
Costs Decision

Hearing Held on 7 December 2022

Site visit made on 7 December 2022

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 January 2023

Costs application in relation to Appeal Refs: APP/B1550/C/21/3287628 and APP/B1550/C/21/3287629

Woodstock, 94 Eastwood Rise, Leigh-on-Sea, Essex SS9 5BU

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr and Mrs Bines for a full award of costs against Rochford District Council.
 - The hearing was in connection with an appeal against an enforcement notice alleging without planning permission, the material change of use of land to use as domestic garden and the erection of a 1.8 metre high close boarded timber fence adjacent to the highway and enclosing the land.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

The submissions for Mr and Mrs Bines

2. These are that the Council acted unreasonably by failing to review its case and resist the appeal. The Council did not object to the material change of use, instead the focus was on the erection of the fence. The fence is permitted development and so it was incorrect to require its removal and the Council only made the concession on ground (c) at the Hearing.
3. The Council also failed to accept or consider the fall-back position for the fence both in deciding to take enforcement action and in resisting the appeal. The Council unreasonably relied on guidance¹ produced by the Ministry of Housing, Communities and Local Government to support its position and misdirected itself with regard to the definition of "highway" within the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO). In addition, they failed to take account of the information provided by Essex County Highways.
4. It was also unreasonable for the Council to rely on the 1997 permission (reference F/0445/97/ROC), and this was only conceded at the Hearing.

The response by the Council

5. The Council responded by saying that the approach to the previous planning application and subsequently, the reason for issuing the enforcement notice, was that it regarded the fence to be part and parcel of the material change of

¹ Permitted development rights for householders, Technical Guidance September 2019 (Technical Guidance)

use. That was explained in the officer report and the Statement of Case. As such, it was reasonable to rely on *Murfitt*. The verge was also well maintained and not neglected and so it was appropriate to rely on SPD 2 Housing Design paragraph 16.

6. The Council tried to do its best and believed NRE was a highway but conceded ground (c) at the Hearing. However, it submitted that the fall-back position was not a realistic approach.
7. With regard to the 1997 planning permission, the Council acknowledged the error in the officer report. Nevertheless, the Council would still have arrived at the same outcome.

Reasons

8. The Planning Practice Guidance (the Guidance) advises that costs may only be awarded against the party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense or wasted expense in the appeal process.
9. The Council began their response by stating that "Unreasonable behaviour starts when the appeal is lodged." That is incorrect. A local planning authority is at risk of an award of costs before the appeal is lodged if it is concluded that an appeal could have been avoided by a more diligent investigation that would have either avoided the need to serve the enforcement notice in the first place or ensured that it was accurate.
10. In the first instance, I find that the Council failed to establish the status of Nore Road East, yet it was quite clear from the Highway Authority that it was a private road. In addition, the Council were confused over the meaning of "highway" in planning legislation and there was a failure to understand that the Technical Guidance definition of an unadopted street only applied to Part 1 of the GPDO whereas fencing is considered under Part 2.
11. If this had been resolved before the Hearing/issue of the enforcement notice and the Council realised that the fence was permitted development, this should then have informed their subsequent decisions on whether to take enforcement action and the drafting of the allegation. The Council's case, as framed in the allegation, failed to demonstrate that it was expedient to issue an enforcement notice when no harm could be identified from the material change of use. Nevertheless, the Council issued the enforcement notice.
12. I turn now to my second point. I find it was not possible to rely on *Murfitt*² when two separate allegations were set out, namely a material change of use and operational development. If a link had been made in the allegation that the fence facilitated the material change of use, then *Murfitt* could have been relied upon.
13. As it was, the Council only conceded the ground (c) appeals at the Hearing. This was unreasonable behaviour that led to wasted expense on the ground (c) appeals. This could have been avoided and should have been obvious from initial investigations. At the latest, the Council could have withdrawn its

² *Murfitt v SSE* [1980] JPL 598

objections on the receipt of Final Comments from the applicants. This would have saved time spent discussing the ground (c) appeals at the Hearing.

14. There was also unreasonable behaviour in dealing with the ground (a) appeals. Although the Council apologised for misleading the applicants by relying on an incorrect planning reference number, it was unable to respond in full to information about the application as records have gone astray over the years. Some information was given in a response to a Freedom of Information request (received on the day of the Hearing³) but the applicants had asked for that information several months previously when making their appeals. This amounts to unreasonable behaviour by the Council that led to wasted expense on formulating part of the case for the ground (a) appeals.
15. The Council's response to this point, that "they would still have arrived at the same outcome", is further evidence of their inability to understand *Murfitt*. There is a difference between an allegation that alleges two breaches of planning control and an allegation alleging one, namely a material change of use with ancillary operational development that facilitates it. This has implications for ultimately what the Council was trying to achieve in issuing the notice in that with the former, the *Mansi*⁴ principle is invoked whereas with the latter, it is reasonable to require the removal of the ancillary facilitating operational development to remedy the breach of planning control.
16. I turn now to my final point. If the Council had understood this, then the applicants' submission regarding the fall-back position for the fencing would have been accepted. As it was, the Council maintained their resistance to it which I find adds to the unreasonable behaviour I have already found and results in further wasted time and expense by the applicants in explaining it.

Conclusion

17. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the guidance, has been demonstrated and that a full award of costs is justified.

Costs Order

18. 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 Rochford District Council shall pay to Mr and Mrs Bines, the full costs of the appeals proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
19. The applicants are now invited to submit to Rochford District Council, to whom a copy of this decision has been sent to, details of those costs with a view to reaching agreement as to the amount.

D Fleming

INSPECTOR

³ Planning ref: F/0629/97/ROC

⁴ *Mansi v Elstree RDC* [1964] 16 P and CR 153