Costs Decision

Hearing held on 14 March 2017

Site visit made on 14 March 2017

by Pete Drew BSc (Hons), Dip TP (Dist) MRTPI

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

Decision date: 17 March 2017

Costs application in relation to Appeal Ref: APP/P1940/C/16/3154795
Land and building at Highwood Lodge, Highwoodhall Lane, Pimlico, Hertfordshire HP3 8SJ

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Three Rivers District Council for a full, or in the alternative a partial, award of costs against Adam Victor Kenealy.
- The Hearing was in connection with an appeal against an enforcement notice that originally alleged: *Without planning permission, the material change of use of the Land from its use for agriculture to a residential use including the erection of a building (hereinafter called "the Building" and shown cross hatched in blue on the attached plan) and associated structures (including gravel hardstanding, patio, close board fencing and domestic chattels/paraphernalia)*; as corrected in my main decision.

Formal Decision and Costs Order

1. In exercise of my powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990, and all other powers enabling me in that behalf, IT IS HEREBY ORDERED that Adam Victor Kenealy shall pay to Three Rivers District Council, 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.

2. The Applicant is now invited to submit to Adam Victor Kenealy, to who's Agent a copy of this decision has been sent, the details of those costs with a view to reaching agreement as to the amount.

The case for Three Rivers District Council

3. The application is made having regard to the following paragraphs of the Planning Practice Guidance ['the Guidance']: 16-030-20140306, 16-031-20140306, 16-032-20140306, 16-040-20140306, 16-051-20140306 and 16-053-20140306. The Council says that the appeal was unreasonable because it had no reasonable prospect of success and that this unreasonable behaviour has directly caused the Council to incur unnecessary or wasted expense. It says the Council has been put to considerable time and expense in order to deal with the appeal and that this was unnecessary because it should never have been made. As such a full award of costs is sought on a substantial rather than procedural basis, including the preparation of the appeal statement and supporting documents and the expense of making the costs application.

4. The Council draws attention to the types of behaviour, which may give rise to a substantive award against an Appellant. It says the appeal had no reasonable prospect of success and this concern was exacerbated by the failure to engage with the Council. In the Council's view the development was clearly not in

accordance with the Development Plan [DP] because it was a new building in the Green Belt and, as such, does not accord with the National Planning Policy Framework [the Framework]. It says this should have been obvious from the outset and that the attempts to say otherwise do not hold up.

5. The Council says that applying the statutory approach in section 38(6), the only material consideration that has been advanced is the security need and even in that respect the evidence is slim. The Council says there are no other material considerations which indicate that planning permission should be granted. It draws attention to the phrase *inadequate supporting evidence* and says that is wholly the case here because the highest it is put is that the scheme should have planning permission as a form of ancillary development. However the Council says unless the development can be brought within the exceptions in paragraphs 89/90 of the Framework, which the Appellant has been wholly unable to do, the Appellant should not have come down this road.

6. Turning to the third bullet-point of paragraph 16-053-20140306 of the Guidance, it is clear that the onus of proof falls on the Appellant in respect of ground (d). In this case the Council suggests that the Appellant has tried to hoodwink everyone into thinking that the works started in 2011. In order to show that the works are immune the Appellant has to bring compelling and cogent evidence. However at the Hearing the Appellant has confessed the opposite is true and that the works were undertaken in 2013. The Appellant must have known that if he embarked on ground (d) that the onus fell on him and yet it is clear that he knew from the outset that he did not have a 4-year case. For these reasons a full award of costs is sought or, in the alternative, a partial award of costs in relation to ground (d) should be made because in the Council's view this is a plain case where there should be an award of costs.

The response on behalf of Adam Victor Kenealy

7. Dealing with the ground (a), the Appellant says that taking account of the conditions that have been offered a grant of planning permission would enhance the countryside. It is claimed that the Council has no evidence to counter that submission and that may be seen as acquiescence given the position that existed in 2012 when the stables were still evident. In the Appellant's submission there would be no damage to the Green Belt if the ground (a) were allowed and planning permission was granted. In relation to this application these arguments are said to go a long way to discount it.

8. It is said that whether the works are said to have extended, altered or replaced the building, that there would be compliance with, in particular, bullet-points 3 and 4 of paragraph 89 of the Framework and the criteria in Policy DM2. In the Appellant's view, when taken with the conditions that have been offered, this would ensure compliance with both the Framework and the DP. This is not a virgin site and buildings existed on it in respect of which there had been no enforcement action. Viewed in this light it is said to be eminently reasonable to have lodged the appeal against the enforcement notice on ground (a). The existing buildings were used for recreational purposes, which were ancillary to the enjoyment of the dwellinghouse and after the building was changed that remains the position. Whether or not that argument succeeds, it is said reasonable evidence has been submitted on behalf of the Appellant to show in absolutely clear terms that a building has been used on the appeal site for more than 4-years by the occupants of Highwood Lodge. It is submitted that this is enough to counter the application made in respect of ground (d).

9. For these reasons it is submitted that there was a realistic prospect of success on both grounds, with or without concessions, such that it was reasonable to fight the Appellant's corner at appeal stage.

Reasons

10. The Guidance 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.

11. I deal initially with ground (d). I have given a reason in paragraph 10 of my main decision why this ground could not succeed. The grounds of appeal, the Agent's email dated 31 July 2016 and the Appellant's statement, are all predicated on the view that the works to the building comprised a conversion, but such an assertion does not stand up to close scrutiny. It appears that it was only at the Hearing, albeit partly in adjournment, that relevant concessions were made as to the full extent of the works undertaken in 2013[1]. Given the terms of what I understand to be an agreed Statement of Fact, together with other concessions made during the Hearing, e.g. those detailed in paragraph 13 of my main decision, the claim that this was a conversion is bordering on irrational. It should have been obvious to the professionally represented Appellant that this claim would not get close to discharging the onus of proof because it is clearly apparent that the extent of the building works did materially affect the external appearance of the building and was development.

12. I acknowledge that I have corrected the allegation and hence put it on a slightly different footing, but it was agreed at the Hearing that there would be no injustice from doing so. Moreover my reading of the evolution of this matter is that it was largely necessary to do so because of the manner in which the Appellant had conducted himself. In pre-Hearing correspondence the Council said the terms of the notice was informed, at least in part, by the reply to the PCN[2]. However it would appear that it was only at the Hearing, for the first time, that the Appellant conceded that relevant answers in the reply to the PCN were wrong. It is therefore plain that if the Appellant had not approached this appeal in such a reckless manner, e.g. by making clear at an earlier stage that the invoices were falsified, relevant PCN answers were wrong and that key claims in the statutory declaration were incorrect, that the Council might not have needed to go to the lengths that it did in its comprehensive statement.

13. I acknowledge that the Council has not sought to make a procedural award but one of the examples given under that head[3] is: "*providing information that is shown to be manifestly inaccurate or untrue*". In this case it is the Appellant who has admitted, only at the Hearing, that the information he has previously given to the Council is untrue. That has consequences and the first of those is that this ground of appeal had no reasonable prospect of succeeding. Whilst the Appellant's appeal documentation did not expressly rely on things like the PCN response or the statutory declaration neither did it say, in unambiguous terms, that the content thereof was wrong. The Appellant's brief statement addresses grounds (d) and (f) under the same heading and relies on, amongst other things, the invoice dated 2010 for the original stable block, with the clear inference that nothing materially changed. However the assertion in paragraph

[1] See, amongst other things, paragraph 9 of the Statement of Fact [Document 4 to main decision]
[2] See for example paragraph 10 of the Council's response to the Inspector's note dated 21 February 2017.
[3] See paragraph 16-052-20140306.

2.4 of the statement to that effect is unsupported by evidence and is not a sound basis, at least in the absence of more, on which to sustain a ground (d) appeal. However nothing else was put in to substantiate the claim, there was a failure to engage with the Council prior to the Hearing to agree a statement of common ground and the concessions that were then made at the Hearing only serve to reinforce my view that pursuit of the ground (d) was unreasonable.

14. Turning to ground (a), the grounds of appeal and the Appellant’s statement are also predicated on the unsupported claim that this was a conversion and hence the re-use of an existing building. I acknowledge that the Appellant’s position changed at the Hearing and reference was made to the third and fourth bullet points in paragraph 89 of the Framework. I have given reasons in my main decision why the first of these does not apply and ultimately that comes back to the basic problem that there is no substantive evidence that the original building was retained. The argument in respect of the fourth bullet point is less stark but in my view it was unreasonable to claim that the new building was in the same use as the stable. The reference to ancillary use appears to have been an attempt to fudge the issue but, particularly having regard to the use of the historic curtilage for the car business, it was always destined to fail. It is material that the Appellant does not seem to have taken that use into account.

15. In that context the development was clearly not in accordance with the DP and the Framework. Although other considerations were advanced, which I have dealt with in paragraphs 41-44 of my main decision, these arguments were very weak and not supported by clear evidence, whether by giving details of the business or by reference to comparable appeal decisions. The reliance on conditions to address the harm was not reasonable in circumstances where they did not begin to deal with the issue of the inappropriateness in principle. For all of these reasons I find that the ground (a), the deemed application, had no reasonable prospect of success. This ground that falls squarely within the first bullet-point of paragraph 16-053-20140306 of the Guidance.

16. I deal briefly with ground (f) because neither party has expressly dealt with it in the context of this application. However the grounds of appeal and the Appellant’s statement are also predicated on the claim that the building could be “*restored*”[4] to its pre-conversion appearance. Underpinning that claim is the unsubstantiated assertion that significant components of the stable remained. Accordingly my earlier logic applies and so this too was unreasonable.

Conclusion

17. For the reasons identified above, I conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated. As such, in the circumstances of this case it is appropriate to make a full award of costs as set out in the formal decision and costs order.

Pete Drew

INSPECTOR

[4] The Appellant’s term at paragraph 2.7 of the statement.