The Planning Inspectorate

Costs Decisions

Inquiry held on 1 May 2024

Site visit made on 1 May 2024

by D Boffin BSc (Hons), DipTP, MRTPI, DipBldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 28 June 2024

Costs applications in relation to Appeal Ref: APP/N0410/C/23/3335891
Land on the south side of Twin Trees Farm, Rowley Lane, Wexham, Buckinghamshire SL3 6PB

- The applications are made under the Town and Country Planning Act 1990 (the 1990 Act), sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- Application A is made by Mr Marco D'Auria for a full award of costs against Buckinghamshire Council.
- Application B is made by Buckinghamshire Council for a partial award of costs against Mr Marco D'Auria.
- The inquiry was in connection with an appeal against an enforcement notice (EN) alleging a material change of use of the Land to a mixed use (sui generis) comprising of:
  - agriculture, and;
  - vehicle repairs,
  - vehicle breaking,
  - vehicle maintenance,
  - external storage and storage within buildings (including but not limited to vehicles, car parts, wood, and floor screed related products),
  - wood workshop,
  - storage and distribution of building materials,
  - storage and distribution of ice cream and associated products,
  - the stationing of a mobile home for residential occupation, and,
  - residential (the Unauthorised Use)
  - and the carrying out of operational development to facilitate the unauthorised material change of use to residential, comprising the erection of a log cabin for residential occupation.

Application A – Decision

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

Application B – Decision

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

Application A

The submissions for Mr Marco D'Auria

3. The costs application was submitted in writing. In brief, the full award is sought because the applicant considers that the Council did not, before the service of the Enforcement Notice, or since, adequately understand or apply the law relating to the identification of planning units and did not, before the notice was served, make adequate investigations to enable it to know what uses were taking place on various parts of the site affected by the Enforcement Notice or how, if at all, the various uses taking place on the site are interrelated.

The response by Buckinghamshire Council

4. The response was made in writing. The Council does not accept that it did not carry out adequate investigations prior to issuing the Enforcement Notice. It has stated that it considered the evidence available to it, including the aerial photos, maps and documentary evidence submitted with various certificate of lawful development or use (CLEUD) and planning applications, as well as the letter sent by the appellant's agent, Birketts LLP, to the Council on 28 July 2023 (Birketts letter), and site visits and the Planning Contravention Notice (PCN). It considers that this was more than adequate and allowed Mrs Islam to exercise her planning judgment properly informed by the evidence.

Reasons

5. Parties in planning appeals normally meet their own expenses. However, 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.

6. Awards against a local planning authority may be either procedural or substantive. The PPG advises for enforcement action, local planning authorities must carry out adequate prior investigation[1]. Local planning authorities 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 accurate. It goes on to state that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example acting contrary to, or not following, well-established case law.[2]

7. Officers from the Council, including Mrs Islam, visited the appeal site prior to the current EN being issued. Photographs were taken at those site visits and photographs were taken utilising a drone in April 2023. An EN was issued in June 2023 relating to a mixed use of the appeal site but was later withdrawn by the Council. In response to that EN the Birkett's letter explained the agent's view that the appeal site was not one planning unit but was subdivided into several planning units. The Council issued a PCN in October 2023 in relation to the alleged erection, alteration and extension of buildings on the appeal site. Nevertheless, the questions within that PCN requested information in respect of the use of the buildings and mobile home that are on the site.

8. The appellant had also submitted a planning application to retain the log cabin and CLEUD applications in respect of; the existing use of the buildings for the storage of ice cream and associated products, office and repair and maintenance of vehicles; and the existing development of dwelling (log cabin). All those applications were refused by the Council, and they have not been appealed. A planning application to retain the agricultural building was undetermined by the Council at the time of the Inquiry.

9. The Council's Statement of Case and Mrs Islam's proof of evidence (PoE) cite the main judgments in relation to the identification of the planning unit. The reasoning demonstrated in those documents indicates that the Council does not appear to have acted contrary to that well-established caselaw. However, I acknowledge that Mrs Islam's oral evidence appeared to introduce

[1] Paragraph: 048 Reference ID: 16-048-20140306
[2] Paragraph: 049 Reference ID: 16-049-20140306

unconventional reasoning regarding the noise insulation properties of the wooden walls and the implications for the identification of a planning unit.

10. Furthermore, the identification of the relevant planning unit is a matter of fact and degree. However, that assessment of the planning unit needs to be based on diligent investigation especially on a site such as this where there are several primary uses being undertaken by the owner of the site and several tenants. The Council appears to have based its assessment of the relevant planning unit/s on the observations of officers during brief site visits, drone photographs and the contents of the planning and CLEUD applications. However, the Council states in its written evidence that there is no physical demarcation or boundaries within the site and that a functional relationship exists across the site as all the uses share the areas of hardstanding to the front of the buildings. Paragraph 4.10 of Mrs Islam's PoE indicates that she understood there were different occupants of the site. Yet, she considered that due to the uses not being clearly marked off from each other including the parking and storage areas, the use of different parts of the site by the different businesses fluctuating and the lack of signage enclosure or marked entrances to the units indicated that the appeal site was one planning unit in a mixed use.

11. Nonetheless, physical demarcation of parts of the site are visible on the drone photographs and would have been visible during a site visit. Council Officer's visited the site in August 2022, but they were asked to leave after a brief period as the appellant was not on the site. The Council states that the appellant had indicated he would not be available for a site visit until January 2023, so they had decided to carry out the site visit in August 2022. Nevertheless, it is unclear why another more detailed site visit, in connection with this alleged breach, was not carried out at any time after August 2022 and prior to the current EN being issued given the rights of entry with and without a warrant conferred under section 196 of the 1990 Act.

12. Moreover, in my judgement, it is unclear as to how the Council assessed the manner in which the parking and storage areas were being used and whether that use fluctuated given that their assessment appears to have been based largely on brief site observations and the drone photographs. Additionally, whether the units were physically separated internally and the means of construction of any internal walls would not have been apparent from their investigations. Nonetheless, the Birketts letter and the PCN indicated that the buildings were split into units that were occupied separately and contained evidence in relation to how the external areas had been used. I acknowledge that the applicant's evidence in relation to the number of planning units on the site has altered based on the oral evidence heard.

13. Nevertheless, the significant difference in the assessment of the planning units by the applicant's agent compared to its own assessment should have reasonably led to further investigations and a re-examining of that assessment by the Council. However, other than the issuing of the PCN there is little evidence to indicate that the Council's assessment was re-examined or that it attempted to corroborate or contradict the applicant's evidence by additional investigation or site visits.

14. Even though, I have not agreed with the applicant's assessment of the extent of planning units on this site I have found, in my substantive decision, that the alleged mixed use of the appeal site has not occurred as a matter of fact. It appears to me that this is a case where the appropriate level of due diligence

has not been applied. In issuing the EN in the way it was framed, I find that the Council's behaviour was unreasonable. I acknowledge that it is more likely than not that if the Council had applied the appropriate level of due diligence that an EN or more than one EN would have been issued in relation to development on the appeal site. Whilst other grounds of appeal could/may be made against the future EN/s it is more likely than not that a ground (b) appeal would not be submitted by the applicant given the outcome of my substantive decision.

15. The Council's unreasonable behaviour therefore has led Mr D'Auria to incur unnecessary and wasted costs, as described in the PPG, in making an appeal against the EN and a full award of costs is justified.

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 Buckinghamshire Council shall pay to Mr Marco D'Auria, the 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.

17. The applicant is now invited to submit to Buckinghamshire 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.

Application B

The submissions for Buckinghamshire Council

18. The costs application was submitted in writing. In summary, the Council submits that Mr D'Auria has exhibited unreasonable behaviour in a substantive sense by pursuing his ground (d) appeal. It considers that this has caused the Council to incur unnecessary and/or wasted expense in respect of the additional time spent by the Council, its instructed Counsel and its officers in considering and responding to the ground (d) appeal.

The response by Mr Marco D'Auria

19. The response was made in writing and in brief he states that it is very evident in this case that any additional costs that have been incurred by the Council in relation to the ground d appeal are de minimis. He goes onto state that the ground of appeal as set out in section 174 of the 1990 Act does not limit the ground strictly to the breach alleged but allows it to relate to any breach of planning control which may be constituted by the matters stated in the notice.

Reasons

20. As stated previously, parties in planning appeals normally meet their own expenses. However, the 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.

21. Awards against an appellant may be either procedural or substantive. The PPG states that an appellant is at risk of an award of costs being made against them if the ground of appeal had no reasonable prospect of succeeding. It also states that this may occur when in enforcement appeals, the onus of proof on matters of fact is on the appellant[3].

[3] Paragraph: 053 Reference ID: 16-053-20140306

22. In my substantive decision the ground (d) appeal did not fall to be considered as the ground (b) appeal succeeded. The appellant made the ground (d) appeal on the basis that '*a number of the uses alleged have been taking place on the site within separate planning units ….. for over ten years. They are established in their own right. They are not part of a mixed use.'*[4] Section 174 (2) of the 1990 Act states that a ground (d) appeal is '*that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters'.*

23. The appellant's ground (d) appeal was therefore not made in respect of the alleged breach of planning control as set out in the EN. However, the appellant's ground (b) was made on the basis that the mixed use as alleged in the EN had not occurred as a matter of fact. The ground (d) appeal related to the ice cream business and vehicle repairs uses taking place for over ten years and the log cabin being erected for over 4 years. The grounds (b) and (d) appeals were therefore related. The appellant believed that he would be successful on ground (b) and that is a reasonable judgement to make. The ground (d) appeal was therefore submitted to provide evidence in relation to parts of the breach of planning control if I agreed with the appellant's evidence in respect of the ground (b) appeal and if I did not quash the EN. Whilst I did not agree with the appellant's assessment of the planning units on the site, he was not unreasonable to submit a ground (d) appeal assuming that his ground (b) appeal would be successful.

24. Moreover, the Council has confirmed that it understood from an early stage that the ground (d) appeal had been made on this basis only. I do not consider that it was unreasonable of the appellant to provide evidence for a ground (d) appeal based on what he considered had happened on the site. It's a matter of judgement whether the ground (d) appeal as set out by the appellant is contrary to established case law. Furthermore, it involves fairly complex issues in respect of the interpretation of that caselaw. Therefore, in this respect the appellant did not act unreasonably by submitting this ground of appeal.

25. The appellant submitted largely the same written evidence in support of his ground (d) appeal as he did in support of his CLEUD applications. Nevertheless, the appellant did give oral evidence at the Inquiry clarifying the written evidence and providing his recollections in respect of those parts of his case.

26. Overall, in my judgment the appellant was not unreasonable in submitting the ground (d) appeal on the basis that his ground (b) appeal would be successful and the EN would not be quashed. There is little to indicate that on that basis the ground of appeal had no reasonable prospect of success.

27. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated in this respect.

D Boffin

INSPECTOR

[4] Statement of Case: paragraph 5.2.2