



Costs Decision

Hearing held on 7-8 August 2024

Site visit made on 7 August 2024

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 September 2024

Costs application in relation to Appeal Ref: APP/J1535/C/22/3297662 Land and Buildings at Blunts Farm, Coopersale Lane, Theydon Bois, Epping CM16 7NT

- 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 Theydon Farm Units Ltd for a full award of costs against Epping Forest District Council.
 - The Hearing was in connection with an appeal against an enforcement notice alleging:
 - (a) Without planning permission the material change of use of the site and buildings to commercial and business uses.
 - (b) Without planning permission the laying of road planings to create an accessway, the laying of hard surfacing on the site and construction of a breeze wall over 2 metres in height.
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Decision

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

Submissions

2. The costs application, the response to it and the applicant's comments on the response, were all provided in writing.

Reasons

3. 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. This decision should be read in conjunction with the Appeals PPG.
4. The applicant's claim relates to several issues which I address under the headings below.

Highways

5. In respect of the ground (a) appeal and the deemed planning application, the Council stated in its Statement of Case:

"The key planning considerations in this appeal relate to the 7 reasons for refusal outlined below and this section focuses on these reasons only..."

6. The Statement of Case went on to set out 7 reasons for refusal from a previous planning application. But that planning application was not before me in the appeal. Of those 7 reasons, 2 of them, relating to the Green Belt and the

Special Area of Conservation (SAC), reflected reasons for issuing the enforcement notice. However, 5 of those reasons, broadly relating to highway matters, are not reflected anywhere in the reasons for issuing the enforcement notice.

7. The recipient of an enforcement notice should expect to understand the harm arising from the breach of planning control from the reasons for issuing the enforcement notice, stated on the notice itself. But from the way the Council's Statement of Case was worded, the appellant was led to believe they would also have to address the 5 highway reasons and the appellant's case was at risk if it did not. In effect, via its Statement of Case, the Council had developed its case and added to its reasons for resisting the appeal development.
8. Addressing the 5 highway reasons would inevitably have required significant preparation by the appellant. Moreover, from all of the information provided, these 5 reasons included detailed technical matters and addressing them would have necessitated input from people with highways expertise. Nothing has been provided to lead me to a different conclusion in these respects.
9. In paragraph 5(viii) of my Pre-Hearing Note dated 1 August 2024, I identified that the Council would need to clearly clarify its position in respect of the principal matters in dispute, including in respect of these reasons for refusal from a previous planning application. However, the Council did not engage with this until after the Hearing had opened.
10. As a consequence of the above, the appellant logically and reasonably instructed highways experts, who attended the Hearing to represent the appellant's case in respect of highway matters. The Council withdrew the 5 highway reasons for resisting the appeal development after the Hearing had opened. But by this time, the appellant had already incurred costs associated with preparation and attendance at the Hearing.
11. This withdrawal reflects one of the examples of unreasonable behaviour set out in the PPG (see Paragraph: 047 Reference ID: 16-047-20140306) and the PPG acknowledges that costs may include time spent by appellants and their representatives, in preparing for an appeal and attending the appeal event, including the use of consultants to provide detailed technical advice (see Paragraph: 032 Reference ID: 16-032-20140306).
12. I have had regard to correspondence provided between the appellant and the highway authority. This indicates that the Council did not involve the highway authority in its decision to develop its case with highway reasons for resisting the appeal development and it did not engage the highway authority in the appeal process either. This reflects a lack of co-operation with other parties and is an example of unreasonable behaviour set out in the PPG (see Paragraph: 047 Reference ID: 16-047-20140306).
13. As a consequence of the above, the appellant was unable to engage with the highways authority or, in respect of highway matters, establish any common ground or narrow the scope of the appeal. There is no information to indicate otherwise. Yet, at the point where the Statement of Common Ground was agreed, the Council continued to resist the appeal development for highway-related reasons without evidence from the highway authority and it continued to do so until after the Hearing had opened.

The Enforcement Notice Plan

14. The plan attached to the enforcement notice is inaccurate. This was drawn to the Council's attention by the appellant when the appeal was lodged. The Council subsequently sought to correct this plan, by substituting it with another plan, dated 9 May 2022.
15. But no power exists for the Council to have done this and, from the information available to me, the Council ignored a request from the appellant for the enforcement notice to be withdrawn and reissued with an accurate plan. I have no reason to believe this was not a reasonable request in the circumstances, particularly as the plan attached to the notice does not reflect publicly available title plans for the land. In any event, the second plan was also inaccurate.
16. As is set out in the PPG (see Paragraph: 048 Reference ID: 16-048-20140306), local planning authorities must carry out adequate prior investigation for enforcement action and they 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 ensured that the enforcement notice was accurate.
17. The Council states that prior to the notice being issued, site inspections were undertaken. But this did not result in the enforcement notice plan being accurate. Following my accompanied site visit, a third plan was prepared by the Council (during the Hearing) and the appellant confirmed that this third plan adequately addressed their concerns.
18. Nevertheless, the appellant's ground (b) appeal could have been avoided if, as part of its investigation, the Council had properly established the precise boundaries of the land to which the notice would relate. I have not been provided with any reason why this would not have been possible and it seems to me it would have been, using rights of entry if necessary and/or a Planning Contravention Notice (PCN). But no such notice was issued.
19. In any event, to understand the plan error, the Council should have co-operated with the appellant and promptly reviewed its case, following the lodging of the appeal, as part of sensible on-going case management. The Council could have swiftly withdrawn the enforcement notice to get the plan right and then reissue the enforcement notice with an accurate plan, as invited to do so by the appellant. I have no reason to believe this would not have been the most responsible and cost-efficient response to the ground (b) appeal in this case.
20. But instead, the Council's lack of co-operation generated work for the appellant and meant that the appellant had to advance its ground (b) appeal. As is advocated by the PPG, a more helpful approach by the Council would probably have resulted in either the ground (b) appeal being avoided altogether, or the issues to be considered being narrowed, thus reducing the expense associated with the ground (b) appeal (see Paragraph: 049 Reference ID: 16-049-20140306).

Unilateral Undertaking

21. The enforcement notice clearly identifies the likely adverse effect of the appeal development on the integrity of the Epping Forest SAC as a reason for issuing the enforcement notice. The Council's Statement of Case is consistent with the enforcement notice in this regard. Both documents refer to a planning

obligation to mitigate the adverse effect and the Statement of Case is explicit that a contribution or other mitigation would be required.

22. From all the information provided, the preparation of a planning obligation to address this issue is consistent with the relevant planning policy provided and the Council's Interim Air Pollution Mitigation Strategy. This Strategy sets out that for non-residential development, the Council will only be seeking financial contributions from development on employment sites (which are specified) but that other trip generating development proposals will be considered on a case by case basis.
23. In light of the above, the appellant reasonably undertook work to prepare a planning obligation and incurred costs associated with doing so. However, on 24 July 2024, 2 weeks before the Hearing opened, the Council changed its position and stated that it would not seek any financial contributions. On this basis, the costs the appellant incurred in addressing this issue up to this point were wasted. At the Hearing, in respect of the test set out in paragraph 57(a) of the National Planning Policy Framework, the Council said that a planning obligation was not necessary. This was a fundamental departure from the position it had previously advanced.
24. Nevertheless, given the thrust of the relevant planning policy, the relevant text of the above Strategy and what had been stated in the enforcement notice and the Council's Statement of Case, the appellant reasonably proceeded with the planning obligation, to protect its position, concerned that the Council was, in effect, failing to apply its own policy. In my appeal decision, I have not needed to consider whether the planning obligation was necessary or not, because of the way the Council drafted the enforcement notice. As such, the appellant's costs incurred relating to the planning obligation, after 24 July 2024 were also wasted.

Nullity & Jurisdiction

25. The applicant has invited me to award full costs if I find the enforcement notice to be a nullity or if I am deprived of jurisdiction on the ground (a) appeal. Whilst in my appeal decision I have not found the notice to be a nullity, I have found it to be invalid and beyond correction. This is because it does not specify with sufficient clarity the alleged breach of planning control.
26. As a consequence of the way this was worded in the notice, the appellant advanced a ground (a) appeal for a different use to that which the notice was directed at. This is not what section 177 of the 1990 Act provides for. Yet this approach was endorsed by the Council via the Statement of Common Ground, as the Council explicitly agreed that the breach of planning control (and therefore the deemed planning application) was for a storage use.
27. However, during the Hearing, the Council changed its position and advanced a case that the use attacked by the notice is a mixed use of car repairs, car wrapping and storage and distribution. The appellant's entire ground (a) appeal was predicated on the use being a storage use (this is obvious from all of the appellant's submissions) and the Council clearly understood this when it drafted its Statement of Case. So as a consequence of the Council's change in position at the Hearing, the ground (a) appeal that the appellant had prepared could not proceed and the costs incurred in its preparation were wasted.

28. This entire difficulty could have been avoided if the alleged breach of planning control stated in the notice was accurate, rather than broad and vague, as I have found in my appeal decision. It was within the gift of the Council to get this right, by a thorough site inspection and/or by drawing on other statutory powers available to it as part of its investigation, including issuing a PCN, if necessary.
29. The PPG is clear that, for enforcement action, local planning authorities must carry out adequate prior investigation and that they 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 ensured that the notice was accurate (see Paragraph: 048 Reference ID: 16-048-201403060). I am in no doubt that this applies to the ground (a) appeal in this case (the scope of which the Council had agreed to).
30. Whilst I fully appreciate that issuing a PCN is discretionary, I have seen no evidence that the Council gleaned what it needed to about the nature of the unauthorised use by site inspections and other enquiries alone, in order to draft an accurate notice in respect of the allegation. Moreover, I have not been provided with any satisfactory explanation of why a PCN was not used to establish what the unauthorised use was. From all of the information available to me, this was only established during the Hearing, resulting in the Council changing its position, to the appellant's significant disadvantage in respect of the ground (a) appeal.

Conclusion

31. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense as described in the PPG, has been demonstrated and that a full award of costs is justified.

Costs Order

32. 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 Epping Forest District Council shall pay to Theydon Farm Units Ltd, 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.
33. The applicant is now invited to submit to Epping Forest District 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.

L Perkins

INSPECTOR