

Costs Decision

Hearing Held on 17 January 2023

Site visit made on 17 January 2023

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 February 2023

Costs applications in relation to:

Appeal A Ref: APP/N1025/C/21/3283424

Appeal B Ref: APP/N1025/C/21/3283425

Land at Field north of 200 Hopwell Road, Draycott, Derbyshire DE72 3SD

- The applications are 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 applications are made by Mr Andrew Nightingale for a full award of costs against Erewash Borough Council.
 - The hearing was in connection with an appeal against enforcement notices alleging:
Appeal A: Without planning permission the material change of use of the Land for agricultural use to non-agricultural use comprising of the construction of a building with no agricultural use established on the land, formation of access track, laying of hard surfaced turning area, siting of storage containers and storage of non-agricultural items; and,
Appeal B: Without planning permission, operational development comprising of the erection of a building with no agricultural use established on the land, formation of access track, laying of hard surfaced turning area, siting of storage containers and storage of non-agricultural items.
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Decisions

Appeal A

1. Application for an award of costs in relation to Appeal A is allowed in the terms set out below.

Appeal B

2. Application for an award of costs in relation to Appeal B is allowed in the terms set out below.

Reasons

3. The Planning Practice Guidance (PPG) advises that costs may 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.
4. The applicant contends that the Council acted unreasonably procedurally by failing to submit their statement of case (SOC) within the required deadline. Although the Planning Inspectorate refused to accept the Council's late statement the applicant was unsure that would be the case and had prepared

- rebuttal statements. Ultimately these were not required so he wasted time and expense in preparing them.
5. The applicant further claims that the Council failed to carry out adequate investigations prior to serving the enforcement notices. He believes that the Council did not have sufficient evidence to establish that a material change of use had taken place. Furthermore, the requirements of the notices were excessive given that the limited items stored which did not relate to an agricultural use were only there temporarily, and subsequently removed. He had permission for a general purpose agricultural building and the building constructed was being used as such. The breach of control alleged had not therefore occurred and an appeal was not necessary. Furthermore, the appeals were changed from written representations to a Hearing as the Inspector needed to have a discussion about what was being alleged and clarify matters set out in the notice. The Council's case and evidence could not therefore have been clear and a failure of the Council to present their case clearly meant the applicant had to incur further costs in preparing for the Hearing.
 6. The Council acknowledge that their SOC was late. However, as it was not accepted by the Planning Inspectorate there was no statement of case for the applicant to rebut. Furthermore, the Council state that their case was clearly set out in their Enforcement Report which had been submitted with the appeal questionnaire. The applicant clearly knew what the issues were.
 7. The Council submit that they carried out a thorough investigation. Just because the applicant did not agree with the notice and reasons for issuing it, does not mean their investigations were not adequate. Non-agricultural uses were taking place and the storage of the helicopter fuselage was acknowledged by the applicant. The applicant has therefore failed to justify unreasonable behaviour and an award of costs should not be justified.
 8. The PPG advises that a local planning authority may act unreasonably if, for example, they fail to adhere to deadlines. For enforcement action, the PPG advises that local planning authorities must carry out adequate prior investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place or ensured that it was accurate¹.
 9. The Council's SOC was received on 24 February 2022 some eight days after it was due. The applicant contacted the Planning Inspectorate initially on 2 March by telephone and by email on 7 March to clarify whether the SOC would be accepted, and if so any revised timetable for a rebuttal. The Planning Inspectorate confirmed on 9 March 2022 that it would not be accepted. The SOC was late. However, ultimately it was not accepted as evidence and no rebuttal statement at that stage were required. No additional costs would need to have been incurred by the applicant in this regard.
 10. A Planning Contravention Notice was completed by the applicant in July 2020 which stated that the Land was in use for agriculture and the hard surfaced area and access track were being constructed to support that use. It also provided details of the prior notification for an agricultural building which had been submitted and determined in 2019. The applicant stated in the PCN that

¹ PPG, Paragraph:048 Reference ID:16-048-20140306.

the only cars stored on the Land were his vehicles. The agricultural building was completed in November 2020. In terms of further investigations, the Council's Enforcement Forum Report, dated 14 July 2021 records: a drive by visit on 26 February 2021 when the access track works were noted; a site visit on 28 April 2021 when the owner provided access to the building and photographs were taken; and a visit on 5 May 2021 when the storage containers were inspected. There is no evidence that any further inspection of the Land or buildings took place before the notices were served on 24 August 2021.

11. It will be seen from my decision that the enforcement notice in Appeal A was a nullity and I found in Appeal B that there had not been a breach of planning control in relation to the construction of the building. The notice in Appeal A alleged a material change of use in the Land. However, the notice was vague and ambiguous. It did not clearly specify what the appellant had done wrong or what he was required to do to remedy the alleged breach. From the evidence before me, including what I heard at the Hearing, the Council did not have a clear understanding as to what had taken place on the Land. It seems to me that the Council alleged a material change of use in the Land (Appeal A) and the erection of a building without planning permission (Appeal B), without any substantive evidence that a material change of use in the Land had taken place, or that the building constructed was not in agricultural use. If the Council had been more diligent and monitored the use of the Land and building, they would have had a clearer understanding of its actual use and been able to either clearly specify the new use such that the notice would have not been a nullity, and/or recognised that there had not been a breach of planning control.
12. It will be seen by my decision that Appeal B on ground (c) succeeded. Considering the evidence in the Council's SOC and given orally at the Hearing, it was unreasonable for the Council to have included the building in the notice and Appeal B in so far as it related to the building could have been avoided. It should not have been necessary for the applicant to address the issues in relation to ground (c) in Appeal B or the notice in Appeal A, and he incurred unnecessary expense as part of the appeal process in relation to those matters.
13. However, the notice in Appeal B also alleged the formation of an access track and hard surfaced turning area, and the applicant does not dispute that those developments took place without the benefit of planning permission. The reasons for the Council issuing the notice and alleged harm were set out in the notice and in their Enforcement Forum Report. The reasons were complete and relevant and included details of the policies of the development plan that they considered the unauthorised developments conflicted with. The Council subsequently further supported their case with a Hearing Statement and orally at the Hearing.
14. It will be seen by my decision that I granted planning permission for the access track and hard surfaced turning area. However, that decision was a matter of professional judgement, and I am satisfied for the reasons set out in the paragraph above, that the Council adequately substantiated its reasons for issuing the notice and Appeal B in so far as it related to the formation of the access track and hard surfaced turning area could not have been avoided.

15. I therefore conclude that unreasonable behaviour by the Council resulting in unnecessary expense, as described in the Planning Practice Guide, has been demonstrated and a full award of costs is justified in relation to Appeal A, and a partial award of costs is justified in relation to Appeal B.

Costs Order

16. 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 Erewash Borough Council shall pay to Mr Andrew Nightingale, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in Appeal A and ground (c) in Appeal B; such costs to be assessed in the Senior Courts Costs Office if not agreed.
17. The applicant is now invited to submit to Erewash Borough Council to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Elizabeth Pleasant

INSPECTOR