
Costs Decision

Inquiry Held on 1 November 2022

Site visit made on 2 November 2022

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 15 November 2022

Costs application in relation to Appeal Ref: APP/B0230/C/22/3297997 121 Dorrington Close, Luton LU1 3XP

- 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 Kiran Ayub for a full award of costs against Luton Council.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the erection of a garden fence.
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Decision

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

The submissions for Kiran Ayub

2. The first ground of the appellant's costs application considers the conduct of the Council prior to the issue of the enforcement notice, which she considers unreasonable. Reference is made to the CPR Pre-Action protocols and to the Council's policy on enforcement. It is averred that the Council failed to act proportionately and had failed to disclose relevant information.
3. The second ground concerns the formulation of the enforcement notice, the appellant contending that the failure to refer to a highway or to impose requirements commensurate with permitted development rights to construct a 1m high fence meant that the appeal could not be avoided.
4. The third ground concerns the Council's conduct at the Inquiry, raising three separate matters. The first contends that if the Council's Statement of Case had not been in error as to the wording of the relevant planning condition, the inquiry procedure would have been unnecessary. The second concerns the absence of any highway plan attached to the notice and an assertion that if a diagram and plan had been produced prior to the Council's Proof of Evidence then no inquiry would have been necessary. The third concerns a 2009 photograph of the fence submitted with the Council's Proof of Evidence and an assertion that if this had been produced earlier then I should have had no cause to query the image shown in a different photograph of September 2020.
5. The appellant's application for costs is summarised by saying that the enforcement notice was served without exchanging information with the appellant. There is evidence of e.mail communications which were not responded to by the Council. The notice does not give essential information in order for the appellant to know exactly what is the breach of planning control.

6. This became known only when the Council filed its Statement of Case. The appellant's solicitor complained to the Planning Inspectorate that new material had been introduced into the Council's Proof of Evidence served on 5 October 2022. All of the new material introduced by the Council would have meant that no inquiry was necessary if it had been served previously. All the new material consisted of evidence which existed on 4 August 2022 [this being when the Inspectorate confirmed (again) the mode of procedure to the parties] and when the Council filed its Statement of Case. All of these factors make the Council's conduct unreasonable.

The response by Luton Borough Council

7. The Council say that the appellant has failed to engage with the relevant guidance in the Planning Practice Guidance and instead makes irrelevant references to the CPR. The application fails to set out exactly what award is being sought.
8. Correspondence sent a year before the notice was issued is not relevant to the test for costs which requires evidence of wasted costs as part of the appeal. The 1985 permission was not withheld, and does not anyway support the appellant's case. The Land Registry entry could have been obtained by the appellant.
9. The appellant does not say why the withdrawal of a previous notice is relevant to this appeal or unreasonable. Her record of the Council's witness's evidence is incorrect. The appellant was aware prior to the issuing of the notice that the Council considered the fence to be adjacent to the highway. No appeal was brought on ground (f) and therefore the requirements of the notice are not relevant to the appeal or any costs award.
10. The Council's case in relation to the 1985 permission has been consistent. If the appellant is now saying, as she appears to, that an inquiry was unnecessary then this strengthens the Council's application for costs. The Council complied with the inquiry timetable and that is not unreasonable.

Reply by Kiran Ayub

11. The CPR is relevant because the failure by a party to follow the pre action conduct and protocols is unreasonable. The efficient functioning of tribunals depends on parties using public resources sparingly and as a last resort.
12. Had the Council responded to the earlier e-mails, the appellant would have known the Council's case at an earlier stage and thus time and expense would have been saved. The notice was an abuse of the Council's statutory powers. HM Land Registry would have shown these are private parking spaces. Condition 5 of the 1985 permission also requires this.
13. The parties agreed that the 1985 permission does not withdraw permitted development rights and the Council should not resile from this. It is not for the planning inspector to request disclosure of a document to assist a party. The Council's costs rebuttal does not explain why the Council require complete removal of the fence. The Council are confused. A breach under section 171A(1)(b) should have been alleged if permitted development rights had been removed and the notice should have required a reduction in the height of the fence and not its complete removal.

14. The inquiry and appeal were unnecessary because the appellant could have reduced the height of the fence if she had been given the option to do so. The inquiry was necessary because the notice and [Council's] statement of case were confusing and vague. In the light of the evidence served by the appellant a proper and reasonable response might have been [for the Council] to review the notice or the need for a public inquiry.

Reasons

15. The Planning Practice Guidance sets out that costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour has caused another party to incur unnecessary or wasted expense in the appeal process.
16. As to the first ground of the application, the PPG explains that costs applications may relate to events before the appeal proceedings arose, but that costs that are unrelated to the appeal are ineligible.
17. I consider that the first ground of the application here amounts to a collateral attack on the Council's decision that it was expedient to issue the enforcement notice. For reasons explained in my substantive decision, that is beyond my scope to review.
18. Accepting for present purposes (but without deciding) that the Council's behaviour prior to issuing the notice was unreasonable, I consider whether any unnecessary or wasted expenses arose as a consequence.
19. The particular complaint is that the Council had in its possession the 1985 planning permission and an HM Land Registry search result before the issue of the enforcement notice, and it is contended that these documents supported what the appellant was saying in correspondence to the Council that the fence did not adjoin the highway.
20. Condition 5 of the planning permission requires that the parking spaces should not be used other than for residents' and visitors' parking and the servicing of vehicles. The Land Registry title may have shown that the title included allocated parking. It is not clear to me whether the Council had at that stage obtained a title plan. In either case, these matters would not have been determinative of the land's status as highway, because if public rights have been achieved then they would override the title or planning restrictions. In the event I concluded that this area was not part of the highway, but the Council's case was arguable whether or not consideration was given to these documents.
21. Therefore I am unable to find that any non-disclosure by the Council has resulted in any wasted expense in the appeal. If the Council had disclosed these documents to the appellant, then it is by no means clear to me why that would have resulted in no appeal being brought: to the contrary, the appellant's contention was that these documents strengthened her case.
22. Therefore I am unable to find that the Council had put the appellant to any unnecessary or wasted expense on this ground.
23. Turning to the second ground, despite what the Council's witness may or may not have said in cross-examination, there is no requirement for an enforcement notice to state why a fence is not permitted development. The allegation was of the erection of a fence without planning permission. That is all that is required.

24. In a legal ground (c) appeal against the notice, it is necessary for the appellant to demonstrate that the fence benefits from a planning permission (or that permission is not required). If the appellant seeks to show that the fence is permitted development, then the onus is on her to show why article 3 of the 2015 Order is applicable, having regard to the restrictions found in that article and to those in the relevant Schedule of the Order itself.
25. Therefore there was no unreasonable behaviour by the Council on this ground.
26. It is in any event clear from the documents in the case that the appellant and the Council were in disagreement as to the position of the highway before the enforcement notice was issued. If the notice had stated that the fence was adjacent to the highway, there is no reason to think that the appellant would not have appealed against it. For the reasons explained in my substantive decision, the requirement to remove the fence altogether (rather than reduce it in height to 1m) is commensurate with the allegation made, whether or not it is adjacent to a highway used by vehicular traffic.
27. Therefore the appellant was not put to any unnecessary or wasted costs on this ground.
28. As to the third ground, for the reasons explained in my other costs decision of today's date, had the appeals been confined to ground (c) I find it unlikely that the inquiry procedure would have remained appropriate. My wish to be informed about the 1985 planning permission would have been the case even had the Council correctly reproduced the relevant condition in their Statement of Case. For the avoidance of any doubt, I did not seek the 1985 permission in order 'to assist a party' and consider this an unconscionable suggestion. I sought it because I am being asked, by the appellant, to determine whether the alleged development is in breach of planning control. For the reasons explained in my substantive decision, this involves understanding what planning controls apply to the land in question.
29. The appellant does not say why, had any of the relevant material been produced earlier, no inquiry would have been necessary. Upon receiving the material the appellant did not withdraw any of her grounds of appeal or change her case. She merely added new material of her own. It is entirely commonplace for a party's Proof of Evidence to respond to the case being made by an opposing party, and to include appendices providing further information on the matters at hand.
30. Therefore I am unable to find that the Council has behaved unreasonably on this ground, nor that the appellant has been put to any unnecessary or wasted expense.

Conclusion

31. For the above reasons I refuse the application for an award of costs. I add only that I am dismayed by the appellant's use of the post-Inquiry written costs application process as a vehicle for making further submissions on the substantive appeal.

Laura Renaudon

INSPECTOR