
Costs Decision

Inquiry Held on 10 and 11 September 2019 and 10 March 2020

Site visit made on 10 March 2020

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 April 2020

Costs application in relation to Appeal Ref: APP/A2280/C/18/3197399 Building G, land rear of 48-52 Napier Road, Gillingham, Kent ME7 4HD

- 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 Medway Council for a partial award of costs against Mrs J Sangha.
 - The inquiry was in connection with an appeal against an enforcement notice alleging without the benefit of planning permission, the change of use to six self-contained flats.
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Decision

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

The submissions for Medway Council

2. The application is for a partial award of costs on two points in respect of:
 - the postponement of the inquiry, which was originally scheduled to open on the 24 April 2019; and
 - the adjournment of the inquiry on the 11 September 2019.
3. The appellant's notification that she needed to postpone the inquiry scheduled for the 24 April 2019 came too late for the Council and they incurred the full cost of the venue hire. This could have been avoided as the appellant knew three weeks before she postponed that she needed to be elsewhere.
4. The adjournment of the inquiry on the 11 September 2020 was caused by the introduction of new evidence. The Planning Practice Guidance (the Guidance) and the Planning Inspectorate's Procedural Guide 'Enforcement Notice Appeals England', 23 March 2016, both state in these circumstances another party may make an application for costs, which may give rise to a procedural award of costs. The only reason given to explain the submission of the new evidence was that it was not known about beforehand. However, this caused the Council to incur additional costs such as extra preparation time and the costs of additional venue hire.

The response by Mrs Sangha

5. Mrs Sangha resists both applications. The first application is unfair. The appellant made a request to postpone the Inquiry on the 16 April 2019. It could not have been made earlier as there was a delay in communicating the

existence of the warrant from India. As such, the situation was beyond her control. Following the death of her husband, Mrs Sangha is having to deal with multiple litigations. Had she known in advance of this aspect of the costs application, she would have obtained confirmation from her lawyers in India that this is what occurred. The Planning Inspectorate were also satisfied with her explanation and agreed to the postponement.

6. With regard to the second application, the additional evidence was not substantial and the appellant apologised for the late discovery when it was brought to the attention of the Inquiry. The Council also appear to have overlooked that the September sitting was originally scheduled to last for three days in any event so there has been no extra time or costs incurred there. Furthermore, no additional costs were incurred in responding to the additional evidence as the Council failed to engage with it until the Council's witness accepted it during cross examination on day 3 of the inquiry.

Reasons

7. The Guidance advises that 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.
8. How to make a costs application is set out in the Guidance as follows 'All cost applications must be formally made to the Inspector before the hearing or inquiry is closed but as a matter of good practice, and where circumstances allow, costs application should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry and can be added to or amended as necessary in all submissions.'
9. As such, with regard to the first costs application, this could have been made in writing after the April postponement or raised as an intention when the inquiry opened in September. It could also have been referred to when the inquiry was adjourned as the Council signalled that they would probably be making a costs application based on the late introduction of the new material. In any event, prior notice would have allowed the appellant to respond in full, with explanations from the appellant's lawyers, especially those in India, as to who did what, why and when.
10. Notwithstanding what it says in the Guidance, and even if the Council were not sure whether to go ahead with the costs application until March 2020, it seems to me it is also a matter of professional courtesy to inform the other party, to allow them a 'fair crack of the whip' in formulating their response.
11. With regard to this appeal, I have taken into account the appellant's personal circumstances: that she was unexpectedly widowed in September 2016 and since that time has had to deal with 'multiple litigations', seemingly in India, as well as take on the management of her husband's businesses and substantial property portfolio in the UK.
12. Whilst there is confusion as to what the documents accompanying the postponement request mean, I am satisfied that the appellant did what she could to let everyone know that she could not attend in April. I also note that the Council agreed to the request for a postponement the day after the request was made and asked if the Planning Inspectorate could make a decision, as

soon as possible, on the request so that the room booking could be cancelled. The postponement request was granted on the 18 April the day after the Council's email and both parties were notified of this by email. I therefore find that there was no unreasonable behaviour on the part of the appellant in respect of the first part of the costs application.

13. With regard to the second part of the application, the Guidance gives examples of unreasonable behaviour which may result in an award of costs against the appellant and these include 'introducing fresh and substantial evidence at a late stage necessitating an adjournment or extra expense for preparatory work that would not otherwise have arisen'.
14. It does not follow that the introduction of new evidence at a late stage automatically results in an award of costs as the Guidance says, 'may result'. However, the appellant was professionally represented and as such she therefore was aware of the requirement to adhere to the deadlines in the appeal process. Her appeal was also submitted on ground (d) where the burden of proof falls on her. It was her responsibility to demonstrate with all her evidence that the alleged breach of planning control occurred before the relevant date and continued, without material interruption, for a period of four years thereafter.
15. I would have expected the appellant's legal representatives to ask the appellant for all her documentary evidence, to analyse it and present it in such a fashion so as to demonstrate, on the balance of probabilities, that the ground (d) appeal should succeed.
16. This did not occur before April 2019, when the inquiry was first due to open, and there was no satisfactory explanation as to why rent book 3 and the other documentary evidence was not discovered until the end of the Inquiry's first sitting day in September 2019, when the appeal had been lodged in March 2018, a year before the inquiry was originally due to open.
17. If the evidence had been analysed sooner, it would have been apparent that there was a gap between the end of rent book 2 in May 2017 and the start of the Goldex statements in 2018. Whilst on the face of it, the discovery of rent book 3 appeared to bridge the gap, that was not known until it was analysed. After accepting the new evidence, it then became necessary to adjourn proceedings to consider it and also for it to be analysed. The opportunity was also taken then by the appellant to order and analyse all of the evidence to present the ground (d) case, as I required, as this should have been done at the outset. It is not for the Inspector or the Council, in responding to the ground (d) appeal, to have to sift through for example, 224 pages of rent books to work out whether there had been regular rent payments for each flat over four years.
18. The presentation of the appellant's case, namely the submission of late material and the nature of the evidence, which required analysis, amounts to unreasonable behaviour. The appellant submits that the tables would have been presented in closings but I consider that was too late in the proceedings. It led to the Council having to carry out a similar exercise 'in house' in order to try and make sense of the evidence.

19. The late evidence was substantial in that without it my findings may have been different. I therefore do not accept the respondent stating it was not substantial. It was important evidence for the respondent's case at the appeal.
20. As to whether there were any costs incurred as a result of the adjournment, day 3 of the Inquiry was held in the Council offices. However, the original sitting in September was scheduled for three days and the Council had to cancel the third sitting day as it was not needed as planned, due to the adjournment. Extra costs may also have arisen from the Council's barrister's time. In terms of looking at the new material and the analysis, the Council would have had to do this anyway if it had been submitted on time. There is an element of wasted time though because the appellant did not present their evidence in a reasonable manner. The appellant submits that in reality the Council's actions took very little time as the Council did not 'engage with' the new material. Nevertheless, it is my view that, whatever the additional amount, it was wasted expense.

Conclusion

21. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated in relation to the second part of the application for costs only and, in relation to that, the award of costs 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 Mrs Jaswinder Kaur Sangha shall pay to Medway Council, the partial 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.
23. The applicant is now invited to submit to Mrs Jaswinder Kaur Sangha's agent, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

D Fleming

INSPECTOR