The Planning Inspectorate

# Costs Decision

Site visit made on 8 July 2020

**by K Stephens BSc (Hons), MTP, MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 19 August 2020**

**Costs application in relation to Appeal Ref: APP/N1025/C/18/3219523**
**Land at Carr Hill Farm, Cole Lane, Ockbrook, Derbyshire DE72 3RD**

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Erewash Borough Council for a full award of costs against Mr Richard John Barton.
- The appeal was against an enforcement notice alleging, without planning permission, the material change of use of the Land from agriculture and residential to various mixed uses.

## Decision

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

## Reasons

2. Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs (in this case the Council) to incur unnecessary or wasted expense in the appeal process.

3. The Council contends that the appellant acted unreasonably by withdrawing two grounds of appeal and seeking to add an additional ground of appeal at a late stage in the appeal proceedings. As a result there was wasted time and effort and abortive work.

4. Paragraph 051 of the PPG gives an inexhaustive list of examples of unreasonable behaviour by appellants, such as prolonging proceedings by introducing a new ground of appeal and withdrawing of an appeal without good reason. The appellant initially appealed on four grounds: (b), (d), (f) and (g).

5. Based on the appellant appealing on ground (d) the Planning Inspectorate deemed that an Inquiry was necessary due to the complexity of issues and the need for evidence to be given under oath and tested under cross-examination.

6. Late in the appeal process, at the exchange of Statements of Case the appellant withdrew grounds (d) and (g). At the same time he sought to introduce a new ground (a) appeal for two elements of the unauthorised use, namely the conversion and sub-division of a building for the storage of construction/building/rendering materials and equipment within Use Class B8, and to use part of an existing building for the storage of vehicles, plant and equipment in association with the appellant's civil engineering contracting business. This arose from the Council refusing to determine a planning

application for this development which the appellant wanted to be considered under ground (a).

7. As a result of ground (d) being withdrawn the appeal procedure reverted to Written Representations (WR).

8. A ground (d) appeal - that it is too late to take enforcement action - is a legal ground of appeal that relies on facts to demonstrate that the alleged uses and activities had been operating continuously for over 10 years prior to the date the notice was issued. If successful, the alleged development is deemed lawful. The burden of proof lies squarely with the appellant. In addition it is a well established principle of planning enforcement law that where there is an existing mixed use, an additional materially different use will result in a material change of use of the whole planning unit, such that any immunity period built up prior to the introduction of the new use will be lost, if there is a material difference between the original mix and the new mix of uses. The Council referred to this principle, as contained in *Beach v SSETR & Runnymeade BC* [2001] EWHC 381 Admin, but it is illustrated in many cases as a commonly understood legal principle.

9. To appeal on ground (d) the appellant should have been sure of his case and that he had sufficient evidence to support it, on the balance of probability. The reason given for the withdrawal of ground (d) in the appellant's appeal statement[1] was in effect that the appeal was misconceived due to the failure to take into account the effect of new uses being added to an existing mixed use, as raised by the Council in its Delegated report[2] and appeal statement. No reasons were given for the withdrawal of ground (g), apart from the appellant was 'content'.

10. The appellant, through his professional agent, claims he was 'in the dark' about the Council's case from the enforcement notice and had sought to 'reserve his position' and so appealed ground (d) in 'good faith'. He also claims he was ignorant of how the Council was applying the *Beach* case, which he regards as not being a well-known case for the matters the Council was defending, until he had read the Delegated report. Then when the appellant was clear about the Council's case he withdrew ground (d), but only after the appeal had become an Inquiry and statements of case exchanged. In his appeal statement (3 April 2020) the appellant describes how he had felt unable to put his case properly at the start of proceedings and felt obliged to later plead a new ground (a) late in the appeal process.

11. With regards the ground (a) appeal - that planning permission ought to be granted for the matters alleged in the Notice - the Planning Inspectorate had written to the appellant early on in the appeal process to ask if an appeal on ground (a) was to be made and if so the necessary fees needed to be paid to the Council within a certain deadline. No appeal on ground (a) was made or fees paid within the stipulated time period. Under section 177(5A)[3] the ground (a) appeal therefore lapsed. The appellant alleges that his solicitor spoke to the case officer at the Planning Inspectorate, who gave him the 'green light' to submit a ground (a) appeal late on in proceedings by suggesting he include the ground (a) appeal for the Inspector to decide. I have not been provided with

[1] Paragraphs 1.4 – 1.6 of the Appeal Statement dated 3 April 2020
[2] Submitted by the Council with the Questionnaire
[3] Town and Country Planning Act 1990

any evidence of the details of any such conversation. Nonetheless, when the appellant sought to later introduce a ground (a) appeal, the Planning Inspectorate wrote to confirm that there was no provision for a ground (a) appeal to be pleaded at this late stage in the proceedings, as the time period for appealing had lapsed. The fact remains a lapsed ground (a) appeal cannot be re-instated.

12. Even if an appellant is not fully conversant with the implications of the various grounds of appeal or appeal procedures, a paid professional agent should be aware of relevant well established case law and appeal procedures. Although I am satisfied that the appellant did not deliberately set out to complicate, frustrate or prolong the appeal proceedings, I find the appellant acted unreasonably in making an appeal on ground (d) without the necessary evidence to substantiate the appeal on that ground and later withdrawing it when he realised, due to a failure to have regard to well established case law, that it was misconceived; and in pleading a ground (a) appeal too late to be accepted.

13. In order for a costs application to succeed I need to be sure that the unreasonable behaviour I have found has resulted in unnecessary and wasted expense for the Council.

14. There would have been additional costs to both parties as a result of the Planning Inspectorate's decision to upgrade the appeal to an Inquiry. It is not uncommon for appeal procedures to be upgraded at the discretion of the Planning Inspectorate on a closer reading of the case and assessment of its complexities and the need for evidence to be tested in a more rigorous manner with cross-examination. Whilst the decision for an Inquiry was ultimately made by the Planning Inspectorate, the decision was borne from the appellant having appealed on ground (d).

15. The Council prepared a statement for the initial WR appeal. Once the appeal was to be dealt with by Inquiry, the Council was required to produce a Statement of Case. This largely followed the format and content of the WR statement, and would not have involved substantial new work, as the Council's own case had already been rehearsed in its Delegated enforcement report. Nonetheless it still involved responding to the ground (d) appeal.

16. The mutual exchange of statements of case for the Inquiry revealed the appellant's withdrawn grounds, but only after the Council had already expended the time and effort responding to all four appeal grounds. The Council instructed a barrister to represent it at the Inquiry, which was later cancelled due to the withdrawal of ground (d). The appellant's statement of case also sought to introduce a ground (a) appeal late in the appeal process. As a result, the Council intervened to query the legitimacy of this with the Planning Inspectorate. The Council also suggested, rightly, that with the withdrawal of ground (d) the appeal need no longer proceed as an Inquiry and could be adequately dealt with by WR.

17. I accept that these later actions of both parties avoided an Inquiry and the additional work and expense involved with that, such as writing Proofs of Evidence and any rebuttals. I note that when the appeal reverted back to WR, the Council did not prepare any new statement, but relied on previously submitted statements.

18. However, I find the Council expended unnecessary time and effort responding to the ground (d) appeal before it was withdrawn, and time and effort spent considering the ground (a) appeal and advising the Planning Inspectorate of its views.

19. Whilst the withdrawal of ground (g) was without substantive reason, I am satisfied that the substance of this ground would not have caused the Council to expend any further time or effort.

**Conclusion**

20. I conclude that the Council has incurred unnecessary and wasted expense as a direct result of the appellant's unreasonable behaviour in relation to withdrawing ground (d) and attempting to plead a new ground (a) appeal late in the appeal process. Therefore, a partial award of costs is allowed, subject to the Costs Order set out below.

**Costs Order**

21. 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 Richard John Barton shall pay to Erewash Borough Council the costs of the appeal proceedings described in the heading of this decision, but limited to those costs incurred in dealing with the appellant's ground (d) appeal and responding to the appellant's plea for a new appeal ground (a) to be considered late in the appeal process; such costs to be assessed in the Senior Courts Costs Office if not agreed.

22. The Council is now invited to submit to Mr Richard John Barton, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*K Stephens*
INSPECTOR