



Costs Decision

Inquiry Held on 10 and 11 January 2023

Site visit made on 11 January 2023

by Mrs H M Higenbottam BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16th June 2023

Costs application in relation to Appeal Ref: APP/Z1510/C/21/3278305; 43 Colne Road, Coggeshall, Essex CO6 1TD

- 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 Braintree District Council for a partial award of costs against Mr Paul Cross.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the erection of an outbuilding and the formation of a vehicular access.
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Decision

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

Preliminary Matters

2. The Council is seeking partial costs in relation to Appeal A which is one of three appeals that were dealt with at the same Inquiry. Appeal B¹ related to whether the use of the appeal site as residential garden of 43 Colne Road was lawful through the passage of time and Appeal C² related to whether the erection of a workshop was permitted development.

The submissions for Braintree District Council

3. The costs application was made orally at the Inquiry. A written note was handed up (Inquiry Document 6).
4. The appellant withdrew the ground (a) appeal in respect of the access, the ground (b) in its entirety and the ground (c) in respect of the outbuilding at the last minute. The appellant withdrew the ground (f) at the start of the Inquiry.
5. In relation to the ground (a) it was unreasonable for the appellant to pursue this ground in relation to the outbuilding in the light of the Inspector's previous dismissal of the appeal (the 2020 Appeal³). against the refusal of planning permission for the outbuilding in 2020. It was not until the proof of evidence that the appellant raised the possibility of a 'fallback' based on permitted development rights. The costs sought in relation to this ground of appeal relate solely to the costs of responding to arguments that the outbuilding was acceptable on its own merits.

¹ Appeal B APP/Z1510/X/21/3278193

² Appeal C APP/Z1510/X/21/3278210

³ Appeal reference APP/Z1510/D/20/3248467

6. Furthermore, it was unreasonable to pursue a ground (a) appeal for the access as it was always bound to fail and it was unreasonable to submit it. Mr Norman, of National Highways, produced evidence to address this, albeit it was late.
7. The following paragraphs of written evidence because otiose because of the appellant's actions:
 - a. Statement of case: paragraphs 5.2-5.5; 5.8-5.12; 5.15-5.22;
 - b. Proof of Carol Wallis: paragraphs 3.3.1-3.3.18;
 - c. Proof of Darren Tuff: paragraphs 3.3-3.8; 3.9; 3.10-3.11;
 - d. Proof of Mark Norman.
8. In relation to the ground (f) appeal the Council is content to leave it in the Inspector's hands.

The response for Mr Paul Cross

9. The response was made orally at the Inquiry. A written note was handed up (Inquiry Document 7).
10. The Council's partial application for costs is in relation to:
 - a) Costs incurred in preparing its response to the appeal in respect of those grounds of appeal which were withdrawn by the appellant on 5 January 2023.
 - b) Partial costs incurred in preparing its response to the ground (a) appeal in respect of the outbuilding.
11. This has been an unusual and unique appeal. The issues, grounds and position of both parties has evolved in the run up to the Inquiry, throughout the inquiry, even up to just before closing submission. This is due to the complications in the facts of the case and the wording of the enforcement notice. Neither party has acted unreasonably, and it has not resulted in unnecessary time being spent. Ultimately this has led to the substantial area of agreement on some of the issues.
12. The withdrawal of ground (b) in its entirety and ground (c) in relation to the outbuilding. The withdrawal of grounds before the Inquiry was not unreasonable behaviour and it would have been far more unreasonable to pursue grounds at the Inquiry which did not have a realistic prospect of success. As grounds were withdrawn before the Inquiry there is little evidence of wasted preparation costs, amounting to a few minor paragraphs in Mr Tuff and Mrs Wallis's proof of evidence.
13. The appellant did not withdraw ground (a) in relation to the access and the ground (c) outbuilding issue was clarified.
14. Ground (f) was withdrawn and then reinstated. It was pursued at the Inquiry and was accepted as part of the agreed position between the parties.
15. The Council has withdrawn issues which had previously been addressed by the appellant in relation to Appeal C. This is indicative of this appeal which evolved for both parties up to the start and throughout the course of the Inquiry.

16. In relation to Mr Norman's proof of evidence the Council accepted that this was not submitted to the Inspector or the Appellant in advance of the Inquiry and was, instead, late evidence.
17. In relation to the ground (a) appeal for the outbuilding no time was spent during the Inquiry in dealing with the merits of the outbuilding. A few minor paragraphs in the Council's proofs of evidence addressed these. However, time was spent prior to the Inquiry in both parties' evidence and at the Inquiry addressing prior existence, use and lawfulness of the original gate and access which is now accepted as lawful.
18. The appellant has not behaved unreasonably. Further the Council has failed to demonstrate and specify how any alleged unreasonable behaviour has led them to incur unnecessary or waste costs.

Reasons

19. The Planning Practice Guidance (PPG) advises that costs may be awarded against another party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.
20. In relation to the initial documents submitted in relation to the ground (a) appeal reference is made to both the outbuilding and the access. On 5 January 2023 the appellant emailed to clarify the grounds of appeal following a review of the evidence. The PPG encourages parties to review their cases. The email confirmed that ground (a) was only being pursued in relation to the building; ground (b) was withdrawn and was only ever being pursued in relation to the access; ground (c) was continuing to be pursued only in relation to the access; ground (d) was withdrawn because the appellant accepted that the extension to the gate i.e. the widening of the access, had taken place within the 4 year period whilst he maintained that an access had existed for a long time and that historic access was altered and widened.
21. Following agreement between the parties at the Inquiry in relation to the allegation it was corrected to allege a widening of an existing access rather than creation of an access. On the basis of the original allegation, I do not consider it was unreasonable for the appellant to pursue a ground (a) in relation to the access, along with the other grounds pursued, as in his view there had always been an access and that access was altered and widened in 2019. The Council accepted that the access had been widened and that there had been a narrower access in existence for many years. There was agreement between the parties that the allegation could be corrected without injustice or prejudice to allege creation of a widened access.
22. The Council consider that the ground (a) appeal for the outbuilding had no prospect of success. This ground of appeal should be looked at together with the linked appeals, Appeals B and C, in mind. On its face it was clear that the appellant was seeking to demonstrate a fallback position. In any ground (a) it is expected that the parties will address whether the development complies with the development plan. The Council therefore had to address this for the outbuilding. Clearly there was the possibility that if Appeal B and C were allowed, there would be a demonstrable fallback position which would be a material consideration in the ground (a) appeal for the outbuilding.

23. In the 2020 Appeal the Inspector found uncertainty about the lawful use of the land on which the building was sited and whether permitted development rights would be available for a building on the appeal site. In the light of my decisions on Appeals B and C that uncertainty was removed and there was a legitimate fallback for an outbuilding in a similar location as the appeal building. This fallback was a material consideration and, in my view, was determinative in the ground (a) appeal for the outbuilding, for the reasons set out in my decision.
24. The Council were aware that the appellant had put forward the proposition that a building could be erected under permitted development rights in a similar position as the outbuilding the subject of Appeal A in the 2020 Appeal. The existence of Appeal C, which was linked to Appeal A, clearly indicates that the appellant was seeking to demonstrate a fallback argument. I therefore do not consider the appellant was unreasonable in pursuing a ground (a) appeal in relation to the outbuilding.
25. The withdrawal of ground (b) reasons are not clear. Ground (b) was only in relation to the access and the allegation was creation of an access. The correction to the allegation in my decision, demonstrates how the cases evolved for both parties. The issue that the appellant pursued was there had been a historic access that was made wider in 2019. This was accepted by the Council and agreed between the parties the correction of the allegation. I do not accept that the appellant acted unreasonably in withdrawing the ground (b) before the Inquiry.
26. In January 2023 the appellant confirmed that the ground (c) appeal only related to the access. The withdrawal of the ground (c) appeal at the Inquiry was a direct result of the agreed corrected allegation. The withdrawal of ground (c) was therefore not unreasonable.
27. The withdrawal of ground (d) is again tied up with the correction of the allegation. The appellant had been clear that an access existed but that historic access had been widened in 2019. Had the corrected allegation been made by the Council in the first instance, it is clear that the appellant would not have pursued a ground (d) appeal in the first place, as he accepted it was widened in 2019 and those works were not immune through the passage of time.
28. On the facts of the case, I can understand why a ground (d) appeal was pursued and on reconsideration it was withdrawn. However, the issue for the appellant was the allegation of a new access when he had been using an access for many years and he was seeking to present that evidence. I do not consider it was unreasonable for him to make the ground (d) or to withdraw it when he did. The case was complex and both parties arguments developed as the case progressed and they understood the position of the other party. On the basis of the original allegation, I consider it was not unreasonable to withdraw the ground (d) when the appellant reviewed the case because the act of widening the access had been carried out 2019 and that widening was not immune from action through the passage of time.
29. The pursuit of the ground (f) appeal followed directly on from the corrected allegation. The appellant did not act unreasonably in pursuing this ground of appeal.

30. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Hilda Higenbottam

Inspector