

Costs Decision

Site Inspection on 25 November 2016

by Graham Self MA MSc FRTPI

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

Decision date: 08 December 2016

Costs Applications Relating to Appeals APP/R5510/C/16/3149394 & APP/R5510/W/16/3149420

Site at: The Bear on the Barge, Moorhall Road, Harefield UB9 6PE

- The application is made under the Town and Country Planning Act 1990, Sections 78, 174, 322 and Schedule 6, and the Local Government Act 1972 Section 250(5).
 - The application is made by The Bear on the Barge Limited for an award of costs against the London Borough of Hillingdon Council.
 - The appeals were made against an enforcement notice issued by the council and against the failure of the council to decide an application for planning permission within the statutory time limit.
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Procedural Matters

1. Separate costs applications were made for each of the appeals under Sections 78 and 174. I am determining both applications here.

Summary of Submissions by Appellant

2. In relation to the Section 78 appeal, the main basis of the costs claim is that the council acted unreasonably in refusing to determine the planning application within the eight week statutory period. The appellant also expresses concern about whether the council's refusal to determine the application was reasonable in itself. One reason for an award of costs against a planning authority, as stated in national advice, is if it prevents or delays development which should clearly be permitted. In this case the delay in deciding the application was unwarranted. The appellant was left with no other choice than to appeal the non-determination, thereby incurring professional costs necessary to pursue the appeal.
3. As for the Section 174 appeal, the appellant contends that the planning authority acted unreasonably by issuing the enforcement notice while having before them a validated planning application. The costs caused to the appellant could have been avoided if the decision-making procedure had been allowed to run its natural course; then if the application had been refused the applicant could have appealed by the appropriate methods. The council's executive officers had sought to usurp the proper delegated decision-making procedures which were already in place at least 28 days before the enforcement notice was issued.
4. There were no public interest issues of such gravity which outweighed proper planning and appeal procedures. Issuing the enforcement notice at that stage was unreasonable and vexatious. There were good planning policy reasons supported by case law for granting permission for the retention of the

development. The enforcement notice was incorrectly served on a dissolved company. The period for compliance with the notice was also too short.¹

Rebuttal by Council

5. In response, the council contend that the application was determined outside the statutory period because of the complexities of the site and late responses by statutory consultees. The decision to take enforcement action was well founded. There is nothing in legislation or procedural guidance to prevent the issue of an enforcement notice while a planning application to regularise the breach is being determined. The council wrote to the appellant in December 2015 inviting an application; no response was received. A further letter was sent on 8 January 2016² giving the appellant until 11 February 2016 to respond; again no response was received. Had the appellant engaged with the council a different approach might have been adopted.

Assessment

6. Decisions on awards of costs are irrespective of the outcome of the related appeal. Costs may 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.
7. The application for retrospective planning permission is dated 21 February 2016. This was a Sunday, so the earliest the application could for practical purposes have been received by the council on 22 February. Eight weeks after that was 18 April. The enforcement notice was issued on 30 March; it was due to take effect on 29 April. According to the Section 174 appeal form, the appeal against the enforcement notice was made on 28 April at about 16.38 hours. The Section 78 appeal against non-determination of the application was then made at 13.35 hours on 29 April.
8. The sequence of timings summarised above has curious aspects. It suggests that the council's planning officer or officers had decided to recommend refusal of the application by 30 March. If so, there would have been no reason to delay taking the matter to a planning committee meeting, irrespective of whether all the consultation responses had been received.³ It also makes me wonder, for example, what would have happened if the officer's actions had not been endorsed by the planning committee when it met later. If the council had believed that the four-year immunity period was imminent, rapid enforcement action would have been clearly warranted, but the council have not made any such suggestion.
9. On the other hand, some developers deliberately try to delay enforcement proceedings by not responding to communications from planning authorities, and the available evidence suggests that this happened here, or at least the council could reasonably have believed it was happening, given the appellant's apparent failure to respond to the council's letters in December 2015 and January 2016. The council's second letter on 8 January 2016 asked various questions, for example seeking information about the importance of the extensions to the

¹ The points mentioned in these last three sentences were set out at some length in one of the appellant's written submissions for the enforcement appeal, headed "The Three Outline Grounds of Appeal". The application for costs was included within this submission. The arguments relating to the appeal itself, and to the appeal against the refusal of planning permission, are dealt with in my decisions on the appeals.

² In the council's written submission this date is given as 8 January 2015; this appears to be a mistake.

³ In any case, a failure to respond in time by a statutory consultee (the Canals and Rivers Trust is specifically mentioned by the council) should be a problem for the consultee, not for other parties, and should not delay decision-making.

business. This letter warned that if no response was made by 11 February or if no planning application was made, enforcement action might be taken. Both of these letters were addressed to "Mr K Wyatt, Manager, The Bear on the Barge", and the appellant has not tried to deny that they were not received; so there is no good reason why they should not have been treated responsibly by their recipient. Yet the appellant did not respond or submit an application by 11 February.

10. There is no evidence as to whether the council sought agreement from the applicant for an extension of time, when the council found they could not determine the planning application within the statutory eight week period. At the very least, the council should have informed the applicant about the problem. As far as I can tell from the information available to me, neither of these things happened in this instance.
11. The fact that the enforcement notice was served on a dissolved company indicates that the council did not serve a planning contravention notice to verify matters such as ownership. That was perhaps inadvisable, especially as the questions asked in the council's letter of 8 January could usefully have instead been included in a planning contravention notice, which would have required a response. However, the decision not to issue such a notice (or overlooking the possibility of it, if that is what occurred) was not unreasonable behaviour.
12. The appellant's claim that there was no choice other than to appeal against the non-determination of the planning application is artificial. There was another possible choice, which would have been to agree on an extension of time for the application to be decided. What is probably more likely is that the appellant knew or guessed or assumed that the application would be refused, and decided to appeal immediately after the eight week period.
13. My conclusion on these procedural aspects is that both parties behaved unsatisfactorily to some extent - by about March and April 2016, both sides appear to have adopted entrenched positions without communicating with each other. The council may have lost patience with what was perhaps perceived as intransigence and lack of communication by the appellant, and having decided on enforcement action, were unwilling to suspend the proceedings while the application was processed and determined. In many situations such firmness of approach would be admirable, but there was a degree of unreasonableness in issuing this enforcement notice while the planning application was most of the way through processing but had not been determined.
14. I now turn to the appellant's argument that development should have been permitted and that it was unreasonable for the council not to have granted planning permission. It will be apparent from my decision on the appeal that I do not accept this contention. I do not need to repeat the reasons here. This undermines the appellant's argument that the appeals should not have been necessary. It seems to me that having regard to the history described in the written evidence and irrespective of the timing of events, appeals against either a failure to determine the application or a refusal of permission, and against an enforcement notice, would have been inevitable.
15. As mentioned in paragraph 6 above, two criteria have to be met for a costs application to succeed: there has to be unreasonable conduct by a party; and the unreasonable conduct has to have caused another party to incur expenditure which would otherwise have been avoided. I have found that the timing of the enforcement action, shortly before the planning application was due to be decided was unreasonable to a degree; but the appellant's conduct was a contributory

factor, and because the appeals would have happened anyway, the council did not cause the appellant to incur unnecessary or wasted expenditure.

16. I conclude that unreasonable behaviour resulting in unnecessary or wasted expense has not been demonstrated, so an award of costs is not justified.

Decision

17. The applications for an award of costs relating to both of the appeals are refused.

G F Self

Inspector