



Costs Decision

Inquiry Held on 23, 24 and 25 May 2023, and 5 June 2023

Site visit made on 25 May 2023

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 July 2023

**Costs application in relation to Appeal Refs: APP/X0360/C/21/3289909, 3289910, 3289912, 3289913 and APP/X0360/W/21/3283104
Land to the South of Twin Oaks, Longwater Lane, Finchampstead RG40 4NX**

- 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 Wokingham Borough Council for a full award of costs against Amy Jones and Arthur Gentle.
 - The inquiry was in connection with appeals against enforcement notices alleging, without planning permission, the material change of use of the land to use as a caravan site for residential purposes and the erection of an open sided covered roofed structure, and the refusal of planning permission for a caravan site for one traveller family.
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Decision: the application is granted and an award of costs is made in terms set out in the Costs Order below

The submissions for Wokingham Borough Council

1. The Council seeks a full award of costs against the appellants on both a procedural and substantive basis.

Procedural award

2. During the course of the planning application, the appellants were asked to provide more accurate plans of the proposed development; for confirmation as to whether or not a personal condition was sought; and for confirmation as to whether the proposed caravans would be touring or static caravans. The requested plan was only provided after the application had been determined. The remainder of the matters were not confirmed until after the Inquiry had opened. This put the Council to the additional cost of having to cover all eventualities, for example in terms of development contributions and conditions.
3. Prior the commencement of the Inquiry, the Council had informed both the Planning Inspectorate and the appellants that the appellants' evidence (as a whole) was extremely limited. In her Rebuttal Proof, Mrs Maynard highlighted this point and made clear that the Council would object to any attempts to introduce evidence at a later stage. Despite this, the appellants continued to introduce new evidence at various stages throughout the Inquiry, including after warnings from the Inspector and having confirmed that they would not do so. This necessitated several adjournments during the course of the Inquiry. Without these, the Council considers it likely that the proceedings could have

been concluded in two days. As it happens, the physical inquiry was pushed into a third day and a fourth day scheduled for virtual closings. This has significantly increased the Council's costs.

4. As detailed in Mrs Maynard's email to the Planning Inspectorate dated 15 February 22, the Council sought to agree a Statement of Common Ground (SOCG) with the appellants, but the appellants refused to agree to even basic matters such as the description of the site or the relevant local plan policies. They also sought to include procedural matters in the SOCG despite these being outside of the parties' control. In these circumstances it became impossible to agree an SOCG at all, which meant that such matters had to be heard in evidence at the Inquiry further prolonging the proceedings.
5. The appellants' planning witness and advocate failed to address any relevant development plan policies in detail in his evidence. Instead, he referred to policies which are either out of date (e.g. the NPPF 2019) or have not been adopted (e.g. Policies H11 and H12 of the Emerging Local Plan and Policy AH6 of the Finchampstead Neighbourhood Plan). He also persisted in questioning the Council's witnesses about these policies even when it had already become clear that they were not directly relevant and should be accorded limited weight. This wasted further time and unnecessarily prolonged the Inquiry, leading to additional cost.

Substantive award

6. The Council seeks a substantive award of costs in respect of the enforcement appeals (i.e. Appeals A & B and C & D). These appeals were brought on Grounds (e), (d), (f) and (g). There was plainly never any reasonable prospect of the appeals on grounds (e) and (f) succeeding: both were premised upon a complete misunderstanding of the law and were (eventually) withdrawn. This merits a substantive award of costs in its own right.
7. Prior to the Inquiry, the sum total of the appellants' evidence on ground (d) was Dr Home's original Appendix R. This Appendix (which had not even been admitted by the Inquiry) contained a reproduction of the Council's own Expediency Report and it showed precisely nothing. Indeed, in his Pre-Inquiry Note, the Inspector warned the appellants that the ground (d) appeal "holds little prospect of success". As noted above, limited new evidence was introduced during the Inquiry. However, this neither addressed the full 10 - year period nor showed any continuous residential use: at most use was "on special occasions". This is plainly insufficient to found any ground (d) appeal.
8. In respect of ground (g), prior to the Inquiry, the appellants had not indicated what period for compliance they would regard as reasonable. During the course of the Inquiry, Dr Home suggested that two years would be appropriate for Notice A. However, following questioning by the Inspector, it became clear that this was based on a complete misapprehension as to the nature of a ground (g) appeal: Dr Home admitted that he was, effectively, seeking a temporary permission. Dr Home also conceded that it would only take the appellants six months to address the steps required by Notice A and one month to address the steps required by Notice B. Given that the Notices allocate 12 and six months respectively for this, there can be no question of them being unreasonable and this ground simply never had any reasonable prospect of success.

9. The Council has incurred significant costs in responding to Appeals A & B and C & D. Indeed, the appellants' reliance on ground (d) was the principal reason why the Planning Inspectorate decided to hear the appellants' three appeals by way of an Inquiry, as opposed to a Hearing or even (the Council's original preference) Written Representations. Had Appeal E alone been determined in this manner then the Council's wasted costs would have been greatly reduced, possibly to nil.

The response by Amy Jones and Arthur Gentle

10. The Design & Access Statement submitted with the application referred to plans. The Enforcement Notices were served in December (of 2021). The appellant had to put in holding appeals because of the date on which the notices took effect. The grounds of appeal varied. The appeal under section 78 was the priority at that time and therefore the enforcement appeals piled pressure onto the site. The application for costs made by the Council is punitive.

Reasons

11. 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. The PPG provides examples of unreasonable behaviour which may result in an award of costs against an appellant. These examples include: only supplying relevant information at appeal when it was requested, but not provided, at application stage; introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen; not completing a timely statement of common ground or not agreeing factual matters common to witnesses of both principal parties and the withdrawal of an appeal without good reason.
12. I will turn first to the award of costs against the appellants on procedural grounds.

Procedural award

13. The plans provided by the appellants were, at best, rudimentary. They were neither to a recognised scale nor fully dimensioned. They were not fit for purpose. By way of example, the issue arose at the Inquiry as to whether the proposed development could be accommodated on the lawful caravan site. The plans did not assist me whatsoever in reaching an informed opinion on that point, and I was obliged to rely on a purely visual assessment. Neither did they assist the applicant in refuting that point by demonstrating the additional caravans could not be accommodated on the site in accordance with the 6m separation distance required by the Council's Design Guide. The Council was therefore perfectly within its rights to request better plans and the appellants behaved unreasonably in not providing those plans when requested to do so.
14. The evidence submitted to the Inquiry by the appellants was extremely limited. The Council highlighted this point before the Inquiry opened and made it clear that the Council would object to any attempts to introduce evidence at a later

stage. Nevertheless, given the limited scope of the initial evidence, it was inevitable that the appellants would seek to introduce new evidence to plug the quite sizeable gaps in their evidence. The appellants continued to introduce new evidence at various stages throughout the Inquiry, despite warnings from myself and reassurances that they would not continue to do so. This invariably necessitated several adjournments during the course of the Inquiry, without which the Inquiry would have been considerably shorter. The Council's estimate that these adjournments pushed the Inquiry into a third sitting day at the venue, and a fourth day for virtual closings, is in my opinion a realistic one. That unreasonable behaviour undoubtedly increased the Council's costs.

15. The PPG is quite clear: appellants are at a risk of an award of costs against them not if they fail to complete a SOCG in a timely manner. It is also clear from Mrs Maynard's email to the Planning Inspectorate dated 15 February 2022 that the Council was seeking to agree a SOCG with the appellants even then. That was some 16 months before the Inquiry opened. It is wholly unreasonable behaviour that the appellants failed to complete an SOCG within that time. This caused valuable Inquiry time to be used covering matters that should have been set out in a SOCG and further prolonged the proceedings.
16. The appellant's failure to provide in a timely manner information reasonably requested by the Council also manifested itself in other ways. For example, it was apparent that work towards the completion of a Section 106 Agreement in relation to contributions to the SPA and the SANG started but then stalled. The appellants' failure to ensure that a completed agreement was submitted in good time obliged the Council to cover those matters in more detail in its written evidence than would otherwise have been necessary. Furthermore, valuable Inquiry time was wasted discussing the submission of a Section 106 Agreement that ought properly to have been before the Inquiry in a completed form when it opened. The appellants acted unreasonably in not providing that agreement in a timely manner.
17. The appellants' evidence to the Inquiry was particularly striking in one respect: it failed to engage with the development plan on any meaningful level and failed to address any relevant development plan policies in detail. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. That message is reinforced in the second paragraph of the National Planning Policy Framework. The questioning around policies and guidance that did not form part of the development plan but on which the appellants nonetheless sought to rely relied prolonged the Inquiry and thereby incurred the Council wasted expense.

Substantive award

18. As indicated in my Pre-Inquiry Note, there was never any reasonable prospect of the appellants' appeals on ground (e) succeeding. It is settled case law that the service of an enforcement notice at a land registry address is proper service for the purposes of section 172 of the 1990 Act¹. In these cases, the Council's service of Notices A and B by that method is very well documented and, indeed, is not disputed by the appellants.

¹ *Newham LBC v Miah* [2016] EWHC 1043 (Admin)

19. Furthermore, in many cases, appeals on ground (e) cannot succeed because of the provisions in section 176(5) of the 1990 Act. In summary, this states that if an appellant claims that they were not served as required by section 172 but they received a correct copy of an enforcement notice and then made a valid appeal, it will make little difference as to whether they were properly served. Had the appeals on ground (e) not been withdrawn, I would have been bound to conclude that the appellants were not substantially prejudiced and the appeals would have failed anyway.
20. The Council requested the appellants to withdraw the appeals on ground (e) in an email from Mrs Maynard as early as January 2022, which also gave fair warning of the Council's intention to seek an award of costs should the appeals on that ground not be withdrawn. Remarkably, that was nearly 18 months before the Inquiry opened! It is wholly unreasonable behaviour on the part of the appellants that the appeals were not withdrawn at that time, or in any event much sooner than at the opening of the Inquiry. The Council evidently incurred wasted expense in seeking the withdrawal of the appeals on this ground and, because the appeals were not withdrawn until the day of the Inquiry, in preparing to give evidence in relation to those appeals.
21. I also indicated in my Pre-Inquiry Note that there was no reasonable prospect of the appellants' appeals on ground (d) succeeding. That comment was based upon a cursory reading of the evidence as part of my initial preparation for the upcoming Inquiry. Even on that cursory examination of the evidence, it was apparent from the aerial photographs embedded within Mrs Maynard's evidence that the material change of use was more likely than not to have taken place in or around 2018. I was prepared to give the appellants the opportunity to provide additional evidence but, when it came, that evidence did not persuade me otherwise.
22. In fact, the appellant's own evidence supported the Council's position rather than refute it. The appellants' evidence that the touring caravan had been slept in "only on special occasions", and therefore very occasionally, demonstrated a complete misunderstanding of settled case law in relation to the application of the "10-year rule". The appellants' appeals on ground (d) could never have succeeded on their own evidence.
23. In an appeal on ground (d), the onus is on the appellant to show that the breach of planning control is immune from enforcement action through the effluxion of time. The appellants evidence fell a very long way short of doing that. The appellants appeal on ground (d) should have been withdrawn and it was unreasonable behaviour on the appellants part to persist with a ground of appeal that never had any reasonable prospect of success.
24. The significance of not withdrawing the appeal on grounds (d) and (e), especially when they had no reasonable prospect of success, is that the decision to proceed with all three conjoined appeals under the Inquiry procedure was predicated on those grounds of appeal being made. This is because appeals on ground (d), and to a lesser extent ground (e), are generally determined by the Inquiry procedure because of the need for evidence to be given under oath and tested through cross-examination. It follows that if the appeals on grounds (d) and (e) had been withdrawn sooner or not pursued at all, the appeals could have reverted to or been started under

the Hearing or Written Representations procedures. This would have saved the Council (and for that matter the appellants) considerable wasted expense.

25. As indicated at the Inquiry, I did not understand the appellant's appeals on ground (f) as originally made. I wanted to give the appellants the opportunity to explain their position, which is why I did not indicate that these appeals should be withdrawn in my Pre-Inquiry Note. The appeals on ground (f) were eventually withdrawn but not until some evidence had been presented in relation to them. It quickly became apparent to me that the appellants' planning witness did not believe that there was a credible appeal on ground (f) available to the appellants and accordingly I invited Dr Home to withdraw those appeals. There then followed a lengthy adjournment during which the appellants discussed whether or not to withdraw the appeals on ground (f).
26. In the event, the appellants decided to continue with that ground of appeal in relation to both enforcement appeals, with the evidence then being given by Amy Jones. She is not a professional planning witness and, with the greatest of respect to her, it was immediately apparent to me that she did not properly understand what the appeal on ground (f) actually is. That is no criticism of her, but the decision to proceed with the appeals on ground (f) was ill-judged and eventually they were withdrawn. But those appeals should have been withdrawn much sooner: in fact, it is highly questionable whether they should have been made in the first place. Hearing those appeals wasted valuable Inquiry time, in addition to which the Council incurred unnecessary and wasted expense preparing written evidence in relation to them.
27. As originally made, the appeals on ground (g) did not contain any indication as to what period of compliance the appellants considered to be reasonable. The suggested periods for compliance later promoted at the Inquiry were completely unrealistic and in relation to Appeals A and B tantamount to a temporary planning permission. Because no appeal had been made under ground (a), it was never open to me to grant a temporary planning permission. Consequently, there was no realistic prospect that the period of compliance belatedly sought by the appellants would be acceptable or even possible.
28. In the event, Dr Home conceded that the steps required by Notice A could be achieved in half the time stated in the notice, and the steps required by Notice B within a fraction of the time stated in that notice. The appellants acted unreasonably in not putting forward a realistic alternative to the period of compliance in the notices and in pursuing those appeals to the extent they did before effectively conceding their whole case. The Council incurred unnecessary and wasted expense in defending that ground of appeal in relation to both notices.

Conclusion

29. The PPG clearly states that the right of appeal should be exercised in a reasonable manner and that an appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding. None of the grounds of appeal on which the enforcement appeals were made had a reasonable prospect of succeeding. Neither appeal should have been made in the first place, at least not relying on those grounds of appeal. The appellants did not exercise their right of appeal in a reasonable manner. In addition, there were significant procedural failings in relation to the submission of Appeal E.

30. I do not find the Council's application for costs to be in any way punitive. The appellant acted unreasonably throughout, both prior to and during the Inquiry. The Council gave the appellants every opportunity to correct their behaviour and gave them fair warning of its intentions to seek an award of costs if they did not do so. But those opportunities were not taken. That resulted in the Council incurring unnecessary and wasted expense in defending its position in respect of all three appeals heard at the Inquiry. Both requirements for the award of costs set out in the PPG are therefore met. Accordingly, I have no hesitation in awarding the Council a full award of costs.

Costs Order

31. 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 Amy Jones and Arthur Gentle shall pay to Wokingham Borough Council, the full costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to Amy Jones and Arthur Gentle, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Paul Freer

INSPECTOR