The Planning Inspectorate

Costs Decision

Site Inspection on 24 February 2022

by Graham Self MA MSc FRTPI

Inspector appointed by the Secretary of State

Decision date: 3 March 2022

Costs Application relating to Appeal Reference APP/B1740/C/21/3286060
Site at: 5 Furzedale Park, Hythe SO45 3HQ

- The application was 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 was made on behalf of Mr Barry Newboult for a partial award of costs against New Forest District Council.
- The appeal was made against an enforcement notice issued by the District Council, dated 29 September 2021.

Decision

1. The application for an award of costs is allowed to the extent that a partial award is made in the terms set out below.

Summary of Arguments for Appellant and Planning Authority

2. **The appellant** (through his agent) has stated that he is seeking an award of costs in association with the application fee for ground (a) of the appeal, on the grounds that the council's behaviour had been procedurally and substantively unreasonable. The council has not carried out its responsibilities to consider material planning matters. The application for the fence in January 2019 was not properly dealt with and the inclusion of the material change of use element in the enforcement notice caused the appellant to incur expenditure of an inflated double fee unreasonably, since the development proposal is for the erection of a means of enclosure and does not involve a material change of use of land. Had the application for planning permission for the fence been considered by the council, the appellant would have had the opportunity to present his case to local bodies and if necessary to make a householder appeal without any appeal fee payment.

3. The council did not carry out adequate prior investigation and should have had regard to other appeals where there were similar circumstances, including 15 Furzedale Park and 28 Brookside. The council did not apply due diligence in investigating the site history or understanding that the site is a single planning unit and that curtilage is not an issue. The council has misrepresented the information available to it and ignored information supplied by the appellant since 2018.

4. Substantive unreasonableness was caused by the council's failure to review the case properly or to provide evidence to support one of its allegations, and by the late inclusion of highway safety issues which had not been previously raised. Because of this late timing it was impossible for the appellant to appoint a highway consultant to advise on this issue; in any event the council had failed to

examine the basic facts. The development had no effect on the sightline for the access track to the neighbouring property.

5. **The council** in response has commented that whether a material change of use has occurred is a matter for the inspector. The appellant had the opportunity to challenge the planning fee by making an appeal against non-determination. Issues arising from delays by the council in responses to the appellant should have been dealt with using the council's complaints procedure.

6. **Assessment and Reasons**

7. 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.

8. The summary above does not attempt to reproduce all the points made on the appellant's behalf, but I have considered all the arguments raised. A partial costs award is sought, and as set out in the written application it appears that what is being claimed is the cost of the application fee caused by the ground (a) appeal.[1] The appellant has accepted that the erection of the fence was unauthorised development, but has contended that the same does not apply to the "use" part of the enforcement notice. This affected the amount of the fee for the deemed application, and it is this increased fee which is apparently behind the costs application.

9. When an appeal is made against an enforcement notice on ground (a) of Section 174(2) of the 1990 Act, an application for planning permission for the development described in the allegation is deemed to have been made. Except for circumstances involving the existence of an undecided separate application for the same development, a fee is payable for the deemed application. Such applications are retrospective, and the fee is normally double the fee which would apply to a prospective application.

10. The history behind the development of the Furzedale Park estate and of the appeal property in particular is rather convoluted and I can see why the District Council appears to have had some difficulty in deciding their approach to the enforcement action. Nevertheless I think the council should have realised that the appeal site as a whole is a single planning unit which has been in residential use for a long time and that this use was permitted. As I have explained in the appeal decision, the permission was apparently conditional on part of the site being kept open and unfenced; but that did not mean that the residential use of this area as part of the residential planning unit was unauthorised. This is fairly clearly a case where a Section 187A breach of condition notice could have been or could be appropriate, were it not for the apparent difficulty in obtaining full details of past planning permissions from available records.

11. The fencing is a different matter - as the appellant has accepted, it is unauthorised development and for the reasons explained in the appeal decision I have found that the council were justified in enforcing against it. So to appeal against this aspect of the enforcement notice and plead ground (a), a fee would have had to be paid anyway. The fee for the application seeking a permission including the material change of use of the land was higher than the fee would have been for the erection of the fence. As far as I can tell from the information

[1] A sentence in paragraph 5 of the claim submission reads: "The appellant is seeking an award of costs in association with the application fee required in association with the appeal under ground (a)". I interpret the words "…costs in association with the application fee required is association with…etc" as meaning that what is being applied for is the cost of the deemed application fee.

available to me, a fee of £924 was paid to the council (who issued a receipt dated 9 November 2021). The doubled fee for retrospective permission for the fence alone would have been much less than that amount.

12. I have commented on the existence of other fences in the area in the appeal decision, and their existence does not mean that it was unreasonable to take enforcement action against the fence at the appeal site. The same applies to the history involving the council's refusal to determine a past application relating to erection of the fence because of disagreement about the required application fee. As the council has pointed out, Mr Newboult could have appealed against the failure to determine the application, but did not. Bearing in mind that the council had received a complaint about the fence, this part of the enforcement action was not unreasonable.

13. On balance I judge that the council acted unreasonably in pursuing enforcement action against the use of the land. I am therefore awarding partial costs, limited to the difference between the deemed application fee for the development covered by the allegation in the enforcement notice as issued and what would have been the deemed application fee for the fence alone. In effect this will be a partial refund of the fee. (As is normal practice for costs applications, the actual amount will be a matter to be settled between the parties, or in the event of failure to agree, by a Courts Costs Office.)

14. In paragraph 8 above I have referred to my understanding of the scope of the costs application. The application makes several references to its partial scope, but some of the rather unfocused text does not appear to have direct relevance to the deemed application fee, and it is just conceivable that the claim for costs was intended to cover more than the deemed application fee. To allow for this possibility, I add here that I have considered whether there might be reason for awarding more than the fee difference just described, and I find that if such a claim were intended, it would not be justified.

Costs Order

15. 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 New Forest District Council shall pay to Mr Barry Newboult the costs of the appeal proceedings described in the heading of this decision notice, limited to those costs constituting the difference between the fee for the application deemed to have been made under Section 177(5) of the 1990 Act, and the fee which would have been required for a deemed application for the erection of the fencing at the appeal site.

16. The appellant is now invited to submit to New Forest District Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

G F Self

Inspector