
Costs Decision

Site visits made on 31 August 2021 and 14 July 2022

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22nd August 2022

Costs application in relation to Appeals Ref: APP/V4630/C/21/3272992 and APP/V4630/C/21/3272993

Land to the rear of 25a Blackwood Road and forming part of Foley Wood, Egerton Road, Streetly, Sutton Coldfield B74 3PL

- The application is made under the Town and Country Planning Act 1990 ("the Act"), sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Stanley Pell and by Mrs Rosemarie Pell for a full award of costs against Walsall Metropolitan Borough Council in each appeal.
 - The appeals were against an enforcement notice alleging the material change [of] the use of the land from open space woodland to use of land as a private residential garden.
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Decision

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

The submissions for Mr Stanley Pell and Mrs Rosemarie Pell

2. The respondent acted unreasonably because it:
 - Failed to substantiate the notice's requirement to remove all means of enclosure from the land and produced no evidence to contradict the applicants' case that the means of enclosure are permitted development.
 - Wrongly cited the effect of the means of enclosure on open space and the character of the remainder of Foley Wood in the appeals on ground (c).
 - Incorrectly regarded the appeal site as designated public open space and made vague, generalised or inaccurate assertions about the impact of the alleged breach of planning control.

The response by Walsall Metropolitan Borough Council

3. The requirement to remove the fence which encloses the appeal site is critical to achieve the restoration of the land to open space woodland.
4. The notice gives reasons for its service and describes the character of Foley Wood and its contribution to the character of Streetly and the wider area. Reference is made to the Tree Preservation Order which covers Foley Wood, and policies of the development plan that protect it as open space. The planning policy context and the harm arising from the breach of planning control have been set out in detail, not as vague, inaccurate assertions.

Reasons

5. The Planning Practice Guidance ("the PPG") advises that costs may be awarded if a party has behaved unreasonably, and so has directly caused another party to incur unnecessary or wasted expense in the appeal process.
6. Section 173(4)(a) of the Act provides that the steps a notice requires to be taken may include the purpose of restoring the land to its condition before the breach took place. The courts have held that a notice alleging a material change of use may reasonably require the removal of works that were carried out to facilitate that change of use¹. They have also found that this may include works that would otherwise be lawful or not amount to development if they are integral to the alleged material change of use².
7. I have not considered the applicants' contention that a material change of use has not occurred because I found that the appeals were not valid and do not fall to be determined. However, it was not unreasonable for the notice to require the removal of the fence that would have facilitated, and been integral to, the change of use it alleged had occurred.
8. There is nothing in the wording of the notice to support the contention that the respondent incorrectly regarded the appeal site as "designated public open space" when it decided to take enforcement action. The notice refers to "open space woodland", "woodland open space use" and "open space", each time without the word "public". While paragraph 4.3 of the notice refers to "woodland ... used by members of the public as open space, recreation land" that appears as a description, not a policy designation.
9. Furthermore, the evidence presented by the respondent has regard to relevant development plan policies and is concerned with the open space quality of the land prior to its enclosure in connection with the alleged change of use.

Conclusion

10. For the reasons set out above I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Mark Harbottle

INSPECTOR

¹ Murfitt v SSE & East Cambridgeshire DC [1980] JPL 598

² Somak Travel v SSE & Brent LBC [1987] JPL 630