



Costs Decision

Inquiry held on 14-17 May 2024, 21-22 May 2024 (virtual sessions)

Site visits made on 14 May 2024 and 20 May 2024

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 August 2024

Costs application in relation to

Appeal Ref: APP/A1720/C/23/3336046

Land at 71-73 St. Margarets Lane, Fareham PO14 4BG

- 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 Fareham Borough Council for a partial award of costs against Titchfield Festival Theatre Limited.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the material change of use of the land to theatre use and an engineering operation to excavate and create an underground area beneath the land.
-

Decision

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

Submissions

For the Council

2. The costs application was submitted in writing at the Inquiry. The Council responded to the appellant's response orally, summarised as follows, with reference to the paragraph numbering in the appellant's response where appropriate:
 - The appellant was in fact aware that there was no question that the use of area C was in breach of any condition (paragraph 5).
 - The notice was served correctly. Until recently the appellant was not the registered owner so it was right to serve the notice on the parties that were listed as the registered owners, even though they no longer have an interest in the land.
 - Although the appellant had indicated in their response to the Planning Contravention Notice (PCN) that area B was in lawful theatre use, the appellant had not demonstrated that the use was lawful (paragraph 11).
 - The letter from the Fire Officer was crucial to the question of the lawfulness of the theatre use for the Council's planning witness. It is unclear why this letter, which was written in 2013, was not provided earlier (paragraphs 13-17).
 - The appellant was already aware of the Council's view in relation to existing use rights (paragraph 19).
 - Area B was described as storage, rather than as ancillary theatre use (paragraph 22).

- With regard to the appellant's uncertainty regarding the appropriate contact at Hampshire County Council (HCC) for the unilateral undertaking (UU), this should not have led to delays, as the appellant should have been able to identify the correct point of contact themselves. The appellant should also have been aware of the matters that it wanted to include in the UU by the time the proofs of evidence had been finalised, so there should not have been delays and changes to the UU during the course of the Inquiry. Financial contributions must always be secured through a legal agreement rather than a planning condition, so this should not have been a source of delay.

For the Appellant

3. The response was made in writing.

Reasons

4. 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.
5. The PPG advises that behaviour that may give rise to a procedural award against an appellant could include delay in providing information or failure to adhere to deadlines, introducing fresh and substantial evidence at a late stage necessitating extra expense for preparatory work that would not otherwise have arisen. In terms of a substantive award, the types of behaviour include pursuing an appeal where it is plain that the development should not be allowed.

Ground (e)

6. The notice was served on the previous owner of the land, despite the Council having been informed of the current ownership through the appellant's response to the PCN. It was not unreasonable for the appellant to challenge the service of the notice through the appeal. The appellant stated in their Statement of Case that the ground (e) appeal was no longer being pursued and confirmed at the case management conference (CMC) that the ground of appeal was withdrawn. It seems to me that the appellant acted promptly to review their case and take appropriate action by withdrawing the ground of appeal when it became clear that it was unlikely to succeed. While the Council had to satisfy itself that the notice had been properly served, this was a reasonable step to take in any event and does not constitute unnecessary or wasted expense.

Ground (b)

7. The appellant lodged the appeal on ground (b) as it appeared to them that the alleged breach of planning control had not occurred, as rather than a change of use, a breach of the conditions attached to the 2012 permission had taken place. The appellant re-examined their case in the light of their understanding of the Council's case. The appeal on ground (b) was withdrawn in the appellant's Statement of Case and this was confirmed at the CMC. In view of the nature of the appellant's case on ground (d), it would have been contradictory to continue with the appeal on ground (b). As the appellant

withdrew the appeal on ground (b) in a timely fashion, I do not find that their behaviour was unreasonable.

Ground (d)

8. At the CMC there was discussion regarding the reference in the appellant's Statement of Case to the lawfulness of the uses in Areas A and B. It was not unreasonable for the appellant, following the CMC, to seek to pursue an appeal on ground (d), as success could have led to the notice being quashed or corrected, even if the accrued lawful use did not relate to the entire appeal site.
9. The appellant could not have submitted the additional information in relation to the hidden ground (d) appeal earlier in the process as the CMC took place after the deadline for the Statements of Case. The additional information was submitted in accordance with the agreed timescale.
10. The two further witness statements and the letter from the Fire and Rescue Service were provided on 13 May, only two working days before the start of the Inquiry and included important information in relation to the lawfulness of the use. The appellant has explained that the information was provided at the suggestion of their advocate. It is not clear why the additional information could not have been provided at the same time as the statutory declaration from Kevin Fraser, in accordance with the agreed timescale.
11. The late submission of information was unreasonable, and the Council had to spend time in preparing its response. The Council had little time to consider the information and also had to spend time in reviewing their case, amending where necessary. However, the Council would in any event have had to respond to the information, and on the balance of probabilities, I do not consider that the unreasonable behaviour resulted in unnecessary or wasted expense for the Council.
12. The appellant could have withdrawn the ground of appeal earlier, rather than waiting until the fourth day of the Inquiry. I do not consider that the ground of appeal was withdrawn in a timely fashion, as the Council had conceded prior to the commencement of the Inquiry that the previous use of the site had accrued lawfulness. The late withdrawal of the ground of appeal constitutes unreasonable behaviour. The evidence was pertinent to the question of the lawfulness of the claimed fallback position and the council would in any event have had to consider it. As the facts were not disputed, limited time was spent on the ground (d) evidence at the Inquiry. It seems to me therefore, on the balance of probability, that the unreasonable behaviour did not result in unnecessary or wasted expense for the Council.

Fallback

13. The appellant's case changed in the run up to the Inquiry, particularly in relation to the claimed fallback position. The Procedural Guide: Enforcement notice appeals – England (updated 11 January 2024) makes it clear that the Statement of Case should set out the planning and legal arguments that the party intends to put forward at the Inquiry. New evidence or arguments should not be included in final comments or proofs of evidence. In their final comments the appellant introduced a claimed fallback argument relating to uses under Class E. In their proof of evidence, the claimed fallback had

changed to the provision of a new theatre within area B, on the basis of a lawful theatre use.

14. It was unreasonable to introduce new arguments at these stages, although I accept that some of these were in response to the Council's comments on the appeal on ground (d). As a result, the Council had to spend additional time responding to the appellant's evolving case. However, this is work that the Council would most likely have had to undertake anyway if the appellant's full case had been set out in their Statement of Case. Therefore, although the appellant behaved unreasonably in introducing new arguments at a late stage, the behaviour did not, on the balance of probabilities, result in unnecessary or wasted expense for the Council.

Unilateral Undertaking

15. The UU was provided in draft form on 11 April but was not provided to the Planning Inspectorate until 13 May, despite my post CMC note stating that a final draft must be provided no less than 10 working days before the Inquiry opens. The UU was further amended during the Inquiry. It is clear that there were negotiations over a period of time leading up to its submission. The appellant's version of events indicates that there were various delays in getting comments from HCC and the Council, which then led to changes to the UU and the need for a revised position statement from HCC and the Council to be provided. Although this could have been avoided if work on the UU had been commenced earlier it is not clear to me, on the balance of probabilities, that the appellant acted unreasonably in this regard.

Conclusion

16. Therefore, for the reasons set out above, I conclude that unreasonable behaviour resulting in unnecessary or wasted expense has not occurred and an award of costs is not warranted.

N Thomas

INSPECTOR