



Costs Decisions

Inquiry Held on 21, 22, 23 & 24 September 2021, and 18 October 2021

Site visit made on 22 September 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: Monday, 10 January 2022

**Costs application in relation to Appeal Refs: APP/D0121/C/20/3259117; Appeal D Ref: APP/D0121/C/20/3259124; Appeal G Ref: APP/D0121/C/21/3269170; and APP/D0121/X/20/3262968
Land at Woodlands Farm, Mearcombe Lane, Bleadon**

- The applications are 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 applications are made by Mr Keith Perrett for a full award of costs against North Somerset Council.
 - The inquiry was in connection with appeals against enforcement notices alleging, without planning permission, the material change of use of the land from former residential and agricultural use to residential use; the erection of buildings labelled as C1 and C2 on the plan attached to the notice; the erection of a building; and an appeal against a refusal to grant a certificate of lawful use or development (LDC) for use as a dwelling, agricultural building, residential curtilage, mixed storage and residential curtilage building.
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Decisions: the applications are refused

Procedural matters

1. Separate applications for the full award of costs have been made in relation to all four of the appeals cited in the header above. The applicant in each case is Mr Keith Perrett, who is either the sole appellant or the lead appellant in those cases. It is therefore convenient consider the applications together.
2. The four applications for costs that have been made, together with the Council's responses and the applicants' rebuttal of those responses, has generated a significant number of points to be considered. It is not possible to rehearse all of those points here, but I have summarised what I consider to be the main points below.

The submissions for Mr Keith Perrett

3. In relation to appeal ref APP/D0121/C/20/3259117, the application is made on both procedural and substantive terms. In procedural terms, applicant considers that the Council has not justified the reason for alleging deliberate concealment of the breach nor supplied any evidence of that this has occurred. In substantive terms, the applicant considers that there has been a marked failure by the Council to comply with statute, guidance and case law in respect of the issuing of the Enforcement Notice. The applicant considers that the Council have to determine whether a breach of planning control has occurred and if it has, whether it is expedient to take enforcement action.

4. The grounds for the application in relation to appeal ref APP/D0121/C/20/3259124 are briefly stated. In essence, the applicant considers that it was unnecessary and premature to take enforcement action given that a planning application to retain the agricultural buildings had been submitted. The appellant considers the LPA were wrong to refuse the scheme submitted and, by implication, criticises the Council on the grounds that the decision to refuse planning permission was made by the same officer investigating potential breaches of planning control on the site.
5. The grounds for the application in relation to appeal ref APP/D0121/C/21/326970 are similar those in relation to the first application, insofar as the applicant again considers that there has been a marked failure by the Council to comply with statute, guidance and case law in respect of the issuing of the Enforcement Notice. The applicant considers that the correct sequence that the Council has to follow is firstly to determine whether a breach of planning control has occurred and, if it has, then determine whether it is expedient to take enforcement action. The Council accept that the alleged breach exceeds the statutory time limit, and the applicant has set out by reference to case law that the matters the Council allege constitute deliberate concealment do not apply. The applicant contends that Council failed to act reasonably or to consider whether it was necessary to issue a further notice, given that the issue of the use of the site for residential purposes is already certified as lawful and that a prior notice for the same breach is the subject of an outstanding appeal. The applicant contends that the duplication of notices aimed at the same breach is unreasonable and not in accordance with statute.
6. In relation to appeal ref APP/D0121/X/20/3262968, the grounds on which the application is made are that the Council has failed to produce evidence to substantiate each reason for refusal on appeal; has acted contrary to, or has not followed, well-established case law; did not review its case promptly following the lodging of the appeal; and has not determined similar cases in a consistent manner. The applicant expands on this in his final comments by suggesting that the Council has failed to adequately review its case following the submission of the appeals and, despite having the benefit of the appellants statements on the linked enforcement notice appeals, has continued to argue legal points that are incorrectly interpreted.
7. In general terms, the applicant considers that he has been unnecessarily put to the costs of the appeal process due to the inadequate determination of the Council in considering whether it was expedient to issue the enforcement notices and in refusing the LDC.

The response by North Somerset Council

8. I have been unable to locate a specific response from the Council to the application for cost in respect of appeals APP/D0121/C/20/3259117 or APP/D0121/C/20/3259124. I will therefore assess these applications directly against the advice in the Planning Practice Guidance.
9. In response to the grounds in relation to appeal ref APP/D0121/C/21/326970, the Council recognise that the new building has been erected for more than four years and this is not been in dispute but consider that where there has been an act of deliberate concealment the statutory time limits do not apply as established in law. The Council maintains that it was correct to issue an enforcement notice for a breach of planning control as it was at that time (and

still is) the Council's opinion that an act of deliberate concealment has taken place. It is also the Council opinion that the relevant test established through the *Welwyn* case and further appeal judgment made through *Jackson* and *Bonsall* have been correctly applied. The Council considers that it has not erred in its assessment of the case.

10. In relation to appeal ref APP/D0121/X/20/3262968, the Council considers that it has acted reasonably in the assessment of the appeal site and has applied the correct case law relevant to the claim made by the applicant in the application for the LDC. The Council points out that a difference of opinion is not grounds for costs provided that the case has been determined correctly by applying the correct case law and other material matters. The case law provided by the appellant was not considered relevant to their case. As part of its assessment of the site, the Council had applied the relevant case law and, by applying that case law, identified that the appeal site two planning units.
11. The Council considers that the claim for cost is not justified and have not acted unreasonably in their assessment of the relevant case law.

Reasons

12. 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 a local planning authority. These examples include acting contrary to, or not following, well-established case law; failure to produce evidence to substantiate each reason for refusal on appeal; not reviewing their case promptly following the lodging of an appeal and refusing to enter into pre-application discussions, when a more helpful approach would probably have resulted in the appeal being avoided altogether.
13. The first general point to make is that the applications for costs were initially made in writing at a time when the appeals were scheduled to be determined by way of the Written Representations procedure. It follows that the applications do not reflect the evidence heard during the course of the Inquiry, including any concessions made by the applicant during cross-examination, additional documentary/photographic evidence presented during the course of the Inquiry or the evidence given by the Council's Building Control officer. I did offer the applicant the opportunity to expend upon or modify his applications at the end of the Inquiry, but this offer was not taken up. My consideration of these applications does, as it must, take account of all the evidence that is now before me, and heard or submitted at the Inquiry.
14. The second general point is that, in my view, the applicant has fundamentally misunderstood the LDC that was granted on 10 November 2010 (Council Ref: 10/P/1631/LDE). That LDC found that use of *parts* of barn as a dwelling were lawful. The applicant appears to have proceeded on the erroneous belief that the use of the whole building was a dwelling to which normal permitted development rights applied and that some of the surrounding land could lawfully be used for purposes incidental to that use. All of the applicants'

subsequent actions, as well as the allegations of unreasonable behaviour on the part of the Council, appear to be have been predicated on that erroneous belief.

15. The description of the use for which the LDC was sought was limited to 'use as a dwelling of parts of a barn'. But, as the evidence presented at the Inquiry revealed, in the event that description turns out to be academic. I have found that the building now standing on the site is, as a matter of fact and degree, a new building. The partial use of the original barn as a dwelling could not, and did not, survive the loss of that building. Several important points flow from that.
16. The Council applied the relevant case law in considering whether it was expedient to serve the enforcement notice in relation to the building, namely *Oates v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2229. The Council acknowledged that the building had been substantially complete for a period in excess of four years and that in other circumstances would have been immune from enforcement action. However, it considered that deliberate concealment had occurred and that the normal four-year period of immunity should be disapplied. It therefore relied upon the relevant case law in relation to deliberate concealment, starting with the lead case of *Welwyn*¹ and the subsequent judgments in *Jackson*² and *Bonsall*³.
17. The Council correctly identified that there had been a break in the residential use of the land when the building was under construction and the applicant lived elsewhere. The Council then asserted, correctly in my view, that the use of the land for residential purposes began in or around December 2012, rather than in 2005. And applied the relevant caselaw to conclude that it was open to the Council to initiate enforcement action when it did, because there was a significant period of time between 2010 and late 2012 when residential use of the land was not taking place, such that the Council could not have taken enforcement action at that time.
18. It therefore seems to me that, at every stage, the Council followed the relevant case law and applied it to the 'facts' discovered during the course of its investigations. I am mindful that is scope for a difference of opinion in relation to those 'facts', and the way in which those 'facts' were applied. But I am satisfied the Council has not acted unreasonably in terms of not following relevant case law.
19. In that respect, the relevant areas of case law are evolving and/or have not been conclusively decided by the courts. By way of example, the judgments in *Bonsall* and *Jackson* appear to have widened the scope in relation to the issue of deliberate concealment in comparison to the principles established in *Welwyn*. Although I ultimately did not agree with the Council's application of the facts to that case law, I do not consider the Council's interpretation of the pertinent facts to be entirely without merit or in any way unreasonable.
20. Similarly, the courts stopped short of conclusively resolving the point concerning the application of the *Murfitt* principle in terms of whether an enforcement notice directed to a material change of use of the land could

¹ *Welwyn Hatfield v SSCLG and Beesley* [2011] UKSC15

² *Jackson v SSCLG* [2015] EWHC 20 (Admin)

³ *Bonsall and Jackson* [2015] EWCA Civ 1246

require not only the cessation of the residential use of the building but also the removal of the building itself, where the building concerned was immune from direct enforcement action. In the absence of a conclusive determination of the point by the courts, it was entirely reasonable for the Council to reach its own view as to the applicability of the *Murfitt* principle to the facts of this case. My conclusion in that respect is reinforced by the fact that the Council supported its position with evidence and legal submissions on the key points. In my view, the Council cannot be considered to have acted unreasonably in doing so.

21. In that respect, a proper understanding of the breach of planning control alleged in the notices is key. In the first notice, only a material change in the use of the land was alleged. No operational development was alleged. In the last notice, the opposite was the case. Whilst that may initially appear to be an unorthodox way to proceed, it is entirely lawful. It also becomes entirely logical when the facts and circumstances are taken into account, as well as the time at which the breaches of planning control were discovered. It also seems to me that the facts and circumstances of this case are unusual if not unique. For that reason, the Council cannot be criticised for determining these appeals in a matter inconsistent with other cases.
22. In that context it is not, as the applicant contends, the case that the Council has issued duplicate notices aimed at the same breach. It is clear from section 55(1) of the 1990 Act that there are two limbs of development: operational development and a material change of use. The Council issued separate enforcement notices aimed at each of those two limbs. That is not unreasonable and is entirely in accordance with statute.
23. Whether it is expedient to take enforcement action is solely a matter for the local planning authority. The Council gave cogent reasons for issuing the enforcement notices. It substantiated those reasons with evidence during the appeal process, submitting detailed written evidence and calling two professional witnesses to appear at the Inquiry. The Council cannot be considered to have acted unreasonably in these respects.
24. Similarly, the Council cannot be said to have failed to adequately review its case following the submission of the appeals. If anything, the opposite is true: the Council bolstered its position with further evidence between issuing the notices and the Inquiry such as, for example, that given by the building control officer. Although the applicant sought to persuade the Council that it had erred as a matter of law in issuing the notices, the Council was not obliged to accept the views of the applicant. In the event, I consider that the Council was broadly correct in its approach. Even where I have disagreed with its interpretation of some aspects of case law, the Council cannot be said to have acted unreasonably in not accepting the applicant's views.
25. I do not consider that the Council can be criticised for initiating enforcement action against the agricultural buildings when a planning application to retain those buildings had been submitted. It is apparent that the Council had sought the submission of information vital to the consideration of that application (a business plan of some description). When it became obvious that the provision of that information was unlikely to be forthcoming, I accept that the Council had no alternative other than to initiate enforcement action. The Council did not act unreasonably in doing so. If anything, it was the applicant's failure to provide the requested information that forced the Council's hand.

26. I see no difficulty with the same Council officer determining the planning application for the agricultural buildings and investigating potential breaches of planning control on the site. Indeed, there is a certain logic to that in terms of efficiency and consistency, and I have no reason to believe that the issuing of the enforcement notice was in any way compromised or pre-judged by the officer concerned.
27. I do, however, consider that some criticism may be levelled at the Council for its lack of engagement with the applicant in issuing the notices and during the appeal process. Nevertheless, the applicant and the Council were and still are a long way apart in terms of their interpretation of relevant case law. It therefore seems to me that there was never any realistic prospect of the appeals being avoided altogether even if the Council had been more responsive, or of the issues between them being significantly narrowed. For that reason, I do not consider that the Council's failure to engage with the applicant prior to issuing the notice and afterwards, whilst neither helpful nor best practice, amounts to unreasonable behaviour.
28. In summary, I consider that the Council has not acted unreasonably in the terms set out in the Planning Practice Guidance. 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 (emphasis added). Consequently, in the absence of any unreasonable behaviour on the part of the Council, an award of costs in favour of the applicant is not justified.

Paul Freer
INSPECTOR