
Costs Decision

Inquiry Held on 10, 11 & 12 May 2022, 30 August 2022, and 1 & 2 September 2022

Site visit made on 10 May 2022 and 2 September 2022

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 November 2022

Costs application in relation to Appeal Ref: APP/Q3115/C/19/3238398 Land at 12 (aka Plot 12), Kiln Lane, Garsington

- 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 Arthur McDonagh for a partial award of costs against Garsington Parish Council.
 - The inquiry was in connection with an appeal against an enforcement notice alleging failure to comply with condition No 1 of a planning permission Ref P15/S/S1878/FUL granted on 29 April 2016.
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Decision: the application is refused

The submissions for Mr Arthur McDonagh

1. The appellant relies upon the admission made by Counsel acting for Garsington Parish Council to the effect that Mr McDonagh was led to believe that material sought to be put to him in cross-examination was material that had been redacted from Proofs of Evidence originally submitted to the Planning Inspectorate. The Parish Council knew that this was new evidence that had not been disclosed to the appellant in advance. By failing to disclose that fact to the Inquiry, the Parish Council gained a procedural advantage that they were not entitled to.
2. Not correcting the inference that the material was in the unredacted version of Mr Mathias' evidence caused much time to be wasted on the pursuit of disclosure of that document and the need for time to respond. Had the Inquiry been informed that it was entirely new evidence, it is unlikely that the evidence would have been allowed to be cross examined until it had been properly disclosed to the appellant. There is every chance that it would have been excluded as being too late and thereby not necessitated the adjournments and submissions that were made. At least two full days of Inquiry time were wasted by this unreasonable behaviour.

The response by Garsington Parish Council

3. The cause of the appellant's complaints does not originate with the Parish Council. When the Parish Council submitted its Proofs of Evidence to the Planning Inspectorate, it did not expect them to be rejected. Nonetheless, the Parish Council respected that decision and moved forward with the appeal in accordance with it. At the Inquiry, the Inspector made it clear that he wished to determine the appeal on the basis of the documentary evidence submitted

and the oral evidence to be heard at the Inquiry. As such, the Parish Council considered the original Proofs of Evidence submitted to the Planning Inspectorate to be irrelevant. To the extent that the appellant understood that there was material in those original Proofs of Evidence was relevant is his fault and his fault alone.

4. The appellant's renewed request for the originally submitted Proofs of Evidence by way of Freedom of Information (FOI) request was refused by the Planning Inspectorate. A further request when the Inquiry reconvened after the adjournment was also refused. As the Inquiry progressed, the appellant and his team repeatedly and persistently raised the concern that the Parish Council were seeking to hide something from them. The Parish Council was anxious to dispel that misunderstanding and, in the interests of transparency, considered that it was in the public interest for the appellant to have the original versions of the Proofs of Evidence made available to him.
5. It is misleading to say that the original Proofs of Evidence were only disclosed once the appellant no longer had the chance to cross examine Mr Mathias. It was made clear on a number of occasions that Mr Mathias would be prepared to be further cross examined. The appellant declined that opportunity.
6. Contrary to what the appellant has suggested, Counsel acting for the Parish Council did not mislead the Inquiry into believing that the original version of Mr Mathias' Proof of Evidence contained details of the specific matter raised by him. At no point did the Inspector say that he was misled, only that he had assumed that the original Proof of Evidence did contain that material. Insofar as Counsel acting for Parish Council accepts anything, it is to apologise for any part he played in the assumption drawn by the Inspector. The appellant has not pointed to any specific statement made by Counsel acting for the Parish Council to support the inference that he drew as to the content in the original Proofs of Evidence.
7. It is not correct to say that the Parish Council obtained a procedural advantage. The Inspector did not allow the matters to be put to Mr Mathias or given in evidence because they were matters contained in the original Proofs of Evidence. The Inspector repeatedly made it clear that he wished to hear all the evidence of those who wished to speak at the Inquiry and for him to decide what weight to give that evidence. The Inspector allowed the "new" evidence on the basis that any prejudice to the appellant could be remedied by giving him the opportunity to consider those allegations and produce a response.
8. The progress of the Inquiry was not in any way affected by the evidence given by Mr Mathias. The Inquiry would have needed to be adjourned in any event to hear from the remaining witnesses. The adjournment of the Inquiry to enable the appellant to consider Mr Mathias' evidence has not caused the appellant any unnecessary expense. It is striking that, despite the Inquiry being adjourned by the Inspector to enable the appellant to respond to that evidence, the appellant produced precious little by way of further evidence to rebut Mr Mathias' account.

Reasons

9. The Planning Practice Guidance (PPG) advises that, 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. The PPG indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice.
10. In order that it could fully participate in the Inquiry proceedings, the Parish Council requested, and was granted, Rule 6 status. The PPG indicates that interested parties who choose to be recognised as Rule 6 parties under the Inquiry procedure rules may be liable to an award of costs if they behave unreasonably. The PPG does not provide any specific examples of unreasonable behaviour which may result in an award of costs against a Rule 6 party, but I draw parallels with the examples of unreasonable behaviour outlined in the PPG in relation to the conduct of appellants and local planning authorities.
 11. In the context of this claim for costs, a key event during the Inquiry was the publication on 16 August 2022 of the letter from the Planning Inspectorate in response to the appellant's request that the unredacted version of the Proof of Evidence submitted by the Parish Council be disclosed. The answer that it could not was clear and unequivocal, and was based on advice obtained directly from the Information Commissioner's Office.
 12. From that moment on, the Parish Council knew that the Planning Inspectorate would not be releasing the unredacted Proof of Evidence whilst the Inquiry was still in progress and that it would not be eligible for release until after my decision on this appeal was issued. The subsequent decision of the Parish Council to release the unredacted version of the Proof of Evidence must be considered with that firmly in mind.
 13. In those circumstances, the decision to release the document was commendable. The Parish Council says that it arrived at that decision in the public interest, and I have no reason to doubt that. I did not detect any ulterior motive at the time, and do not now. The Parish Council does not indicate precisely what public interest lay behind the decision to release the unredacted Proof of Evidence, but it occurs to me that releasing the unredacted Proof of Evidence removed any possibility of a judicial review of my decision on that particular ground. That in itself has to be in the public interest.
 14. When the unredacted Proof of Evidence was released to the Inquiry, it immediately became apparent that the differences between the redacted and unredacted versions were minimal. In that respect, it was unfortunate for the progress of the Inquiry that the unredacted version of the Proof of Evidence was not released sooner. I have no doubt that releasing the document sooner would have saved a considerable amount of Inquiry time. The appellant's estimate of at least two full days of Inquiry time is, in my view, a realistic one.
 15. But I make no criticism of the Parish Council for not releasing the unredacted Proof of Evidence sooner. The decision to do so was made in the light of the circumstances that prevailed at the time. That is why I consider the publication of the letter from the Planning Inspectorate on 16 August 2022 to be key. Prior to that event, the circumstances were very different. It is therefore not unreasonable for the Parish Council to have considered its position afresh following the publication of that letter. In that context, I draw a parallel with the guidance in the PPG that local planning authorities will be at a risk of an award of costs against them for not reviewing their case as part of sensible on-going case management.

16. The Parish Council did not gain a procedural advantage as a result of the timing of the release of the unredacted Proof of Evidence. There was new evidence contained in the unredacted Proof Evidence, but that was just one word. It transpired that a passage of text had also been inserted into the resubmitted Proof of Evidence that was already before the Inquiry. I accept that there is an argument to the effect that this new evidence ought not to have been accepted and should have been returned by the Planning Inspectorate, but I put it no higher than that. In any event, that passage of text was before the Inquiry from the outset and therefore the appellant had the opportunity to test that evidence through cross-examination of Mr Mathias. The appellant was therefore not prejudiced in any event.
17. Overarching all the above is that, in accordance with the 'Franks' Principles of openness, fairness and impartiality, I afforded the appellant every opportunity to fully consider and respond to the evidence contained in the unredacted Proof of Evidence. Mr Mathias had made it very clear that he would have been prepared to answer questions on the new evidence but the appellant did not ask for Mr Mathias to be recalled. It is no fault of the Parish Council that the appellant did not avail himself of the opportunities available to him to the fullest extent.
18. I conclude that the Parish Council did not act unreasonably by not releasing the unredacted Proof of Evidence sooner. In the absence of unreasonable behaviour on the part of the Parish Council, an award of costs is not justified.

Paul Freer
INSPECTOR