
Costs Decision

Inquiry held on 21 and 22 August and 23 and 29 October 2018

Site visit made on 22 August 2018

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 December 2018

Costs application in relation to Appeal Ref: APP/W1525/C/17/3181909 Land at Old Chase Farm, Hyde Lane, Danbury, Chelmsford, Essex CM3 4LP

- 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 Chelmsford City Council for a partial award of costs against Mr Alexander Jubb.
 - The inquiry was in connection with an appeal against an enforcement notice alleging a material change of use of land to use for storage.
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Decision

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

The submissions for Chelmsford City Council

2. The costs application was submitted in writing, with additional points being made orally after the appellant's response. The gist of the application is that the appellant failed to fully disclose the details and arguments being put forward in respect of the ground (d) appeal. As a result of this unreasonable behaviour it was necessary to adjourn the inquiry in order that the Council was not prejudiced. Accordingly the appeal was prolonged and directly caused the Council to incur costs, including the costs of preparing further evidence and attendance at the resumed inquiry.

The response by Mr Alexander Jubb

3. The response was made at the inquiry in writing and orally. The point is made that allowing additional time to ensure no prejudice to the Council is not the same as a finding of unreasonable behaviour. In submitting a statement of case the obligation placed on a party is met provided that the case is made and sufficient documentary evidence is provided to support it. The procedural requirements were met to a sufficient degree and accordingly the appellant did not behave unreasonably when objectively judged.

Reasons

4. 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. Examples of a type of behaviour that may give rise to a procedural award of costs against an appellant include:

- Delay in providing information or other failure to adhere to deadlines;
- Prolonging the proceedings by introducing a new ground of appeal or issue.

Appeal procedure and grounds of appeal

5. When making the appeal on 9 August 2017 the appeal form indicated that the appeal was being made on grounds (a), (c), (f) and (g). The appellant selected an inquiry as the preferred procedure, with two days suggested as the duration. The Planning Inspectorate by letter dated 15 January 2018 confirmed that the appeal was valid and explained that a written representation procedure was considered the most suitable. According to the timetable a statement was to be submitted by 26 February if it was necessary to add details to the appeal.
6. The appellant by email dated 22 January reaffirmed the view that an inquiry was required. In its response of 26 January the Planning Inspectorate confirmed that the appeal would continue with the written representations format but that the procedure would be kept under review throughout the process.
7. The appellant's statement of case was submitted on 5 March 2018 and at paragraph 2.18 stated: "Having now considered matters further the Appellant also wishes to appeal against the Enforcement Notice on ground (d)". In section 6 of the statement on the grounds of appeal, ground (d) sets out basic facts about this ground, which appears to be a direct quote from the Planning Inspectorate's Procedural Guide on enforcement notice appeals. There then follows a single sentence: "Based on the evidence contained within APP6, particularly APP6(g) and (h) from 2005 it is clear that on a balance of probability that at the time the enforcement notice was issued on 6th July 2007¹, the appeal site had been used for storage for a period in excess of 10 years for the purposes of section 171B(3)."
8. The appellant describes APP6 as setting out "the history of the wider site for storage including the extent of the CLEUD"². APP6(g) is advice from Richard Wald as to whether the CLEUD permits general storage or only storage of caravans. APP6(h) is a letter from Smart Planning dated 13 February 2013 containing (i) advice as to the current permitted use of the land, bearing in mind the site's planning history, and (ii) comments on the redevelopment potential of the site. A statutory declaration by Mr Jubb is at APP6(l).
9. Subsequently there was correspondence exchanged between the appellant, the Council and the Planning Inspectorate on the inclusion of a ground (d) appeal and the appropriate procedure for determining the appeal. Included in this correspondence a letter dated 6 April 2018 from the appellant stated that the evidence upon which the appellant relied pursuant to ground (d) was not available until very recently and in particular the aerial photography was not available in August 2017.
10. A site inspection on 26 April 2018 was cancelled because the procedure was under review. By letter dated 24 April 2018 the Planning Inspectorate confirmed that the appeal would be determined by the inquiry procedure.

¹ The date probably should be 6 July 2017, being the date of the enforcement notice subject of the current appeal.

² Statement of case APP6 paragraph 6.6

11. Two proofs of evidence were submitted on behalf of the appellant. Mr Cussen's proof was confined to grounds (a), (f) and (g), noting that grounds (c) and (d) were covered in the original statement of case and appendices, final comments³, the evidence of Mr Jubb and in legal submissions to be made at the inquiry. Mr Jubb's short proof set out additional points on his knowledge of the site, the CLEUD, further legal advice on whether the hardstanding was previously developed land and the need for storage facilities.

The Inquiry and appellant's note dated 21 August 2018

12. During the course of the inquiry and more particularly Mr Jubb's oral evidence it appeared the case being advanced was that the use of the land for storage had become lawful prior to 2005. After discussion I asked the appellant to clarify the basis of the ground (d) appeal and a note dated 21 August 2018 was submitted the following day.
13. The appellant's note clearly stated that reliance was placed on a material change of use to storage in 1983/84 and the following 10 year period of continuity of that unlawful use. In addition the note stated that whilst not necessary to do so, the appellant was able to demonstrate a 10 year period of use for storage on the appeal site in the 10 year period preceding service of the enforcement notice in 2017.
14. Having heard submissions from the Council and the appellant I agreed to the Council's application for an adjournment in order that consideration could be given to the ground (d) case advanced by the appellant.

Assessment

15. The appellant undoubtedly made the appeal and submitted a statement of case in the expectation that the appeal would be determined by way of an inquiry. The procedural history shows that the appeal was proceeding by written representations until 24 April 2018. The ground (d) appeal was introduced at statement stage. At that point not only should the supporting facts be stated but also the full particulars of the case, whichever procedure was being followed⁴. Following the change in procedure no additional statement of case was submitted. The proofs of evidence added nothing specific to the ground (d) case.
16. Therefore at the start of the inquiry the appellant's statement of case was the primary source of detail on the ground (d) appeal. To this extent I agree with the Council's submission that paragraph 6.26 in the appellant's statement of case is the only paragraph which addresses the ground (d) appeal. This paragraph directs the reader to APP6, particularly APP6(g) and (h) and to the period from 2005. In view of the content of APP6(g) and (h) my understanding, based on paragraph 6.26, was that the ground (d) appeal rested on the period from 2005. The aerial photographs included in the appendices to the statement cover the period 1999 to 2016 and therefore do not assist a ground (d) case over an earlier period, before and after 1983/84.

³ No final comments were submitted by the appellant – see Planning Inspectorate letter dated 28 March 2018.

⁴ Regulation 7 The Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002 (SI 2002/2683); Rule 6 The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 (SI 2002/2685); Procedural Guide: Enforcement Notice Appeals – England, Planning Inspectorate Annex B and Annex D

17. The subsequent case presented by the appellant was substantially different. Even though the appellant argued that all the material was before the inquiry, there was no statement comparable to the 21 August 2018 note. This note was the first time that a material change of use was related to a particular date. Furthermore in that statement the ground (d) case was expressed in the alternative, a case that had not been articulated at all before then. The statutory declaration of Mr Jubb (APP6(I)) includes statements that storage has taken place over the whole site but does not present a case or ground (d) argument. The statutory declaration of Mr Rushbrook also makes a similar point. However, whilst grounds of appeal are sometimes 'hidden' it is not at all clear from the statutory declarations that an earlier 10 year period of unauthorised storage use was being relied on. This is especially so when the appellant is professionally represented and paragraph 6.26 identifies the period post 2005. The reference to storage across the site equally could be read as being relevant to the ground (c) appeal.
18. I conclude that the appellant failed to set out full particulars of the ground (d) case until day 2 of the inquiry. This failure to comply with the regulations and procedural guidance was unreasonable behaviour.
19. The Council says that it has incurred costs as a result of the unreasonable behaviour including the costs of preparing further evidence and the costs of attendance on a further day's hearing. The Council also claims that it would be entitled for the costs of attending on an additional day if it is concluded that the inquiry would have taken 2 days. The appellant submits that if, contrary to his response to the costs application, a partial award for costs is justified it should be limited to the costs incurred in submitting the additional evidence on ground (d) and the costs in coming back for one additional day.
20. The appellant does not dispute that unnecessary expense would have been incurred by the Council in presenting further evidence on ground (d). As to the additional inquiry time, and more particularly the half day on 29 October, the appellant submitted that this was a function of the Planning Inspectorate not allocating sufficient time in the first place and my decision to hear closing submissions rather than accepting them in writing.
21. The facts are that the appellant at the outset estimated that an inquiry would last two days and stated that two witnesses would be called. After the procedure was changed to an inquiry, the inquiry was scheduled to last one day. On 27 June 2018 the Planning Inspectorate asked the parties if more time would be needed and on 28 June requested that information on witnesses and timings be provided. On 24 July the appellant informed the Planning Inspectorate that he would be calling professional planning evidence, client evidence and "may well also call authors of the statutory declarations", and suggested that at least an extra day would be required. The Planning Inspectorate on 25 July requested the appellant to complete the inquiry timetable form, previously issued. On 26 July the appellant replied that the inquiry was likely to take 2 full days with a third morning for overspill/site visit.
22. In a pre-inquiry note, before the extent of the ground (d) case was appreciated, I stated "the likelihood is that the inquiry will need to go into a second day". As it turned out the inquiry sat for three and half days, including the site visit. More particularly time was taken on the afternoon of day 1 to clarify the emerging case on ground (d) and how it would be dealt with. This

included an adjournment for the Council's barrister to receive instructions and a discussion on the way forward. Day 2 started later than would have been the case in order that the appellant's note could be considered by the Council. Once the inquiry resumed some 30 minutes was taken in considering the Council's application for an adjournment. At that time both parties estimated that one extra day would be sufficient to complete the inquiry. Once the inquiry resumed in October the calling of additional witnesses was a contributory factor to the extension of the proceedings into a fourth day.

23. The fact that the ground (d) case was not articulated adequately at the outset resulted in an inability to properly programme the inquiry, inquiry time was used inefficiently, the event became disjointed and the proceedings were prolonged unnecessarily. The original time allocation by the Planning Inspectorate and the oral presentation of closing submissions are of little significance by comparison. In my view requiring closing submissions in public was necessary to ensure timeliness, the ability for clarification and procedural fairness. Therefore the additional costs arising from the unreasonable behaviour include (i) the costs incurred in preparation of the evidence in response to the ground (d) case for the period pre 2005, and (ii) the costs of the Council's attendance on day 3 and day 4 of the inquiry.
24. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs is justified.

COSTS ORDER

25. 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 Alexander Jubb shall pay to Chelmsford City Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the preparation of the additional evidence in response to the ground (d) case presented in the appellant's note dated 21 August 2018 and the attendance at the inquiry on 23 and 29 October 2018, such costs to be assessed in the Senior Courts Costs Office if not agreed.
26. The applicant is now invited to submit to Mr Alexander Jubb, to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Diane Lewis

Inspector