The Planning Inspectorate

Costs Decisions

Inquiry Held on 26 and 27 November 2019

Site visit made on 28 November 2019

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 January 2020

Costs application 1
Appeal A) Ref: APP/C1760/C/19/3220542 and
Appeal B) Ref: APP/C1760/C/19/3220546
The land at Whitehouse Field, Goodworth Clatford, Andover, Hampshire

- The application is made under the Town and Country Planning Act 1990 (the Act), sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Test Valley Borough Council for a partial award of costs against Mr Simon Nelson of Nelson Asset Management Ltd.
- The inquiry was in connection with an appeals against enforcement notices:
  A) alleging the breaching of conditions imposed on planning permission ref TVN.6179/8 "In that the ground level of the land has been raised above that which was permitted by the approved plans"; and
  B) Alleging the formation of hardstanding on the Land in the approximate position shown hatched green on the attached plan and the formation of bunds on the Land in the position shown approximately cross hatched blue on the attached plan.

Costs application 2
Appeal A) Ref: APP/C1760/C/19/3220542 and
Appeal B) Ref: APP/C1760/C/19/3220546
The land at Whitehouse Field, Goodworth Clatford, Andover, Hampshire

- 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 Simon Nelson of Nelson Asset Management Ltd for a partial award of costs against Test Valley Borough Council.
- The inquiry was in connection with an appeals against enforcement notices:
  A) alleging the breaching of conditions imposed on planning permission ref TVN.6179/8 "In that the ground level of the land has been raised above that which was permitted by the approved plans"; and
  B) Alleging the formation of hardstanding on the Land in the approximate position shown hatched green on the attached plan and the formation of bunds on the Land in the position shown approximately cross hatched blue on the attached plan.

Costs Decision 1

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

Costs Decision 2

2. The application for an award of costs is refused.

Costs Application 1

The submissions for Test Valley Borough Council

3. The Council has applied for partial costs for 3 broad reasons. These were submitted in writing but I will summarise the basic grounds below.

4. Firstly, the appellant appealed both notices on the basis of ground (d) which was then withdrawn during the course of the inquiry. With respect to Appeal B, rather than ground (d) the case was clearly more relevant on ground (f). Secondly, evidential points in relation to the appeals on ground (c) have either been shown to be unsubstantiated or plainly unreasonable. With respect to both cases, it should have been clear that there was no likelihood of success on grounds (b) or (c). Thirdly, the appellant attempted to rely upon a plan which has had to be accepted as being inauthentic (the disputed plan) and its provenance was not properly checked and should have been. That has directly resulted in wasted expense.

The response by Nelson Asset Management Ltd

5. The Council had not given any pre-warning about the application for costs until around 20 minutes before the inquiry opened. There were plenty of opportunities prior to the inquiry to raise the issue of costs. The way that this has been done has changed the nature of the inquiry.

6. It is for both sides to emphasise their own cases and call as a witness who they see fit. That does not make their approach unreasonable. It does not follow logically that a party to an appeal must concede a point or otherwise risk costs. The costs and cases for issuing the notices have generally been predicated on the Council looking through the wrong end of the telescope basing it on the Brunel Survey rather than the planning permission.

7. With respect to ground (d), the Council's planning witness had to deal with it anyway in the normal course of things. The appellant's planning witness showed what has happened over time. The appellant has been frank in conceding this point.

8. With respect to the disputed plan, there is an overlap with the appellant's own costs application as the Council failed to deal with it properly or forewarn of possibility for a costs application. The appellant acted in an exemplary way by showing the plan to the Council when it became available, sought to engage on that document and when evidence came to light about its authenticity, withdrew reliance on it immediately.

Reasons

9. The Planning Practice Guidance (PPG) advises that parties in planning appeals and other planning proceedings normally meet their own expenses. Costs may however 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. The PPG confirms that the aim of the costs regime is, amongst other things, to encourage all involved in the appeal process to behave in a reasonable way and follow good practice.

10. Although the PPG stresses that it is good practice to make costs applications in writing before an inquiry, at the very least they should be made to the

inspector before closure of the event. Although the appellant was not aware of a likely costs application until 20 minutes before I opened the inquiry, the application was made in time.

The disputed plan

11. I will take the Council' third aspect of the costs application first because it raises in my view, the most significant aspect of this costs application. The appellant sent, on 27 March 2019, a plan to the Council that was subsequently shown through the forensic examination of an expert instructed by the Council, not to be genuine. The appellant has not disputed the forensic report and subsequently confirmed that they would not be relying on it. The plan had, according to the appellant's solicitor, been discovered on 14 January 2019, shortly before the submission of the appeals.

12. There is no indication that any of the appellant's witnesses or other advisers had checked the veracity of the plan between its discovery in January 2019 and its submission with a letter from the appellant's planning consultant on 27 March 2019. This letter and plan were submitted after the lodging of the appeals. The disputed plan was very clearly used to try to make the Council less than confident about relying upon the evidence it had discovered regarding the Brunel Survey. It is not clear how the disputed plan came into being, but I consider that the appellant before attempting to rely upon it, should have done more to confirm whether or not it was authentic particularly as it was initially going to form a important element of their case. By relying at the early stages of the appeal on the plan was unreasonable in my opinion.

13. If the disputed plan had been accepted, it could have had significant implications for the case. The Council clearly took it seriously, writing to the Planning Inspectorate on 6 June 2019 pointing out that a forensic report was being considered and requesting an extension of the initial statements stage of the appeal.

14. The Council incurred the expense of the investigations into the document including preparation of a witness statements from its own long-standing employee and the forensic laboratory which produced a report that was presented in evidence. Time was taken to consider the advice by its own team including resultant correspondence. The forensic report was available prior to the date for preparation of proofs of evidence and the appellant did at least accept this which has prevented some wasted time and therefore expense by the Council's team dealing with the appeal. A partial costs award in my view is however justified due to the initial submission of this plan.

Withdrawal of appeals on ground (d)

15. The PPG states that an appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding. Furthermore, the late withdrawal of an appeal without good reason is given as an example of unreasonable behaviour and I consider that the same principle should apply to the withdrawal of a ground of appeal in enforcement cases.

16. The initial grounds of appeal document indicated a misunderstanding of the time limits for taking enforcement action with respect to breaches of condition with respect to Appeal A. Section 171B of the Act sets out the time limits for

taking enforcement action. It is well established that all breaches of conditions (except those preventing use as a single dwellinghouse - which does not apply here) are subject to the 10 year immunity period as set out in s171B(3). The appellant's grounds of appeal document states that 4 years is relevant for the Appeal A ground (d) case and so there was an initial misunderstanding of what the appellant needed to demonstrate.

17. With respect to Appeal B on ground (d), the correct time limit of 4 years was quoted. The evidence submitted by the appellant with respect to both appeals contained no substance to any initially claimed immunity from enforcement action and the appeals on ground (d) in both cases had little chance of success.

18. The Council did need to consider the available evidence regarding the time limits for taking enforcement action prior to issuing the enforcement notice. When reviewing their case, work was also required in preparing for the public inquiry. Ms Dutfield in her proof of evidence went into some detail however with respect to Appeal A about the correct time limit for taking enforcement action. She also then set out the evidence regarding why a 10 year claim for immunity could not be substantiated. The claim of 4 years immunity with respect to Appeal B was a matter of evidence and was not clear cut although Ms Dutfield also identified that what was claimed appeared to relate more to an appeal on ground (c). That was accepted by the appellant at the inquiry.

19. The appeal on ground (d) with respect to Appeal A was unreasonable and was not withdrawn until the public inquiry. The Council had undertaken work which was unnecessary and therefore involved wasted expense in terms of Ms Dutfield's preparation of evidence on that matter. The conditions for an award of costs on that basis is also therefore justified.

20. The case with respect to Appeal B on ground (d) is less clear cut and in my view, there was clearly more of a cross-over between the evidence that is relevant to ground (c). Although the initial entering on ground (d) was unreasonable, I find that this did not lead to wasted expense.

Strength of the evidence

21. With respect to Appeal A, I have dismissed the appeal on ground (c). Much of the evidence indicates to me however that the way in which the relevant planning application had been considered and in particular the inherent ambiguity within the appeal documentation could have been avoided. The seeds of ambiguity were sown when the approved plans did not clarify what datum should be used to interpret heights. This was exacerbated by the submission and then approval of a plan to satisfy planning conditions, with what appears to have been a mistaken datum level reference.

22. In my view given the complexities of the case and specialist nature of the interpretation of plans and what has been undertaken on the appeal site, it justified the scrutiny of a public inquiry. In this context, the appellant has not behaved unreasonably in putting forward evidence that demonstrated their interpretation of the planning permission which should have been issued in clearer terms.

Conclusion

23. I therefore consider that a partial award of costs is justified due to the unreasonable behaviour by the appellant with respect to the initial use of the

disputed plan and with respect to Appeal A but only in relation to the late withdrawal of the case on ground (d).

Costs Application 2

The submissions for Nelson Asset Management Ltd

24. The appellant's claim for costs relates to procedural matters which were set out in writing before the close of the inquiry and I will not therefore set the whole case out here. I will summarise their case.

25. First of all, the appellant considers that the Council has acted unreasonably in the preparation for the inquiry and specifically in relation to the lack of engagement in the process of agreeing to a Statement of Common Ground (SOCG). Secondly, that the Council did not engage reasonably with respect to the lodging of the disputed plan or the Brunel Survey. Thirdly that the Council's costs application is unreasonable in terms of why and when it was undertaken.

The response by Test Valley Borough Council

26. This is a "tit-for-tat" costs application that appears to have been submitted strategically to prevent any costs being awarded and has no merit.

27. With respect to timeliness, the appellant has acted the same way as the Council. No wasted costs have been indicated as a result of the submission of the cost application and lack of notice.

28. The SOCG chronology indicates that a draft was not sent until 10 months after the appeal was lodged. After that both parties worked on it and any fault therefore lies with both parties. The SOCG when agreed served a useful purpose in confirming no reliance on the disputed plan that had been submitted by the appellant, by confirming that there would be no appeals on ground (b).

29. Regarding the disputed plan, it was advanced by the appellant who should have carried out due diligence before submitting something that could have gone to the heart of their case. In that regard the Council did the running. Furthermore no wasted costs have been identified by the appellant.

Reasons

SOCG

30. The lack of co-operation or not agreeing a statement of common ground in a timely manner or not agreeing factual matters common to witnesses of both principal parties are examples in the PPG of unreasonable behaviour by a Local Planning Authority. The start date for the appeals was 30 April 2019 and the letter of that date from the Planning Inspectorate, set out the time-table for the appeal. The inquiry opened on 26 November and therefore under the inquiry procedure rules a SOCG should have been agreed not less than 4 weeks before that date. A SOCG was eventually agreed shortly before the opening of the inquiry.

31. The Council considers that the late agreement of the SOCG was not entirely their fault. Even if the fault was with the Council it has not been clearly demonstrated by the appellant, as required by the PPG, how the alleged unreasonable behaviour resulted in unnecessary or wasted expense to them.

Engagement regarding plans

32. In the other first costs application above, I have determined that the submission of the disputed plan without having it verified constituted unreasonable behaviour by the appellants. Whether or not there was any immediate engagement with the appellants about their concerns with the plan, the Council did all of the work and paid for the costs of analysing its provenance or apparent lack of it. The Council wrote to the Planning Inspectorate pointing out the potential issue on 6 June 2019 and requesting a delay in the initial statement stage of the appeal. This was an appropriate way of dealing with this matter. When their statement was submitted in July 2019 it was made clear that there was an intention to produce evidence about their concerns. The appellant confirmed that they had no evidence to dispute the forensic report in October, before the deadline for submitting proofs of evidence.

33. The Brunel survey was referred to in the report that lead to the issuing of the enforcement notices. The appellant doesn't suggest that there was a failure to make this available at the early stages of the appeal or before. The appellant refers to the Council's evidence in the 27 March 2019 letter to the Council that accompanied the disputed plan and in that stated that they had never accepted the Brunel Survey as the "April 1997" plan (as referred to on the approved drawings). However, the authenticity of that plan as a survey carried out in April 1997 has not been questioned. It is a matter of evidence and law that I have considered through the inquiry as to its significance to the planning permission. I do not consider that the Council failed to engage with the appellant in any way that has affected the appeal, the appellant's case or in any way that has caused the incurring of unnecessary or wasted expense.

Costs application

34. The appellant was not aware of a likely costs application until 20 minutes before I opened the inquiry. The PPG stresses that it is good practice to make costs applications in writing before an inquiry however, at the very least they should be made to the inspector before closure of the event.

35. The appellant considers the costs application by the Council was an aggressive bullying tactic adopted to cover a failure to adopt a consistent position on the planning permission. I do not perceive the Council's costs application in that way. I have also allowed the first costs application albeit in narrower terms than it was applied for. It was however clearly justified and made before the end of the inquiry. There is therefore no procedural irregularity in terms of timing of the application.

36. The appellant had accepted the lack of provenance of the disputed plan before the submission of proofs of evidence. As such the Council's cross examination of the appellant's witnesses on this matter went on for longer than perhaps was justified. That was in order to make a point purely on costs. I did raise this point with Mr Williams at the time. However, I do not consider that this was to an unreasonable extent and in my view it did not lengthen the inquiry by a significant amount of time.

Conclusion

37. I therefore find that unreasonable behaviour resulting in unnecessary or

wasted expense, as described in the PPG, has not been demonstrated with respect to the second costs application. An award of costs is not justified and the application fails.

Costs Application 1 Costs Order

38. 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 Nelson Asset Management Ltd shall pay to Test Valley Borough Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the initial submission of and reliance upon an inauthentic survey plan and with respect to Appeal A (APP/C1760/C/19/3220542) in relation only to the late withdrawal of the case on ground (d); such costs to be assessed in the Senior Courts Costs Office if not agreed.

39. The applicant is now invited to submit to Nelson Asset Management Ltd, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

A Harwood

INSPECTOR