
Costs Decisions

Inquiry held on 4 April 2017

by B M Campbell BA(Hons) MRTPI

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

Decision date: 02 June 2017

Costs applications in relation to:

Appeal A: APP/K2420/C/16/3143502 &

Appeal B: APP/K2420/X/16/3143504

Land to the north of Newtown Linford Lane, Groby, Leicestershire LE6 0FF

- The applications are made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The applications are made by Mr Arthur McDonagh for a full award of costs in relation to Appeal A and for a partial award in relation to Appeal B, against Hinckley & Bosworth Borough Council.
 - The inquiry was to have been in connection with an appeal against an enforcement notice alleging use for agriculture and for the siting of a twin mobile home for residential use (Appeal A) and in connection with an appeal against the refusal to issue a certificate of lawful use or development (LDC) for an existing dwellinghouse (Appeal B).
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Decision

1. The applications for an award of costs are allowed in the terms set out below.

Background

2. The enforcement notice, the subject of Appeal A, was withdrawn by the Council before the inquiry opened by letter dated 30 March 2017. That appeal did not, therefore proceed. At the inquiry and following clarification of the terms of the application, the Council conceded the case relating to the issue of a LDC, the subject of Appeal B.

The submissions for Mr McDonagh

3. The costs applications were submitted in writing and added to orally at the inquiry.
 4. In brief, full costs are warranted in relation to work undertaken in connection with Appeal A against the issue of the enforcement notice. The alleged breach was plainly wrong, could not be defended, and yet the notice was not withdrawn until a few days before the start of the inquiry. The Council's behaviour was unreasonable and resulted in wasted expense for the Appellant in having to prepare this appeal for the inquiry.
 5. A partial award is sought in relation to Appeal B as it is acknowledged that there was some ambiguity on the application form as to what was being applied for. However, any that there was should have been dispelled by the time of receipt of the evidence to the related hearing in the Magistrates Court,
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if not before. At that time it was patently clear that the certificate sought was for operational development and not for an existing use. Adopting a pragmatic approach, however, costs are sought only for attendance at the inquiry.

The response for the Council

6. The response was made orally at the inquiry. The main points made are as follows.
7. It is right to say that the allegation in the enforcement notice was wrong so that ground (b) would have succeeded. However, the late withdrawal of the notice arose as a consequence of a necessary period of consultation with neighbours and the Parish Council from which the conclusion was drawn. If the notice had been withdrawn, say, a month earlier, that would have resolved dispute with the Council but there would still have been an issue with interested persons.
8. Even if there was unreasonable behaviour; that has to have resulted in wasted or unnecessary expense having been incurred. In this respect, most of the matters arising in the enforcement appeal had either been covered in the Appellant's evidence to the Magistrates Court or were required in the evidence prepared for the LDC appeal (Appeal B). What was needed over and above that was de minimis. If a full award is made it should only relate to work which would not otherwise have been done for the Magistrates Hearing or in connection with the LDC appeal.
9. In relation to Appeal B, the confusion as to what was being applied for was amply demonstrated by the Inspector's written and oral requests for clarification. The Council had patently misunderstood as is clear from its evidence which all related to use rather than operations and from the fact that it conceded the case at the inquiry once it was clarified that the application was for operational development.
10. The confusion arose from the errors in the application made by the Appellant and even the evidence to the Magistrates Court contained references to use so the uncertainty remained. It was not until clarification was given at the inquiry that the situation became clear. Had it been made clearer at an earlier stage, the LDC appeal might have been avoided altogether by the Council conceding.
11. Criticism about lack of engagement goes both ways. Whilst the Council did not seek to clarify the application, neither did the Appellant make any attempt to explain what he was applying for and no pre-application advice was sought.

Reasons

12. The Planning Practice Guidance (PPG) 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.

Appeal A

13. A local planning authority may issue an enforcement notice where "it appears to them" that there has been a breach of planning control and it is expedient to do so. Nonetheless, and despite the word "appears", the PPG makes clear that for enforcement action, adequate prior investigation must be carried out. If it

is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve an enforcement notice in the first place, or ensured it was accurate, then the authority is at risk of an award of costs.

14. In this case, the allegation was plainly wrong. It alleged a twin mobile unit for residential use when it was clear from only a cursory glance on site that there was only a single unit caravan present. With the Council having made that basic elementary error, I wonder what, if any, investigation was undertaken to ascertain what had taken place on the site prior to the issue of the notice.
15. The onus was on the Council to properly investigate and to identify the breach that had occurred. I cannot see how it could have been assisted by interested persons who had not been on the site itself and, as laypersons, had no experience in interpreting breaches of planning control. The Council could have drawn a conclusion on the accuracy of the allegation prior to the end of its consultations with interested persons or, indeed, could have delayed issuing an enforcement notice until it had done so.
16. The Council's behaviour in not withdrawing a patently inaccurate enforcement notice until some three working days before the inquiry opened was unreasonable. There is nothing to indicate that its ultimate finding that the structure was a building (as agreed in the signed Statement of Common Ground) could not have been reached earlier if proper investigation had been undertaken. That unreasonable behaviour resulted in wasted expense for the Appellant in having to prepare for the appeal right up until the notice was withdrawn. A full award of cost is, therefore, justified. Whilst noting the Council's comments relating to work already undertaken in connection with other matters and the Appellant's acceptance of some overlap, it is not for me to become involved in amounts. That is a matter for the parties involved and, in the event of them being unable to reach agreement, the Senior Courts Costs Office.

Appeal B

17. The confusion as to what was being applied for in the application for a LDC plainly arose initially from the errors made by the Appellant in completing the application form and in its supporting statement. Box 7 of the form is directly related to s191(1) of the Act with its three subsections. The Appellant clearly indicated that a certificate was sought for an existing use and indeed even indicated that it fell within Use Class C3.¹ The description in box 8 "existing dwellinghouse" is commensurate with use. If the Appellant had wanted to indicate operational development – that is building operations – then it would have been clearer had it read "erection of a dwellinghouse".
18. I find no fault with the Council for considering the application as one for an existing use from the application as made. Whilst it is suggested that the Council should have known what was intended because the answer in box 9 was that the building works were substantially complete more than four years before the date of the application; that reference to s171B could have been an error made by the Appellant given that use is what had been sought in box 8. The supporting statement submitted with the application was no clearer as it referred to use in a number of places such as paras. 1.2, 3.1, 4.1 and 4.2.

¹ of the Town and Country Planning (Use Classes) Order 1987

19. The Appellant criticised the Council for not seeking clarification as to the terms of the application but that seems to me to be abdicating responsibility for his own mistakes. When it became clear to him that the Council had determined lawfulness on use rather than operations, he could have approached the authority with a view to clarifying matters. He did not do so.
20. Nonetheless, at the inquiry I was given the witness statement prepared on 8 September 2016 on behalf of the Appellant for the hearing in the Magistrates Court. In that document, clarification is clearly given that what was being sought was a LDC for operational development and not one for the existing use. With that information to hand, the Council would have been in a position at that time to review its position in relation to the refusal of the LDC and yet it did not do so, instead continuing to defend on the basis of use. That was regrettable as, given the Council's concessions in relation to the building operations; the matter in dispute might have been resolved so that the inquiry did not need to take place.
21. I therefore find unreasonable behaviour resulting in wasted expense to have occurred and that the award of partial costs applied for addressing the need to attend the inquiry on 4 April 2017 is justified.

Costs Order

22. 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 Hinckley & Bosworth Borough Council shall pay to Mr Arthur McDonagh, the costs of the appeal proceedings described in the heading of this decision comprising:
- the full costs incurred in pursuing Appeal A against the issue of an enforcement notice; and
 - partial costs in relation to Appeal B, limited to those incurred in attending the inquiry on 4 April 2017,
- such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to Hinckley & Bosworth 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.

B M Campbell

Inspector

DOCUMENTS

- A Costs Application on behalf of the Appellant
B E mails between Appellant and the Council