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## Costs Decision

Inquiry Held on 12 November 2019, and 6, 7 and 8 July 2021

Site visit made on 8 July 2021

**by Paul Freer BA (Hons) LLM PhD MRTPI**

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

**Decision date: 24 August 2021**

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### **Costs application in relation to Appeal Refs: APP/C3240/C/18/3207861 & 3207862**

#### **Land adjacent to 1 & 2 The Poplars, Shop Lane, Cold Hatton, Telford TF6 6PZ**

- 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 Telford and Wrekin Council for a partial award of costs against Mr John Anthony Dynsky and Mr Mark Evans.
  - The inquiry was in connection with an appeal against an enforcement notice alleging, in summary, without planning permission the unauthorised change of use to a mixed use of builders yard, joinery workshop and wood products manufacturing business, and the erection of a 32m x 9m steel framed industrial building.
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### **Decision: the application is refused**

#### **The submissions for Telford and Wrekin Council**

1. The application is made on substantive grounds relating to the appeals on grounds (b), (d) and (f).
2. In relation to the appeals on ground (b), it was unreasonable for the appellants to initially suggest that any defects in the notice could not be corrected without causing injustice. It was conceded by the appellants' planning witness in evidence that the notice could be so amended. That concession should have been made upfront in the appellants' evidence.
3. The appeal on ground (b) as set out in the Proof of Evidence submitted by the appellants' planning witness was not the ground (b) appeal advanced by the advocate representing the appellants. The grounds of appeal advanced by the advocate were starkly different to those set out in the Proof of Evidence submitted by the appellants' planning witness. The Council had to react quickly in order to respond to the case as put by the appellants' advocate.
4. On ground (d), the appellants' planning witness made an unsolicited concession that any change in the planning unit constituted a material change of use that was sufficient to stop the enforcement clock. The was wrong as a matter of law, and was such manifestly unreasonable position that the Council had to correct it. It is not reasonable to leave the Inquiry at risk of making an error of law because of a faulty understanding of the appellants' planning witness.
5. The Inspector had to point out to the appellants that the way in which they had put their case amounted to an appeal under ground (f). That was undeniable, but would not have been pursued had the Inspector not correctly identified the

issue. Once identified, the appellants chose to include an appeal on ground (f). It is inherently unreasonable to add new grounds of appeal part way through an Inquiry.

6. The unreasonableness of all these actions is compounded by the fact that they were pointed out at the commencements of the appeals. Even then, the points were not taken onboard and not corrected until mid-Inquiry.
7. The Council incurred wasted costs as a result of the appellant's unreasonable behaviour. The Inquiry was extended in time, in part through the delay incurred in discussing the consequences of the appellants' evidence between Counsel.

### **The response by Mr John Anthony Dynsky and Mr Mark Evans**

8. It is trite that it is for a Local Planning Authority to properly frame the language of an enforcement notice. It is not for an appellant to correct it for them. An appeal on Ground (b) is the only available ground of appeal where an appellant considers that the allegation of unauthorised development misdescribes the breach. If unchallenged, an enforcement notice will take effect upon an erroneous basis. The consequences of that depend very much upon the particular circumstances of the case and the misdescription within the enforcement notice.
9. The evidence of the appellants' planning witness raised those issues. They led to corrections being accepted by the Inspector. An appellant cannot pre-judge whether or not an Inspector will accept such corrections to save an enforcement noticed as opposed to quashing it. Equally an appellant cannot pre-judge whether any party might be prejudiced such that corrections cannot be made.
10. It was entirely reasonable for the appellant to raise those issues and to raise them on the basis that, uncorrected, the enforcement notice should be quashed. That was the putting the appellant's case at its highest. That the defects were considered as capable of correction by the Inspector does not render raising the issue, or contending that the enforcement notice should be quashed, unreasonable.
11. The contention that the case advanced under the appeal on ground (b) was new is unfounded. The Proof of Evidence of the appellants' planning witness expressly raises the issue of the description of the breach including use as a builder's yard. That the Council now characterise that issue is mere 'labelling' does not detract from the point that the correct description of the alleged breach was a matter for the Council to get right in the first place. It was entirely appropriate to raise that issue and contend that without correction the enforcement notice should be quashed.
12. That the appellants' planning witness, under cross-examination, misdirected himself as to the correct position in law cannot be categorised as unreasonable behaviour. The position in law is a matter for submissions rather than planning evidence. It was not a concession which led to the appellant abandoning their case under ground (d). It was a point related simply to the alternative scenario should the appellants' primary case not be accepted by the Inspector. Whilst it was of course entirely appropriate for the Council to point out the (potential) error in law that might have followed from the Inquiry accepting the

evidence of the appellants' planning witness, on that particular point that was simply a consequence of a successful cross-examination. The 'behaviour' of the appellants' planning witness was neither unreasonable nor did it lead to any identifiable incurring of costs by the Council.

13. The subject matter of the appeal under ground (f) was not new. They were points already validly raised under the existing grounds. That the Inspector preferred the route of correcting the deficiencies in the enforcement notice by way of amending the steps required rather than the alleged breach was of course a route entirely open to him. It would be absurd for an appellant, having been offered that option, to resist and insist that the matters are dealt with only under the other grounds.
14. There is no basis for an award of costs as the appellants' behaviour was entirely reasonable. Even if it were not the Council were not put to any additional or unnecessary expense. All of the matters raised had been raised in advance: there was nothing new in the evidence given. The corrections made as a result of those matters being raised were self-evidently necessary. In any event, there is no question of the Inquiry being capable of conclusion in a shorter timeframe given the unavailability of the Council's third witness.

### **Reasons**

15. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, 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. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against an appellant. These examples include prolonging the proceedings by introducing a new ground of appeal or issue.
16. I turn first to the appeals on ground (b). It was incumbent upon appellants' planning witness to express his genuinely held professional opinion in his Proof of Evidence. In that context, the witness was perfectly entitled to initially put the case at its highest: that the notice should be quashed. I have no difficulty with the fact that he then retracted from that initial position. To my mind, that is the entire purpose of cross-examination: to test the evidence of a professional witness. In this case, skilful cross-examination by the Council's advocate forced that concession, and that too is an intrinsic part of the Inquiry process. I find nothing unreasonable in that.
17. I acknowledge that the appeal on ground (b) advanced by the appellant's advocate was different to that set out in the Proof of Evidence provided by his planning witness. But I do not accept the proposition that it was "starkly different". The basic point had already been made in the Proof of Evidence submitted by the appellants' planning witness. All the appellant's advocate did was to develop that basic point. I recognise that the Council had to react quickly in order to respond to the case as then put by the appellants' advocate, and that this took up Inquiry time and caused a delay. Had the appellants' advocate changed entirely the basis on which the appeal on ground (b) was made, then that would manifestly have been unreasonable behaviour. But that was not the case here.

18. The appellants' planning witness clearly did misdirect himself as to the correct position in law regarding changes to the planning unit. This error was also exposed by cross-examination of the witness, and my view remains the same as above in relation to the appeal on ground (b): I have no difficulty with a genuinely held professional opinion being exposed as being misplaced through cross-examination. That cannot be categorised as unreasonable behaviour. Furthermore, I consider that the position in law is a matter for submissions rather than planning evidence. There was no error in law in the appellant's case as presented during closing submissions, and no prospect of the Inquiry being misdirected by accepting the evidence of the appellants' planning witness.
19. The points that collectively formed the appeal under ground (f) were not new. They were points already raised in the Proof of Evidence provided by the appellant's planning witness, albeit under the existing grounds of appeal. It is my responsibility as Inspector to identify 'hidden' grounds of appeal, and/or to deal with points made under different grounds should I consider that to be more appropriate. As the appellants say, it would have been absurd for them, having been offered that option, to resist and insist that the matters are dealt with only under the other grounds. It would also be wholly disingenuous for me to offer the appellants the option of having their points considered as an appeal on ground (f), only to then find that they have acted unreasonably by taking up that option.
20. Having regard to the above, I find that the appellants have not acted unreasonably. The Planning Practice 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. In this case, the first of those criteria has not been met, such that an award of costs is not justified.

*Paul Freer*

INSPECTOR