
Costs Decision

Inquiry held on 11 April 2017

Site visit made on 11 April 2017

by C Sherratt DipURP MRTPI

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

Decision date: 18 May 2017

Costs application in relation to Appeal Ref: APP/C1435/C/16/3151115, 3151116, 3151118, 3151120 & 3151122

Land adjoining The Rhinns, Cherry Gardens Hill, Groombridge, Tunbridge Wells

- 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 Dean Sudds for a full award of costs against Wealden District Council.
 - The inquiry was in connection with appeals against an enforcement notice alleging the material change of use of land to various mixed uses.
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Decision

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

The submissions for Mr Dean Sudds

The material points are:

2. The costs of the appeal in respect of all of the change of use notices has been thrown away as all have either been withdrawn or quashed. This includes the costs of preparation for and attendance at the inquiry.
3. The test is unreasonable behaviour. The issue of notices that were incapable of correction was unreasonable behaviour which plainly led to wasted and abortive costs.
4. If this alone is not sufficient to justify an award of costs, then the local planning authority were alerted to the issues arising as a result of the drafting of the notices in the letter sent by the appellant in July 2016. Whilst the Planning Inspectorate didn't agree at that time, it doesn't exonerate the local planning authority from its responsibility to ensure the notices are correctly drafted. The penultimate paragraph of the Planning Inspectorate response warned that the appointed Inspector may take a different view.
5. In support of the application for costs, the appellant refers to paragraphs 48 of the Planning Practice Guidance that requires local planning authorities to carry out adequate investigation. Had it been more diligent then an accurate notice would have been issued. Alternatively the difficulties with the notices should have been apparent had the Statement of Case properly explained the case for the Council and the differences in the notices; there was no attempt to say anything more than in notices.

6. It is not for the appellant to define the terms of a notice; rather the terms of the notice define the response from the recipient. The notices referred to individual mixed uses rather than one composite mixed use. The appellant responded in that context.
7. Moving forward, the Council will either not serve an enforcement notice in which case the work was entirely abortive or the Council will issue another notice and the appellant will be put to the cost of a second inquiry. It is unreasonable that the appellant should be put to such additional expenditure.

The response by Wealden District Council

The material points are:

8. The withdrawal of the notices was not unreasonable. They were carefully drafted to deal with particular problems that the local planning authority was properly concerned about.
9. The notices were checked by the legal department for the local planning authority. An Inspector decided it was not appropriate to strike down the notices when the appellant raised the matter in July. Accordingly, and entirely reasonably one Inspector took a view that the appeal could proceed on the basis of the notices. In doing so, the Planning Inspectorate rejected the request to hold a pre-inquiry meeting to discuss the validity of the notices. In those circumstances it is simply impossible to contend that the ultimate decision to withdraw in light of a different view expressed by a different Inspector makes the local planning authority unreasonable.
10. Consistent with that, the local planning authority has historically adopted, without any criticism from Inspectors in the past, a similar approach to its change of use enforcement notices in relation to this site – including the last appeal which involved 5 x notices. That approach has continued under two Heads of the Legal Department of the Council.
11. The appellant has not assisted with this matter. The appellant, even now does not say what mixed use they consider is occurring. They have kept their cards close to their chest in what both sides acknowledge is a complex site. This has made it more difficult for the Council to resolve the best way forward. The approach is reminiscent of previous decades where enforcement notice appeals were devoid of substantive merit.
12. In this case, the notices were withdrawn in the specific context of the Inspector's observations, based on the evidence that it was appropriate to seek to deal with the change of use allegations by way of a single notice alleging one change of use to a mixed use.
13. Accordingly, they were not withdrawn because any of the factual events underlying the reasons for issuing the notices had not occurred, or that the local planning authority had unreasonably considered they had occurred, but rather that there was a different planning analysis to those facts which ought to be applied. That matter of planning analysis is a matter of judgement. The local planning authority's judgement on the issue was not unreasonable.
14. The Inspector invited the local planning authority to elect prior to the making of a final decision on whether an amendment to Enforcement Notice A could be made, as to whether it wished to seek to proceed on the existing change of use

notices or withdraw them and proceed with the contention that EN A should be corrected. The local planning authority elected the latter option. Again this was a reasonable choice, given the round table discussion and how the issues evolved during that discussion.

15. For these reasons the decision to withdraw the notices was not unreasonable.

Reasons

16. 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.
17. The Council did not act unreasonably in seeking to enforce against a material change of use of the land. Looked at individually, each notice is clear on its face. However, the individual notices all related to the same area of land and yet each alleged that a different mixed use of that same area of land was occurring. The reasons for issuing each enforcement notice were identical. It was established at the start of the inquiry that the area identified on each plan was consistent with a single planning unit. Having visited the site I agree with this assessment. It follows therefore that not more than one of the alleged uses could have been occurring at the time the notice was issued or none. The identification of the correct planning unit(s), at the time of the investigations taking place, would have been critical to the question of whether one or more uses (mixed or otherwise) were occurring.
18. The appellant brought the inconsistencies with the notices to the attention of both the Council (letter dated 2 July 2017) and the Planning Inspectorate (17 and 23 August 2017) before proofs of evidence were prepared. It is regretful that this letter and the preparation of Statements of Case did not alert the Council to the difficulties with the notices. The Council's case did not distinguish clearly between the various uses, even in the proof of evidence. Furthermore, it was necessary to seek to clarify whether all the reasons reasonably related to each separate use. For example, it was agreed at the outset of the inquiry that the impact on the Ashdown Forest Special Protection Area would not be relevant other than in the case of the notice alleging a residential use, effectively withdrawing reasons for issuing some of the enforcement notices.
19. Whilst all the uses identified in each of the notices may well have been occurring (with the exception of agriculture), the uses were neither physically or functionally separate from each other. The reasons for issue should relate to the allegation. More diligent investigation in relation to the relationship between the uses and the planning unit would have ensured that a single correct notice was issued or at the very least, had uncertainty remained, notices were clearly issued in the alternative.
20. I have considered carefully whether the appeal history (where this particular drafting issue has not been raised before) or the response from the Planning Inspectorate justifies the Council not reviewing their case prior to the inquiry. The role of the Planning Inspectorate is not to provide advice to parties about how to draft enforcement notices or reasons for refusal; that is a matter for the local planning authority issuing the notice.

21. In any event, limited information was available to the Planning Inspectorate at the time of its response, in which it suggested that the notices were not vague or self-contradictory. It was suggested that each notice alleges a discrete mixed use of the land which could be taking place on different parts of it. Accordingly, a pre-inquiry meeting as requested by the appellant was not deemed to be necessary. However, the response from the Planning Inspectorate was clear that the appointed Inspector could still potentially identify flaws in the notice. The response was therefore without prejudice. Furthermore, it was evident at the start of the inquiry that the different uses were not occurring 'in discreet areas' as there was no physical or functional separation of uses within the site. It is only the local planning authority that would have such knowledge at that early stage of the appeal proceedings.
22. The history and response to the appellant from the Planning Inspectorate does not relieve the local planning authority of its duty to ensure notices are drafted accurately following diligent investigation. In this case, the issuing of 5 separate notices relating to the same planning unit but alleging different (mixed) uses, simply could not, as a matter of principle, be accurate. I do not accept there is a planning analysis to be applied in this regard. I consider that the Council acted unreasonably as more diligent investigation would have ensured that an accurate notice was issued, rather than a series of notices, none of which tackled the actual composite mixed use which the Council consider is occurring.
23. I therefore find that unreasonable behaviour resulting in wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified.

Costs Order

24. 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 Wealden District Council shall pay to Mr Dean Sudds, 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.
25. The applicant is now invited to submit to Wealden District 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.

Claire Sherratt

Inspector