 Act.
7. The Council's reasons for refusal was not complete and there is no evidence presented to show that full consideration was given to the aims or wording of policy, and hence the Council acted unreasonably as set out in paragraph B16 of the Circular. There is also no evidence of consideration of the use of conditions as paragraph B25 to allow other than what the Council describe as 'an office'. The policy does allow for the exercise of judgement, as paragraph B18, but there is no evidence that this judgement was exercised in the case.
8. It is the case that in response to a request for comment on the introduction of the National Planning Policy Framework, the Council submitted further information and data, but none of this appeared in the delegated report, and whilst providing background as to why care is needed in considering applications in the town centre and why the policy is important, it does not add to the consideration of this particular use. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has been demonstrated and that a full award of costs is justified.

### **Costs Order**

9. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Eastbourne Borough Council shall pay to Instant Cash Loans Ltd, the costs of the appeal proceedings described in the heading of this decision such costs to be assessed in the Senior Courts Costs Office if not agreed.
10. The applicant is now invited to submit to Eastbourne Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

*S J Papworth*

INSPECTOR