
Costs Decisions

Inquiry Held on 17, 18 and 25 February 2021

Site visit made on 26 February 2021

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 May 2021

Costs application in relation to Appeal A Ref: APP/A1720/C/19/3235825 Land at The Tithe Barn, Mill Lane, Titchfield, Fareham PO15 5RB

- 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 Kevin Fraser for a full award of costs against Fareham Borough Council.
- The inquiry was in connection with an appeal against an enforcement notice alleging without planning permission, the surfacing with tarmac surfacing material of the car parking area to the east and west of The Tithe Barn.

Costs application in relation to Appeal B Ref: APP/A1720/W/19/3235531 The Tithe Barn, Mill Lane, Titchfield, Fareham PO15 5RB

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr K Fraser of Titchfield Festival Theatre for a full award of costs against Fareham Borough Council.
 - The inquiry was in connection with an appeal against the refusal of planning permission for the re-surfacing of the car park area.
-

Decision

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

Reasons

2. 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. In this case, the application for costs is both procedural, relating to the process, and substantive, relating to the issues arising from the merits of the Council's decision to take enforcement action.
3. The appellant suggests that, given the Council have suggested a number of amendments to the enforcement notice, the notice was not properly thought through and was defective. However, I have found in my main decision that there was nothing improper within the notice and that it was sufficiently clear, on its face, to meet the requirements for enforcement notices set out in section 173 of the Town and Country Planning Act 1990 (the Act). In particular, that those on whom it was served should know what the matters referred to in the notice are and specify the steps required to be taken to achieve the purposes.

4. It is suggested that the Council were too swift in issuing the enforcement notice, bearing in mind that the breach of planning control was reported to them by the appellant. I note that the appellant did not set out to deliberately flout planning regulations, sought to regularise the development and believes the breach is not 'serious'. However, the requirements of section 172 of the Act are that the Council may issue notices where there has been a breach of planning control and where it is expedient to issue the notice. It is for them to decide the timescale and weigh up the appropriate considerations as to whether it is expedient to serve an enforcement notice, including taking account of the seriousness of the breach if relevant. Whilst they may have been swift in taking action in this instance and it may have been possible to resolve the breach by other means, that is not for me to determine and does not constitute unreasonable behaviour.
5. I note that the Council carried out limited investigation of the breach of planning control. However, the enforcement notice was served after a planning application was refused for the development, the appellant having self-reported the potential breach. Further investigation could have been carried out, such as testing samples of the pre-existing surface or creating boreholes, but it is unclear whether that would have been necessary in the circumstances. In my main decision I have weighed up such evidence as I was provided, including documents, photographs, verbal and written evidence and made my conclusions against the appropriate tests. Whether or not further investigation by the Council would have been helpful is unclear, although I note that the burden of proof on the relevant ground (b) and (c) appeals is on the appellant.
6. My attention has been drawn to discussions between the Council and appellant that it is indicated could have resulted in agreement that would have overcome the need to proceed with the appeal. Taking account of *Wokingham Borough Council v Scott and others* [2019] EWCA Crim 205 that related to the importance of discussions between parties, it is possible there may have been some agreement on how to proceed in this case, had there been more discussions. I note that the submission of a planning application to roll grit onto the tarmac surfacing was submitted around the same time as the appellant suggested replacing the surface with road planings. The Council appear to have considered that was the appellant's preferred way of dealing with the surfacing and it may be that they misunderstood that the appellant was willing to consider both. On the basis of those considerations, the response from the Council to those requests for discussion was not a sufficient failure to communicate that it amounted to unreasonable behaviour.
7. There was limited mention of the effect of the impermeable surface against the footings of the listed building until submission of the Council's statement of case. The terms in which it was raised at that stage were clear, albeit not expressly mentioning groundwater. This should have been raised unambiguously within the reasons for issuing the enforcement notice and reasons for refusing the planning application. I have found that the development could result in harm to the listed building for this reason, such that it was a reasonable concern for the Council to raise and to discuss in evidence and at the inquiry. Nevertheless, even if raising this issue during the course of the appeal were unreasonable behaviour, it was raised in sufficient time that the appellant was able to deal with it through the appeal process such that it would not have led to unnecessary or wasted expense in the process.

8. Policy CS17 of the Fareham Local Development Framework Core Strategy seeks development to meet a number of criteria. In this case, whilst the proposal met the basic requirement of the policy that development should be easily accessed by all members of the community, I concluded that the development failed to meet the criteria related to heritage assets such that it was in conflict with the policy as a whole. On that basis, I consider that the Council did not focus disproportionately on heritage matters.
9. A drawing showing how a French drain could be constructed was submitted with documentation relating to the later appeal for the grit rolled into the surface of the tarmac. I have indicated this may have been capable of being dealt with by way of condition. However, no such condition was suggested. I note that the Council were not convinced that the details provided were adequate. Taking all of that into account, the lack of a suggested condition on this matter was not unreasonable behaviour.
10. I note reference to the potential for conditions requiring the retention of the limestone base layer and surfacing treatment on it. However, I have considered these matters in relation to the ground (f) appeal and concluded that there is no requirement to remove that base layer such that a condition is likely to have been unnecessary on any grant of planning permission. The only alternative surfacing treatment proposed was grit rolled into the surface of the tarmac, but that is subject of a separate appeal. It is unclear how the Council may have behaved unreasonably in how they dealt with these matters. I see no reason to consider the Council's refusal of planning permission for the tarmac surface to be unreasonable.
11. It is suggested that there has been a lack of consistency in relation to how the car park and access drive, that were re-surfaced at the same time, have been dealt with. I understand that the access drive was considered by the Council to be a private way and, as such, benefitted from the planning permission granted by Class E, Part 9, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015. That decision is not before me. However, the Council were able to distinguish the two sections of surface based on the constrained width of the access drive compared to the large area comprising the car park. As such, their considerations in this regard were not unreasonable.
12. My attention has been drawn to the charitable status of the Titchfield Festival Theatre. I understand that the costs of the works and appeal will impact on the finances of the charity. However, I have to consider the appeal and costs application on their planning and legal merits, such that the status of the appellant in this regard is not a material consideration in my decisions.
13. For the reasons set out above, I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated and the application for an award of costs must fail.

AJ Steen

INSPECTOR