



Costs Decision

Site visit made on 26 June 2024

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 August 2024

Costs application A in relation to Appeal Ref: APP/W1905/C/23/3328124 Darcy's Place, Little Broomfield, Church Lane, Wormley, EN10 7QF

- The application is 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 application is made by Mr John Croke for a full award of costs against Broxbourne Borough Council.
 - The appeal was against an enforcement notice alleging, without planning permission, the material change of use to commercial use of land consisting of open commercial storage (Use Class B8), industrial purposes (Use Class B2) and waste transfer purposes and associated operational development.
-

Costs application B in relation to Appeal Ref: APP/W1905/X/23/3327096 Darcy's Place, Little Broomfield, Church Lane, Wormley, EN10 7QF

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr John Croke for a full award of costs against Broxbourne Borough Council.
 - The appeal was against the refusal of a certificate of lawful use or development (LDC) for builders yard, open and covered storage.
-

Decisions

Application A

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

Application B

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

Preliminary Matters

3. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises¹ 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. Unreasonable behaviour in the context of an application for an award of costs may be either procedural, relating to the process, or substantive, relating to the merits of the appeal.

¹ Paragraph: 028 Reference ID: 16-028-20140306

5. As both costs applications are made with reference to the same arguments in the same documents, I too have addressed the issues together in my reasoning below.

Reasons

6. Although costs cannot be claimed for the period during the determination of the LDC application, I am able to take into consideration behaviour and actions at that time as to whether or not costs should be awarded².
7. I appreciate that following the refusal of a previous LDC application, the applicant may have collected additional and revised statutory declarations (SDs) and reduced the site area, following advice from the Council.
8. I also appreciate that the applicant will then have been frustrated by the Council's decision to refuse the application. However, the Council was not, as a result of its advice, then bound to grant a LDC if it were not satisfied, based on the information subsequently provided, of the lawfulness of the use at the time of the application. Moreover, as I have found that the Council's decision to refuse the application was well-founded, it follows that there was no substantive unreasonable behaviour in that regard.
9. The appellant seeks to highlight that the LDC application was validated on 24 November 2020 but not determined until 13 July 2023. Taken on face value, that is clearly an unreasonable timescale. However, it is explained that alongside the application the Council invited an alternative application for the residential development of the site, which would be subject to a unilateral undertaking (UU) in which the applicant would withdraw the LDC application and relinquish any future claim to lawfulness. It is explained that the LDC application was placed on hold at that time and that in line with discussions with the Council the applicant paid a solicitor to draft the UU and to engage with the Council.
10. It is stated that despite regular chasing, the Council failed to engage further and that without discussion, both applications were refused on 13 July 2023. Nevertheless, based on the above, there was reason for the LDC application being determined well beyond the prescribed period. Furthermore, due to the clearly opposing positions, it is also unlikely that better communication would have enabled an appeal to be avoided altogether.
11. The applicant states that in submitting their six-week statement, the Council failed to respond to the evidence put forward or to introduce any contrary evidence of substance, instead providing images of the site which generally relate to the period from 2019 onwards and outside the period of time during which the claim for lawfulness is based.
12. However, for the reasons explained in my decision for Appeal B, the appellant is not able to cherry pick the period between 2007 and 2018 because any immunity from enforcement action that may have been gained over that period would likely have been lost, having been supplanted by the subsequent material change of use to a mixed use for storage, industrial and waste transfer purposes.

² As per the advice in paragraph: 033 Reference ID: 16-033-20140306 of the PPG

13. Moreover, an application made under S191(1)(a) of the 1990 Act seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful. In that regard, it is likely, based on the applicant's own timeline of events, that at the time of the application, the land was in mixed use.
14. The applicant seeks to highlight that the Council's decision notice references a sworn affidavit from a neighbour, which, despite carrying weight in the decision, was not published online. He also states that from the day following the Council's decision, he and his agent sought to obtain a copy of the affidavit and, as it was not provided, he had to lodge both Appeals A and B blind to its content.
15. Although the applicant is responsible for providing sufficient information to support a LDC application, the PPG advises³ that 'a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence.'
16. Moreover, the PPG lists a delay in providing information and only supplying relevant information at appeal when it was previously requested, but not provided at application stage, as unreasonable behaviour which may result in an award of costs.
17. The Council explain that owing to a technical error, the neighbour's affidavit was not viewable on its website. However, the Council does not explain why it was not shared with the applicant and opportunity given to comment on it. The Council states that once it was aware of the issue a copy was provided. However, it does not refute the applicant's above referenced submission that he sought a copy of the affidavit the day after the Council made its decision in July 2023, nor does it explain why it was not then provided until 7 September 2023.
18. The applicant states that when the document was eventually provided on 7 September, after both appeal cases had been drafted and the appeals submitted, it was clear that the document was not a SD or an affidavit, as it was neither signed nor witnessed.
19. The Council acknowledges that an unsigned copy was provided but states that once it was made aware of that, the error was rectified and a signed copy was provided. However, that signed copy is dated 29 September 2023, which is several months after the determination of the application and several weeks after 7 September 2023. Moreover, the appellant highlights that he did not receive a copy of the signed document until four weeks after it was made.
20. I am therefore satisfied that the Council's actions, insofar as they relate to the representation/affidavit of the neighbour, amounted to unreasonable behaviour and that caused the applicant to incur unnecessary or wasted expense in the appeal process by initially making both Appeals A and B in the absence of the

³ Paragraph: 006 Reference ID: 17c-006-20140306

document, then making comments on an unsigned version, using the services of a planning agent.

21. Nevertheless, it is evident from the Council's delegated report that its decision to refuse the LDC was largely based on photographic evidence. It does not appear that disproportionate weight was applied to the neighbour's representation, whether it was an affidavit or not. Moreover, it is not shown that the Council applied no weight to the SDs submitted by the appellant, such that it would have amounted to unreasonable behaviour, as suggested. The SDs are referenced in its delegated report but for the reasons explained therein, the Council evidently found the photographic evidence more persuasive.
22. I note that the applicant accepts, following clarification provided by the Planning Inspectorate's Casework Officer, that the Council submitted their statements within deadline. On that basis he confirms that the related submission of unreasonable behaviour no longer applies.
23. With reference to the Council's response to the appellant's appeal statement addendum, I am satisfied that the appended statement from its former Head of Planning and Development essentially responds to comments made by the appellant on the previous LDC application. Its provision at final comments stage does not therefore amount to unreasonable behaviour.
24. Nevertheless, for the reasons explained a partial award of costs is justified, for both applications A and B, limited to those costs incurred in preparing the parts of his cases dealing with the neighbour's representation/affidavit.

Other matters

25. The applicant seeks to highlight that the Council also failed to engage with him in respect of the Stop Notice served alongside the Planning Enforcement Notice. However, as acknowledged, that falls beyond the scope of the cost applications.

Application A Costs Order

26. 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 Broxbourne Borough Council shall pay to Mr John Croke, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in preparing the parts of his case dealing with the representation/affidavit of Mr Craig McKinlay.
27. The applicant is now invited to submit to Broxbourne 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Application B Costs Order

28. 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

Broxbourne Borough Council shall pay to Mr John Croke, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in preparing the parts of his case dealing with the representation/affidavit of Mr Craig McKinlay.

29. The applicant is now invited to submit to Broxbourne 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Richard S Jones

INSPECTOR