



Costs Decision

Inquiry Held on 6-8 September 2022

Site visit made on 6 September 2022

by Simon Hand MA

an Inspector appointed by the Secretary of State

Decision date: 16 September 2022

Costs application in relation to Appeal Ref: APP/F1610/C/19/3223863 Land at Plot 2, Quarry Farm, Cricklade Road, South Cerney, Cirencester, Gloucestershire, GL7 5QE

- 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 Cotswold District Council for a full and a partial award of costs against Mr Tom Varey.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the erection of a dwellinghouse on the Land.
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Decision

1. The full application for an award of costs is refused, but the partial application is granted in part.

The case made by the Council

2. A full application is made because of the inconsistent ground (b) arguments. The original grounds of appeal did not include (b) which was only introduced at a late stage, which meant the Council had wasted their time dealing with a factual account that hadn't actually happened. The appeal was originally going ahead by way of a hearing, it was only the introduction of a ground (b) that lead to the Inquiry. Also, the new account still represents an unauthorised breach of planning control which can be enforced against using the second bite provisions which means that this appeal will have been a wasted effort. That the original grounds were introduced by a professional advisor who no longer represents the appellant is irrelevant. If his advice was wrong the appellant will have to recoup their costs from him.
3. The partial award is made on five grounds. The failure to withdraw the ground (c) for both appeals before the inquiry opened. The failure to set out the basis of the grounds (f) and (g) for notice A. The reliance on a fallback position for ground (a) for notice A that was clearly irrelevant. The failure to provide a statement of case for the appeals on notice B. Arguments made in the statement of case concerning under-enforcement and *res judicata* that were not pursued.

The response by the appellant

4. There is no justification for saying the appeal should not have gone ahead as there were grounds (a), (f) and (g) to argue, so there had to be an appeal.

Our arguments on (b) were well founded and we e-mailed the evidence to the Council suggesting the appeal need not go ahead but were rebuffed.

5. We accept the timing on the ground (c) withdrawal was late, but there were no wasted costs as there is nothing about (c) in the Council's representations. The reasons for (f) and (g) were set out in the statement of case and the e-mail asking for those grounds to be considered. On fallback, accepted this could not be advanced but no expense spent on this anyway. The ground (a) for notice B was always parasitic on notice A, and in any event the Council accepted the barn caused no harm. On the under-enforcement case, this was on the advice of previous counsel, but once shown to be wrong by the Council was not pursued, as is sensible. So again no wasted costs.

Conclusions

6. On the full award, I agree it is unfortunate that ground (b) was not pleaded from the outset, but the original grounds were (a), (f) and (g). The introduction of (b), (c) and (f) meant that an Inquiry was required, but the appeal would still have gone ahead, so a full award is not justified. The new grounds were not wholly inconsistent with the PCN response, as I discuss in the decision letter, so it does not seem to me there has been a sudden change of tack that meant any previous work was wasted.
7. Whether the whole inquiry has been a waste of time, as whatever the outcome the Council will simply issue a second-bite notice and still require the dwelling to be demolished, is not as straightforward as the Council suggest. There is an arguable case that the second-bite provisions do not apply and until that is determined the outcome of any further enforcement action is uncertain.
8. I also need to consider whether a partial award is nevertheless justified. The appeal succeeded on ground (b) so clearly the inquiry was not wasted and the introduction of (b) was not unreasonable. It is difficult to see what wasted costs were incurred by the Council as the original grounds were still pursued.
9. Ground (c) was introduced when Dr Murdoch took over the case in June 2019. It was withdrawn at the Inquiry, following my pre-inquiry note suggesting it had no chance of success. It should have been obvious, at any stage of the appeal, that ground (c) could not succeed. Ground (c) is that there has not been a breach because the matters alleged benefit from planning permission. Clearly there is no planning permission for a dwelling and that should have been obvious to the appellant's professional advisors from the outset. Nevertheless, this ground was subject to a sentence in the Council's statement of case and not mentioned thereafter, so I agree, there were no wasted costs. The same is true for the ground (c) on Notice B. As there is no lawful dwelling there can be no permitted development rights, but again there were no wasted costs.
10. The Council accepted during the costs discussion that there were no wasted costs associated with grounds (f) and (g), so I take that part of the partial award to be withdrawn.
11. The fallback was agreed to be untenable on review, the question is was it untenable from the start. The idea was that the badminton court was lawfully built and so the building remained as a fallback position even if the use as a dwelling was unlawful. However, I agree that the fallback is irrelevant for the

- ground (b), but also could not be relevant for the ground (a). If my decision reached ground (a) that meant that ground (b) had failed, and the Council's allegation of the construction of a new dwelling was correct. Consequently, it could not be maintained the building was actually a badminton court as that had never been completed. So it is clear that the fallback could never have succeeded and the Council had to deal with this in their final comments. It was unreasonable to advance this argument in the first place and it did lead to wasted expense by the Council.
12. On the lack of representations concerning Notice B (appeals C and D), I agree this did cause the Council some costs as they deal with it briefly in their statement of case. However, they also accepted at the Inquiry they had no real objection to the building and no-one has suggested the ground (a) appeal for notice B should not succeed as long as either the (a) or (b) for Notice A succeeds. As ground (b) did succeed, then it cannot be argued that the appellant acted unreasonably in not making out a case for notice B as he did not need to do so.
13. Finally the *res judicata* argument was misconceived from the beginning. Any brief scan of s173(11) would show that the notice had to have been complied with in full for planning permission to be deemed to be granted. As the first notice was quashed s173(11) simply doesn't come into play. The appellant's professional representatives should have known this and to raise this at all was unreasonable. Costs were incurred in rebutting this argument and so they were wasted.
14. I shall dismiss the application for a full award but allow that for a partial award in part as detailed below in the costs order.

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 Mr Tom Varey shall pay to Cotswold District Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in dealing with the matter of the fallback position for Appeals A and B and the under-enforcement *res judicata* issue also for appeals A and B; such costs to be assessed in the Senior Courts Costs Office if not agreed.
16. The applicant is now invited to submit to Mr Varey, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Simon Hand

Inspector