



Costs Decision

Site visit made on 19 October 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19th November 2021

Costs application in relation to Appeal Ref: APP/W1715/C/21/3276013 Land to the south of Brigadier Gerard Public House, Botley Road, Horton Heath, Hampshire SO50 7DQ

- 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 Mr James Barney for a full award of costs against Eastleigh Borough Council.
 - The appeal was against an enforcement notice alleging without planning permission, engineering works, namely unauthorised excavation works, resulting from unauthorised tree works on trees covered by Woodland Tree Preservation Order 839, the importation of waste on to the site to aid the burning of the waste, removal of hedgerows [and] creating an access on to the highway from the land.
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Decision

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

Reasons

2. The Planning Practice Guidance (PPG) 'Appeals' chapter advises that parties in planning appeals should normally meet their own expenses. However, costs may be awarded where a party has behaved unreasonably and that behaviour has caused another party to incur unnecessary or wasted expenditure in the appeal process (paragraphs 028 and 030). "Unreasonable" has its ordinary meaning, as established by the Courts¹. Paragraph 031 advises that unreasonable behaviour can be either procedural-relating to the process, or substantive-relating to the issues arising from the merits of the appeal.
3. An award of the applicant's costs was sought on largely substantive grounds. Summarised briefly, the applicant's case is that the Council's investigation prior to issuing the enforcement notice was at fault. This had led to inaccuracies in the notice which made it bad on its face and a nullity, having regard to the principles established in relevant case law. The Council under-enforced in relation to the alleged vehicular access. Despite having had the opportunity to do so, the Council did not withdraw the notice or explain in the appeal why they considered the notice was free from defect. As a result, the applicant had incurred unnecessary costs in pursuit of the appeal.
4. Paragraph 048 of the PPG makes it clear that in terms of matters occurring prior to an enforcement appeal, a Council is at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the

¹ *Manchester City Council v SSE & Mercury Communications Limited* [1988] JPL 774.

first place or ensured that it was accurate. At paragraph 049, the PPG advises that a Council risks an award of costs on substantive grounds by amongst other examples acting contrary to, or not following, well-established case law or by not reviewing a case promptly following the lodging of an appeal as part of sensible on-going case management.

5. As far as I have been made aware, the Council made no response to the costs application. However, I am satisfied on the available evidence that the matters alleged in the notice as constituting a breach of planning control have, with the exception of creation of a vehicular access, occurred in fact. I am also satisfied that such matters involved development as defined in s55(1) of the Act and that they have been undertaken without the required planning permission. Defects identified in the notice notwithstanding, it is therefore highly likely that the Council would have considered it expedient to take enforcement action in respect of the majority of the matters alleged in any event. It follows that the making of an appeal could probably not have been avoided if the applicant wished to try and protect their interests in the site.
6. The Council set out their position as to why the notice was not a nullity, albeit briefly. Their views broadly though not entirely reflect my own conclusions, which have led me to correct and vary the notice. As a result, withdrawal of the notice would have been an unnecessary step for the Council to take; indeed doing so without good reason might have exposed the Council to a risk of an award of costs being made against it on procedural grounds. Although in applying the law to the factual evidence I concluded that no vehicular access had been created, that is not the sole or main portion of the unauthorised works in the allegation. As I corrected the notice to remove the reference to such works, whether the Council had intended to under-enforce in that respect assumes limited significance in the context of the entirety of the unauthorised development. On the whole, the defects seem to me to be more concerned with how the notice has been drafted, rather than the Council's actual investigation. Overall, the notice was capable of correction without causing injustice and I do not regard it as being inherently inaccurate. The applicant would probably have had to pursue their appeal along much the same lines and on similar grounds, had the notice been issued free from defects. It is unlikely that the matters at issue in the appeal could have been significantly more focussed.
7. Accordingly, I find little to support the applicant's claim. In particular, there is little to suggest that the Council have acted in a manner similar to that which the PPG regards as unreasonable behaviour prior to the issue of the notice or in a way akin to the examples referred to above and other examples in the PPG concerning the substance of the matter at appeal, or that it has otherwise acted unreasonably. The Council has substantiated its case at appeal. It follows that the conditions for an award of costs in the PPG at paragraph 030 have not been met.

Conclusion

8. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Stephen Hawkins INSPECTOR