Costs Decision

Inquiry held on 25-27 October and 9 November 2016

Site visit made on 25 October 2016

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 16 December 2016

Costs application in relation to Appeal A - Appeal Ref: APP/X0415/C/15/3140748
Land to the West of Two Dells Lane and South of Cassett House, Two Dells Lane, Ashley Green, Buckinghamshire

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr and Mrs C Winter for either a partial or a full award of costs against Mr Doug Mash.
- The Inquiry was in connection with an appeal against an enforcement notice alleging the formation of a track.

Costs application in relation to Appeal B - Appeal Ref: APP/X0415/W/16/3148937
Three Agricultural Buildings, Two Dells Lane, Chesham, Buckinghamshire

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr and Mrs C Winter for a either a partial or a full award of costs against Mr Doug Mash.
- The Inquiry was in connection with an appeal against the refusal of Chiltern District Council to grant approval under the General Permitted Development Order 2015 for the change of use of three agricultural buildings to three dwellinghouses.

Decision

1. The application for a partial award of costs is allowed in the terms set out below.

Procedural Matter

2. For the purposes of this decision Appeal A is referred to as the enforcement appeal and Appeal B as the Class Q appeal.

The submissions for Mr and Mrs Winter

3. Mr and Mrs Winter were the Rule 6 Party in the above appeals. They seek either a full or a partial award of costs against the Appellant, Mr Mash. Their submissions were made in writing[1] and the main points are as follows:

4. Mr Mash originally made an appeal on ground (c) but in February 2016 advised the Inspectorate that he wished to change this ground (c) appeal to a

[1] Document I

ground (b) appeal. The Rule 6 Party submits that the Appellant was confused as to the difference between the two grounds and notes that the Appellant was professionally represented at all material times.

5. Also in February the Appellant submitted his statement of case, including a ground (b) appeal, and which also attached witness evidence from a number of people including the Appellant and photographic evidence. A revised statement of case maintained the ground (b) appeal, included the previous evidence and a further witness statement.

6. On 17 February 2016 the Rule 6 Party emailed the Inspectorate, copied to the Appellant, stating that the ground (b) appeal was misconceived, asked the Appellant to withdraw it and put him on notice as to costs. On 9 March 2016 the Appellant responded that the ground (b) appeal would be a matter to be addressed by the Inspector at the Inquiry. The Rule 6 Party pointed out that the ground (b) appeal was flawed in its response to the Appellant's statement of case[2].

7. In a further statement dated 23 March 2016 the Appellant maintained his ground (b) appeal. The Appellant withdrew the ground (b) appeal on 2 September 2016, shortly before the exchange of evidence. The fact that the track is development that requires planning permission is accepted by the Appellant in the statement of common ground.

8. The Appellant's decision to run and then abandon a ground (c) appeal and then run and abandon a ground (b) appeal constitutes unreasonable behaviour. The Rule 6 Party incurred costs dealing with these abandoned grounds.

9. With regard to the ground (f) appeal, at no point has the Appellant explained what lesser steps would be appropriate to secure the removal of the breach of planning control despite the Rule 6 Party explaining the requirements of ground (f) to the Appellant on numerous occasions. The only point that was pursued was that the requirement to rip the ground was excessive to remedy the breach. The Appellant accepted that the breach of planning control involved the compression of the ground. The Appellant's failure to put forward any proper basis for a ground (f) appeal is unreasonable and the Rule 6 Party incurred costs in responding to the ground (f) appeal.

10. The Rule 6 Party submitted that the ground (a) appeal was hopeless for a number of reasons including it being inappropriate development in the Green Belt; the Appellant's failure to demonstrate very special circumstances to justify the grant of planning permission; and Mr Smith's acceptance that the track was not necessary for agricultural purposes which had been the only factor relied on as justification for a grant of permission. The appeal on ground (a) was therefore unreasonable and the Rule 6 Party incurred costs in responding to it.

11. With regard to the Class Q appeal the Appellant accepted that without the track mud and ruts would make the route to and from the buildings impractical and impassable for agricultural purposes, it follows that without the track the site is plainly not suitable for residential use. Mr Smith also accepted the proposition that where a site proposed for residential development needs to include parking provision but cannot lawfully do so, it would be an impractical and

[2] Response dated 16 March 2016

undesirable location for housing – the Rule 6 Party maintains that this is the case in this appeal.

12. The decision by the Appellant to pursue his Class Q appeal based as it is on an unlawful and unjustifiable access track is patently unreasonable. The Rule 6 Party has incurred costs in dealing with the Class Q appeal.

The response by Mr Mash

13. Mr Mash responded in writing[3] and the main points are as follows:

14. The ground (b) appeal was withdrawn before the exchange of evidence because, even if it had succeeded, it could not deliver the whole of the track which was the subject of the notice. The withdrawal of the ground (b) appeal did not prevent the Rule 6 Party from detailing the works carried out and making assertions about the pre-existing nature of the land before the works were carried out and the Appellant does not concede his evidence of the pre-existing conditions of the land and the existence otherwise of a way.

15. Any expenditure wasted was limited to the Rule 6 Party having to deal with the ground of appeal in his statement of case.

16. The ground (a) appeal was pursued entirely reasonably. There was a legitimate discussion to be had about whether the engineering works do or do not preserve the openness of the Green Belt and it was legitimate for the Appellant to contend that the works do preserve openness for the reasons given in evidence and submissions. This is a question of fact and degree and involves an exercise of planning judgment. It was also reasonable for the Appellant to maintain that the track brings utility to the functioning of this part of the farm and its buildings and is a very special circumstance capable of overcoming the policy harm to the Green Belt.

17. With regard to the ground (f) appeal. The Appellant says that there should be no requirement to rip the sub-surface because this predicates that the land constituting the track will be cultivated. It will not be and will continue to be used as a means of access to the land. The requirement to remove the hardcore and top dressing and to restore the land to its former level can be achieved without ripping.

18. The costs application in relation to the Class Q appeal relies on the issue of the access track and premises that access without the hardened track would render the Class Q appeal meritless. It would, however, be possible to create a hardened way without engineering operations but, in any event, the track can be provided through the ground (a) appeal if the merits favour it. The parking issue raised by the Rule 6 Party was misconceived.

19. The Appellant was and remains entirely justified in pursuing these appeals and cannot be accused of acting unreasonably.

Reasons

20. The Planning Practice Guidance advises that 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[4].

[3] Document II
[4] ID 16-030-20140306

Appellants are required to behave reasonably in relation to procedural matters, that is the process, and substantive matters, that is, the issues arising from the merits of the appeal[5].

21. The original appeal made on 16 December 2015 in respect of the enforcement notice included an appeal on ground (c) on the basis that the works to the track were repairs. The Appellant's statement of case was sent to the Inspectorate by email on 15 February 2016 at 22.49 and again on 16 February 2016 at 09.41 and it included a case on ground (b) but not (c). A later email, at 16.37 on 16 February explained why the grounds had been amended, in effect, that the repairs to the track were more appropriate for a ground (b) appeal than ground (c). Evidence relating to the ground (b) appeal was attached to the statement. It is not clear from the file when the Rule 6 Party was made aware of the revised ground of appeal but the emails of 15 and 16 February were not sent to them. The Rule 6 Party's statement of case was submitted on 23 February 2016 and addressed the ground (b) appeal. The Appellant submitted a revised statement of case also on 23 February 2016.

22. On 8 March 2016 the Appellant's Agent confirmed that the Appellant himself and a ground contractor would be giving evidence which in the main related to the ground (b) appeal.

23. The Rule 6 Party addressed the ground (b) appeal in their reply, dated 16 March 2016, to the Appellant's statement of case. The ground (b) appeal was withdrawn on 2 September 2016 and the submission date for proofs of evidence was 27 September 2016.

24. The PPG advises that if an appeal is withdrawn without any material change in circumstances an award of costs may be made against the Appellant if the claiming party can clearly show that they have incurred wasted expense as a result[6]. The Rule 6 Party incurred costs in respect of the ground (b) appeal in, among other things, the preparation of their statement of case, their reply to the Appellant's statement of case and in correspondence. The Appellant was professionally represented throughout and there was no change in circumstances. The Appellant was aware of the length of the track throughout the appeal process and the suggestion that the ground (b) appeal was withdrawn because it could not deliver the whole of the track is not plausible.

25. I consider that the Appellant acted unreasonably in making the ground (c) appeal, amending that ground to a ground (b) appeal and then withdrawing the ground (b) appeal. This amounted to unreasonable behaviour which caused the Rule 6 Party to incur costs that were wasted. The wasted costs in this respect are limited to the ground (c) and (b) appeals and up to the date of the withdrawal, that is, 2 September 2016.

26. With regard to the ground (a) appeal, in answering questions in cross examination Mr Smith appeared to have a limited and confused understanding about how Green Belt policy should be applied. However, the evidence in the ground (a) was fully tested at the Inquiry and although I found against the Appellant I do not consider he acted unreasonably in pursuing the appeal on ground (a).

[5] ID 16-031-20140306
[6] ID 16-054-20140306

27. The Appellant's response to the costs application in respect of the ground (f) appeal does not in my view reflect either the statutory purpose of the requirements or the evidence given to the Inquiry. The purpose of the requirements is to remedy the breach and I found in my decision that the breach included the compression of the ground which could be remedied by it being ripped. The requirement has nothing to do with whether the land will be cultivated in future or not. Whatever may take place on the Appellant's land once the requirements have been complied with is a matter for the Appellant and in this respect I note that no evidence was presented to the Inquiry other than supposition from Mr Smith.

28. I therefore consider it was unreasonable for the Appellant to pursue the ground (f) appeal and the Rule 6 Party incurred and wasted costs in respect of it.

29. The Class Q appeal was made on 21 April 2016 and was linked to the enforcement appeal shortly thereafter at the request of the Appellant. One strand of the Appellant's case was that the change of use would be permissible because of the hard-surfaced track leading to and from the buildings. However, the track was a new track (given the grounds of appeal pursued in the enforcement appeal whether or not the Appellant did not concede the Rule 6 Party's evidence on the pre-condition of the land or the existence of a way) and without a hard-surfaced track, on the Appellant's own evidence, the buildings were not accessible by domestic vehicles. This renders the buildings impractical and undesirable for residential use as I so found.

30. The Appellant requested that the Class Q appeal should be linked to the enforcement appeal when he made the Class Q appeal and therefore he was fully aware of the somewhat circular argument that he would be submitting, that is, in the enforcement appeal that the track was required for agricultural use and in the Class Q appeal that the residential use was acceptable because of the existence of the track.

31. The oral evidence in the Class Q appeal given by Mr Smith amplified his written evidence and was fully tested at the Inquiry and his concessions with regard to the track were made in cross-examination. Again, although I found against the Appellant I consider that he did not act unreasonably in pursuing his appeal on Class Q.

Conclusions

32. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Practice Planning Guidance, has been demonstrated and that a partial award of costs is justified.

Costs Order

33. 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 Mr Doug Mash shall pay to Mr and Mrs C Winter the costs of the appeal proceedings in Appeal A described in the heading of this decision limited to the costs incurred by the Appellant's amendment of the ground (c) appeal to a ground (b) appeal; the withdrawal of the ground (b) appeal up to 2 September 2016; and the ground (f) appeal in its entirety.

34. Mr and Mrs Winter, to whose agents a copy of this decision has been sent, is now invited to submit to Mr Doug Mash 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.

Gloria McFarlane

Inspector

Documents submitted

Document I - Updated Costs application on behalf of the Rule 6 Party

Document II - Response to the Rule 6 Party costs application