Costs Decisions

Inquiry opened on 26 October 2021

Site visit made on 9 November 2021

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 15 March 2022

Costs applications in relation to APP/D5120/C/20/3255738
57 North Cray Road, SIDCUP, Kent, DA14 5EU

- 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).
- Application **A** is made by Mr A Stuart for an award of costs against the Council of the London Borough of Bexley.
- Application **B** is made by the Council of the London Borough of Bexley for an award of costs against Mr A Stuart.
- The inquiry was in connection with an appeal against an enforcement notice alleging the making of a material change of use of the Land to a mixed use for soil screening, for manure and soil storage, and for the processing of inert material.

Decisions

Application A

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

Application B

2. The application for a full award of costs is refused, but I conclude that a partial award is justified, in the terms set out in the Costs Order below.

Reasons

3. Parties to a planning appeal are normally expected to bear their own costs, but costs can be awarded where the unreasonable behaviour of a party has caused another party to incur unnecessary or wasted expense. Unreasonable behaviour can be procedural or substantive. Both applications and the respective responses were made in writing.

Application A

4. The Appellant submits that the Council acted unreasonably by failing to promptly review its case, delays in the course of the appeal, and by its conduct during the appeal process.

5. First, it is submitted that evidence submitted by the appellant in respect of appeals against 2 earlier enforcement notices should have been considered, rather than returned to the appellant. However, in respect of any appeal it is for the appellant to adduce the evidence that it wishes to be considered, and probably better to do so in order to avoid ambiguity or confusion. It has also been put that, for this appeal, the Council insisted on the Appellant providing the entirety of his business records. Again, it was for the appellant to decide what evidence to rely upon. Unreasonable delay and failure to cooperate is also

argued is also argued in respect of the Council's failure to respond to letters sent to the Planning Inspectorate on these points, along with an allegation of failure, or tardiness, in considering or disclosing material in its possession, but none of this amounted to unreasonable behaviour that led to wasted costs.

6. It is then submitted that the Council failed to keep an open mind. The specific examples referred to are that the Council originally took the view that no harm was caused by the accessway when serving the previous notices, but late on in this appeal changed its position. Late in the day the Council also asserted that the appellant had deliberately concealed breaches. This was without foundation and occupied considerable time in taking instructions, the appellant giving evidence and in cross-examination, only for the matter to be conceded. As far as I can see, both of these matters arose from reviewing the evidence, and so far as the allegation of concealment is concerned, while it evidently arose from a misunderstanding of an answer given by the appellant to a query during the investigation, having heard his explanation in the course of giving evidence the Council obviously came to the view that the allegation was unsustainable. But that is not an unreasonable approach, nor was it unreasonable in my view to regard the construction of the accessway as inappropriate development in the Green Belt, and therefore harmful. The Council was not bound by a conclusion by an officer of 'no harm', particularly when Green Belt impacts appear not to have been considered.

7. The Council did appear to miss the deadline for serving its full Statement of Case and appendices, though it appears to be partly or wholly down to digital compatibility issues with the Planning Portal. But in the context of the duration of this appeal it is difficult to see how that might have led to unnecessary or wasted expense. Under-estimating the number of sitting days required is not a valid example of unreasonable behaviour in the circumstances. Similarly, while matters such as preparing a Statement of Common Ground and proposed conditions could have been more positively engaged in, no significant Inquiry time was lost on these matters. I turned away a Rebuttal Proof submitted by the Council after the deadline for the submission of Proofs of Evidence, but it was not unreasonable to prepare one since it could have saved Inquiry time, and in any case I cannot see how it might have led to unnecessary or wasted expense since the matters raised had to be dealt with anyway. It was always at my discretion to accept it.

8. The failure of the Council's chief planning witness to visit the appeal site was also claimed to be unreasonable, but there had been many visits by officers to the site, along with 2 Planning Contravention Notices, various Lawful Development Certificate application and a long enforcement history upon which to base conclusions on what was going on and the expediency of enforcement action.

9. Finally, the appellant had prepared his ground (d) case on the basis that the enforcement notice was a second bite notice, but that turned out not to be the Council's intention. I am not entirely clear that the Council fully understood the second bite provision in the 1990 Act, but ultimately I am not persuaded that the decision not to rely upon it led to any unnecessary or wasted expense on the part of the appellant since he relied in any case on documentation and events well before the 10 year immunity period.

10. Overall, I do not agree with the assertion that the Council displayed an uncooperative attitude and hostile approach. For these reasons I consider that the conditions necessary for an award of costs, either full or partial, against the Council are not demonstrated.

Application B

11. The appeal has required the Council to examine documentation preceding the date of the grant of Certificate 09/00091/LDCE in order to be able to respond to the argument that the same land use activities have been carried on for 20 years. Part of the appellant's case was that, at least so far as the LDC land was concerned, the use enforced against was in essence that for which the LDC was granted. I did not accept that proposition, but it was not unreasonable in my view for the case to be put that way.

12. At the Statement of Case stage the appellant submitted summaries of waste transfer notes and sales records which it wished to rely upon. In the absence of confirmation from the Council that it accepted the summaries as evidence, the appellant went on to submit copies of the records themselves. These amounted to some 28 lever arch files, which undoubtedly would have taken time and expense to examine. It is submitted that it was unreasonable to submit this evidence, some of which was illegible. However, while I have some sympathy with this view given that the evidence concerned was not directly referred to during Inquiry sitting, I had advised the appellant in the course of the appeal that any evidence that he wished to rely upon should be submitted, and it is far from unusual in cases involving ground (d) that records going back over at least the relevant time period are submitted. In one form or another, the appellant was relying on this evidence, and in the circumstances I consider that it was not unreasonable to put it before the Inquiry.

13. The 28 lever arch file evidence was not submitted in a digital format, which might have been an issue had the Inquiry been held virtually, but as it turned out the Council was able to host the event in the normal way.

14. It is also claimed as unreasonable behaviour that the appellant did not make clear that he would be arguing that very special circumstances existed to justify the development in the Green Belt until very late in the day. The appellant's principal argument on ground (a) was that the development was not inappropriate development, so in reality the introduction of other considerations considered to be supportive was more of a contingency, but I do not consider it to amount to unreasonable behaviour as it is a matter that I would have had to consider in any event.

15. The provision of noise evidence at the proof of evidence stage, in the form of an acoustic report, is contended to be unreasonable, but it was foreshadowed in the appellant's statement of case, and Mr Jarman, who prepared the report and gave expert evidence, was listed as a witness at an early stage. Similarly, arguments and evidence relating to grounds (f) and (g) were well within the bounds of acceptability.

16. However, among the appellant's arguments on ground (d) was that land outside of the LDC land, the blue-hatched area on the Notice Plan, had been in use for the depositing and storage of soil for in excess of 10 years, and was therefore immune from enforcement. This was not substantiated at the Inquiry, indeed the appellant's own assertion then was that that land was in fact within

the LDC land, which was simply not tenable. Though never formally abandoned, the argument was not pursued in closing submissions. This aspect of the appellant's appeal on ground (d) had no reasonable prospect of success, and would undoubtedly have required time and effort on the part of the Council to refute. The making of this argument and the subsequent failure to substantiate or withdraw it amounts to unreasonable behaviour that has caused unnecessary or wasted expense, and so a partial award of costs is justified.

Costs Order

17. 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, I HEREBY ORDER that Mr A Stuart shall pay to the Council of the London Borough of Bexley the costs of the appeal proceedings described in the heading of this award, limited to the costs incurred by the Council in responding to the appellant's appeal on ground (d) so far as it related to the assertion that the land shown in blue hatching on the Plan attached to the Enforcement Notice had been used for the depositing and storage of soil for in excess of ten years before the Notice was issued, such costs to be assessed in the Senior Courts Costs Office if not agreed.

18. The Council of the London Borough of Bexley is now invited to submit to Mr A Stuart 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.

Paul Dignan

INSPECTOR