
Costs Decisions

Inquiry Held on 18, 19 and 20 January 2022

Site visit made on 26 January 2022

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 8 March 2022

Costs application in relation to Appeal Ref: APP/W3330/C/20/3249482 (Application A)

Land at Oake Lodge, Stathe Road, Burrowbridge Somerset TA7 0JH

- 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 Richard Harborne for a partial/full award of costs against Somerset West and Taunton Council.
 - The inquiry was in connection with an appeal against an enforcement notice (EN1) alleging the unauthorised change of use of an agricultural building (as shown edged in black on the plan annexed to the enforcement notice) to use as a residential dwelling.
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Costs application in relation to Appeal Ref: APP/W3330/C/21/3281426 (Application B)

Land on the north side of Statheclose Rhyne (otherwise known as land adjacent to Lilac Cottage Stathe Road) Stoke St Gregory Taunton Somerset

- 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 R Harborne for a partial/full award of costs against Somerset West and Taunton Council.
 - The inquiry was in connection with an appeal against an enforcement notice (EN2) alleging the unauthorised construction of buildings on the Land in the approximate positions shown edged green on the plan attached to the enforcement notice.
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Preliminary Matters

1. The costs applications were submitted in writing by the applicant at the Inquiry. The appeals cited above in the banner heading relate to the same site and both were before me at the Inquiry. The issues raised in the costs applications are inter-related and to avoid duplication I have dealt with them together.

Decisions – both applications

2. The applications for an award of costs are refused.

The submissions for Mr Richard Harborne

3. The application was submitted in writing and supplemented orally, in summary, the applicant contends that a full award of costs is justified because:
 - The Council were given the chance to withdraw its opposition to both of the appeals in a letter dated 5 November 2021. It did not do so and in

persisting with its baseless opposition to them has caused Mr Harborne to incur the costs of the Inquiry unnecessarily.

- The Council's late concession in relation to the aerial photographs and the compost toilets A and B was unreasonable as it should have withdrawn its opposition to them prior to the Inquiry opening.
- The Council only clarified during the Inquiry that it was not opposing the continuous nature of the residential use of the barn.
- The Council's reliance on inconsistencies within the appellant's evidence melted away during the Inquiry.

4. Alternatively, a partial award is sought because:

- The second application for a certificate of lawful development (LDC) should have been approved and as such the Inquiry time relating to Appeal A would not have been necessary. The Council failed to carry out the balance of probabilities test.
- Mrs Salter's Proof of Evidence contained the whole enforcement history relating to the site with no filtration of what was relevant to the appeals. The substantial amount of documentation was not disclosed prior to the submission of the proof.
- The Council cited reference to aerial photographs in its response to the appellant's Statement of Case. Those photographs were not submitted until 8 November 2021.

The response by Somerset West and Taunton Council

5. The response was made orally, and the substance of that response is as follows:

- In relation to the letter dated 5 November 2021 the aerial photographs had not been produced at that point. The evidence now before the Inquiry in relation to the residential use of the barn is much smaller than previously produced by Batten's. That evidence is not conclusive in relation to that residential use. The Council was not unreasonable in continuing its opposition to the appeals.
- The Council's concession in relation to the aerial photographs and its opposition to the compost toilets appeal was a timely concession. The concession was made after all the evidence had been heard including that obtained through cross examination.
- The inconsistencies referred to by Mrs Galliot, concerning the residential use, related to the evidence as originally put together by Batten's. The Council considered that there were inconsistencies between the statutory declarations from the 3 third parties and that they were removed to focus the evidence and remove any contradictions. The Council consider that there was some confusion over the evidence provided in relation to the compost toilets and this was explored through cross examination. At that point the full picture emerged.
- The second LDC application was submitted after the appeal against EN1 had been submitted. The Council could have refused to consider that

application, but it gave Mr Harborne the chance to provide the evidence in support of his case. The refusal of that application was a reasonable and proportionate response to the evidence that was submitted for the Council's consideration.

- Mrs Salter's evidence was provided with a degree of transparency. The details provide context and some are directly relevant to the appeals.
- The Council contests that there was any meaningful delay and any delays did not lead to any unnecessary costs.

Reasons

6. The Planning Practice Guidance (PPG) 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 directly caused another party to incur unnecessary or wasted expense in the appeal process.
7. The PPG advises that an award of costs against a local planning authority may be procedural, relating to the appeal process, or substantive, relating to the substance of the matter under appeal. It makes it clear that a local planning authority is required to behave reasonably in relation to both of these elements and provides examples of unreasonable behaviour for both¹.
8. The applicant's agent wrote to the Council on 5 November 2021 stating, amongst other things, that *'we are of the view that your opposition to the above appeals is highly unlikely to prevail and has no reasonable prospects of success....he is prepared to provide you with the opportunity to withdraw your opposition to the current appeals, in return for which he will not seek an award of costs against you'*. The Council at that stage did not withdraw its opposition to either appeal.
9. The letter refers to the dated photographs that were submitted by Mr Harborne in support of both appeals. However, the Council maintained throughout the Inquiry that the photographs submitted in support of the appeal against EN1 are not indicative of a residential use of the barn. It also considers that the collation of the submitted documentary evidence was insufficiently precise and unambiguous as to when the material change of use of the barn took place. Furthermore, Mr Pinney highlighted that the second LDC application and the appeal against EN1 originally contained statutory declarations from third parties. Those statutory declarations were not relied on by the appellant after August 2021. In relation to the appeal against EN2 the Council considered in October/November 2021 that the aerial photographs it had obtained indicated that the compost toilets A and B were not immune from enforcement action at the time EN2 was issued. It also considered that there were inconsistencies in the evidence relating to the compost toilets.
10. I have found in my substantive decision, relating to the appeal against EN1, that when viewed in totality, as a matter of fact and degree the evidence presented indicates that on the balance of probabilities that Mr Harborne has lived in the barn for a period of more than four years without significant breaks in occupation. Nevertheless, this followed a detailed analysis of all the documentary and oral evidence that is before me. I have also found in favour

¹ Paragraph: 047 Reference ID: 16-047-20140306 and Paragraph: 049 Reference ID: 16-049-20140306

of Mr Harborne in my substantive decision relating to the appeal against EN2. However, the grounds of appeal relating to the 2 appeals involve judgments in relation to matters of fact and degree that are relatively complex. It was therefore not unreasonable for the Council to contest and resist the appeals in November 2021.

11. Concessions were made during the Inquiry, by the Council, in relation to the continuous residential use of the barn, the aerial photographs and, in closing submissions, its opposition to the compost toilets. However, I do not consider that the concession in relation to the residential use would have led to the Council withdrawing EN1. This is because it maintained its view that the evidence was insufficiently precise regarding when the material change of use had taken place. Consequently, it was not unreasonable for the Council to continue to contest and resist that appeal.
12. Mrs Galliot revealed during her Evidence in Chief that the Council would not be relying on the aerial photographs it had obtained due to the proximity of vegetation to the compost toilets and the quality of the images. Mr Harborne's Proof of Evidence addressed why the toilets were not visible on the aerial photographs and Mrs Salter had seen the toilet structures on her site visit in 2018. Therefore, whether the structures were close to vegetation and screened by it could potentially have been assessed prior to the Inquiry opening. However, the Council's review and withdrawal of its reliance on the aerial photographs during the Inquiry invariably saved Inquiry time.
13. Furthermore, the Council continued to oppose the ground of appeal due to discrepancies and confusion regarding the evidence within the PCN response, the Slade Parry Report and other parts of the evidence in relation to the dates the compost toilet structures were constructed. The evidence obtained through the cross examination of witnesses highlighted that the discrepancies/inconsistencies could have a rational explanation to them. As a result, the Council's concessions concerning the compost toilets were made in a timely manner, in my judgement, and cannot be treated as amounting to unreasonable behaviour that resulted in unnecessary or wasted expense.
14. Mrs Galliot stated at the Inquiry that the inconsistencies cited at paragraph 3.10 of her Proof of Evidence related to the 3 statements of truth/statutory declarations that the appellant was no longer relying upon. Even though those inconsistencies, therefore, had been removed the Council maintained its view throughout the Inquiry that the evidence was insufficiently precise regarding when the material change of use had taken place. The ground of appeal, as stated previously, involves judgments in relation to matters of fact and degree that are relatively complex. Even though, I have found in favour of Mr Harborne in my substantive decision it seems to me that the Council were reasonably entitled to maintain its opposition to the appeal.
15. An appeal against the Council's refusal of the second LDC has not been made. Consequently, it is not within my jurisdiction to determine whether the Council's refusal of that LDC was well-founded. The applicant considers that the Council's objectivity with which it considered the second LDC must be seriously in doubt given that the Council had already issued EN1. He also considers that the dismissive approach of his evidence in the Officer's Report is evident.

16. The Council was entitled to refuse to determine the second LDC application as EN1 had been issued at that stage. Nevertheless, it stated in correspondence with the Planning Inspectorate that EN1 would be withdrawn if there was sufficient evidence to grant the LDC. The claim that the Council was not objective and treated evidence dismissively is a potentially serious matter that also calls the professional integrity of a Council officer into question. And, contrary to the applicant's view, I consider the report relating to the second LDC sets out a cogent case for supporting the Council's stance. The refusal may not have been to his liking, and I have found in his favour, but I am not satisfied that there was any unreasonableness on the Council's part in this respect.
17. The Procedural Guide to Enforcement notice appeals – England indicates that a Statement of Case, amongst other things, should describe the evidence. The Council submitted its Statement of Case in relation to the appeal associated with EN1 in April 2021. That document made a reference to the long history of enforcement complaints on the site within the background section. However, no specific description of that enforcement history was given or whether any of it would form part of the Council's evidence. Furthermore, the Council submitted a joint Statement of Case for the 2 appeals in October 2021 and only specific parts of the enforcement history was mentioned in that document. The Council confirmed to the Planning Inspectorate on the 8 November 2021 that the October Statement of Case was intended to cover both appeals.
18. Mrs Salter's Proof of Evidence included numerous appendices relating to the enforcement history of the site from 2004 to 2021. Those appendices comprised, amongst other things, photographs, correspondence and officer's notes of site visits. Prior to the Inquiry I determined that the enforcement history was likely to be directly relevant and necessary for my decision. As such the evidence was admissible to the Inquiry and would also be able to be tested at the Inquiry. The applicant was given the opportunity, prior to the opening of the Inquiry, of preparing a rebuttal document in response to several of the appendices of Mrs Salter's proof.
19. Had the Council cited the full enforcement history in its statement of case it would still have been necessary for the applicant to incur the expense of professional fees responding to that history. Moreover, given that Mrs Salter was the Council Officer who was directly involved in the investigation and enforcement of the breaches of planning control I consider that it is entirely reasonable that she appeared as a witness for the Council. Furthermore, whilst parts of the enforcement history are not directly relevant to the appeals before me they provide context and background to those appeals. As a result, I do not consider that the Council was unreasonable in providing the enforcement history of the site from 2004 to 2021 or the appearance of Mrs Salter as a witness.
20. The Council did not cite the aerial photographs until its final comments were submitted and they were not submitted until 8 November 2021. There does not appear to have been exceptional circumstances as to why the aerial photographs could not have been cited within the Council's Statement of Case. Nevertheless, even if they had been submitted in good time, it would still have been necessary for the applicant and/or his professional representative to respond to them. As such, I am not satisfied that the delay in the citation and

provision of the aerial photographs has led to unnecessary expenditure having been incurred.

Conclusion

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

D. Boffin

INSPECTOR