
Costs Decision

Inquiry Held on 10-13 September 2024 & 17-20 September 2024

Site visit made on 10 September 2024

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 11 October 2024

Costs application in relation to Appeal A Ref: APP/N0410/C/23/3336002 & Appeal B Ref: APP/N0410/X/22/3304031

Land lying to the west of Lake End Road (formerly known as Orchards Herbs) , Dorney, Buckinghamshire SL4 6QS

- 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 Buckinghamshire Council for a full award of costs against Mr Christopher Ball.
- The inquiry was in connection with an appeal against an enforcement notice alleging, without planning permission, a mixed use including open storage, the storage and distribution of aggregates and the preparation, storage and distribution of readymix concrete, together with the carrying out of operational development to facilitate that use, and a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development for use as a builders yard and storage of commercial vehicles, equipment and building materials, and building materials .

Decision: the application succeeds in part and an award of costs is made in the terms set out in the Costs Order below

The submissions for Buckinghamshire Council

Appeal A

1. It was unreasonable for the appellant to pursue the appeal against the Enforcement Notice. The Council notified the appellant of its intention to make an application for costs in respect of this appeal in the first Case Management Conference in March 2024. The substantive grounds of appeal had no reasonable prospects of success, resulting in an 8-day inquiry which was unnecessary and resulted in considerable unnecessary expense.

The appeal on ground (e)

2. This was predicated on the assertion that the Council had failed to undertake reasonable inquiry regarding the names of occupiers prior to serving the Enforcement Notice. Following receipt of the appeal and a letter from the appellant's solicitor stating that the appellant was aware of at least 6 companies that had not been served (the details of which were not provided), the Council wrote to the appellant to point out that a section 330 Notice had been served on, and emailed to, the appellant and that no response had been received.

3. The appellant then claimed that the email had been sent to an address that was not used or monitored for business purposes. However, that turned out to be incorrect. The appellant also accepted that he had not updated his registered address ("the Burnham Address"), nor made any alternative postal arrangements and that he continued to periodically check for post received at the Burnham Address.
4. After further unauthorised development on the appeal site was witnessed over the 2023 Christmas period, the Council indicated its intention to serve a Planning Contravention Notice (PCN) and requested a copy of the appellant's address from his solicitor. Despite being instructed in the ongoing appeal, no response was received to that request or the subsequent request when the PCNs were returned as "addressee gone away". At the Inquiry, the Appellant declined the opportunity to call his solicitor to be cross-examined on why no response had been received to these reasonable requests.
5. Finally, it is clear that none of the occupiers who gave evidence had suffered substantial prejudice. As the Inspector found in his Preliminary Ruling given at the Inquiry, even when the occupiers were aware that the appeal was up and running, none took any independent legal advice or sought to make any separate representations on the grounds of appeal which had been pursued.
6. Insofar as there was any issue over service, it arose out of the appellant's own unreasonable conduct in failing to engage with the Council and provide his address and any details of the other occupiers of the appeal site. A ground (e) appeal exists to protect the interests of those who may be affected by an enforcement notice. It is not a game by which an appellant should seek to bolster his prospects of avoiding effective enforcement action by being obstructive and uncooperative in communication with the Council before or after the appeal process.

The appeal on ground (c)

7. There have been numerous supervening events which resulted in the loss of the lawful use right of the former Sweeney Yard (hereafter 'the yard') which was found to have accrued in the 2010 Appeal Decision. In particular, there was the change of use from a builder's yard containing three different components of use to a number of separate waste transfer and recovery sites, and the introduction of an airport car parking use into the former Highways England compound. These resulted in clear material changes in the use of the land that preceded the current unauthorised mixed use.
8. The burden of proof rests on the appellant to show that these changes were not material and that the original planning unit had largely remained so as not to create a new chapter in the planning history. However, the appellant provided no expert planning evidence at all on these issues, which amounted to further unreasonable conduct and speaks volumes as to the prospects of success on these issues.

The appeal on ground (d)

9. The appellant's evidence failed to show that the mobile home had been continuously occupied for residential purposes for a period exceeding 10 years. However, the fundamental difficulty with this ground of appeal is that any occupation of the mobile home comprised part of an unauthorised mixed use of

the wider site, which was subject to a number of material changes in use that are not disputed by the appellant. The appellant has failed to identify any separate planning unit which this use is said to relate to as a separate independent use and it cannot be ancillary to the claimed lawful use of the former yard.

The appeal on ground (a) and the deemed planning application

10. The deemed application for planning permission under ground (a) had no reasonable prospects of success, as is indicated by the very late withdrawal of the appeal in respect of the majority of the application site a few weeks before the deadline for the exchange of evidence. The revised application remained equally unreasonable and was not supported by any substantive evidence to demonstrate very special circumstances (VSC), which are necessary to clearly outweigh the substantial harm to the Green Belt and any other harm. This included harm to the character and appearance of the area and harm to the setting of at least four designated heritage assets which must also be given considerable importance and weight.
11. The appellant's case on VSC ultimately rested on economic benefits and Biodiversity Net Gain (BNG). In respect of economic benefits, the evidence regarding the proposed use of the site was confined to a single-page table identifying the turnover and number of employees for each business. No evidence was provided by the proposed occupants of the site regarding their locational requirements, the absence of suitable alternative sites, or the consequences to their businesses if the appeal was dismissed. In respect of BNG, the appellant adopted the wrong baseline and provided insufficient evidence to give any confidence that the claimed BNG could be achieved.
12. This evidence comes nowhere near satisfying the high policy hurdle in paragraph 153 of the National Planning Policy Framework.

The appeals on grounds (b) and (g)

13. The points raised under these grounds were not substantive issues, and could have been addressed through a variation of the notice under section 173A or, if necessary, a written reps appeal which would have avoided the unnecessary costs of an inquiry.

Appeal B

14. The LDC Appeal had no reasonable prospect of success. In short:
 - (a) An application under s. 191 of the 1990 Act (and any appeal under s. 195 in respect of it) seeks to ascertain whether an existing use of land is lawful. In *R (Ocado Retail Ltd) v London Borough of Islington* [2021] EWHC 1509 (Admin), Holgate J. held at [144] that the existing use right must exist at the time of the application. Whilst there is no requirement for an accrued lawful use right to be physically taking place at the date of the application, the appellant must show that it has not been lost through a supervening event.
 - (b) The LDC application was submitted in October 2020 and validated in December 2020.

- (c) The application was made at least 9 months after Highways England took occupation of the land in January 2020 to commence works for the realignment of Lake End Road pursuant to the M4 Motorway (Junctions 2 to 12) (Smart Motorway) Development Consent Order 2016 ("the DCO").
 - (d) The aerial photo dated April 2020 shows that significant works had already been carried out by Highways England, as authorised by the DCO. The appellant accepted that by that date the condition of the land was physically incompatible with its continued use for the purposes which the section 191 application sought to confirm.
 - (e) Furthermore, and in any event, the appellant has also failed to provide sufficient evidence to demonstrate 10 years' continuous use of the LDC Site as "a builders yard and storage of commercial vehicles, equipment and building materials" prior to the occupation of the land by Highways England in 2020.
 - (f) Some of the evidence relied upon by the appellant also conflicted with previous evidence in 2007 regarding the nature and use of the embankment and the Sweeney Yard, which was only selectively re-produced by the appellant in this appeal.
15. It was unreasonable for the appellant to pursue this appeal when it had no reasonable prospects of success. The Council wrote to the appellant on 10 March 2023 pointing out that the appeal had no reasonable prospects of success and warning the appellant that the Council would make an application for costs if it was not withdrawn. The appellant failed to do so, and the Council has incurred unnecessary costs in defending this appeal, which is an academic exercise in a belated attempt to bolster a compensation claim to Highways England, and should never have been brought in the first place.

Conclusion

16. For all the reasons set out above, the appeals and/or grounds of appeal had no reasonable prospects of success and it was unreasonable for the appellant to pursue them without any reasonable evidential justification. In doing so, the appellant has caused the Council to incur the unnecessary costs of defending the appeals through an 8-day inquiry. In the alternative, if it is found that any of these grounds of appeal did have a reasonable prospect of success, the Council makes a partial application for costs for the remaining grounds of appeal.

The response by Mr Christopher Ball

Appeal A

17. The Council's submission is that on each ground of appeal there were no reasonable grounds of success.

The appeal on ground (e)

18. It is plain that what caused the lack of response to the section 330 Notice was that the appellant was no longer actually living at the address given on the Land Registry record. He still owned the property at the address given but had let it to tenants. In fact, this was known to the Council. The address for him on the Land Registry was different to the address given on the LDC application.

The Burnham address was therefore not the 'last known address' that the Council had. At the inquiry the Council made much of the fact that the address on the LDC application had an error in it. There is no evidence that a communication addressed to him with that postcode error would not have been delivered. Indeed, there is no evidence that any letter was sent to that address and was returned in the mail.

19. The Council also complains about conduct of the appellant's solicitor after the service of the Enforcement Notice, this in respect of a further PCN the Council was contemplating serving. That no response was received is (a) hardly surprising given the ongoing appeal proceedings against the Enforcement Notice, and (b) cannot be evidence that supports a suggestion of unreasonable behaviour in relation to the earlier service of the section 330 notice. Up until the service of the Enforcement Notice there was a history of reasonable dialogue between the Council and the appellant's long-standing solicitors. Had the section 330 notice been copied to the appellant's long-standing agent, there is no evidence that this would not have resulted in a positive response.
20. The appellant's case at appeal that the Council had failed to undertake reasonable inquiry was not unreasonable. It did not, in the final analysis succeed, but that does not mean that its basis was unreasonable.
21. The Council also avers that there was 'no prejudice' suffered by those who provided evidence under ground (e). By the time they became aware of the service of the notice it was too late for them to apply to be an appellant. Further, it is plain that the only matter on which they could have provided relevant evidence (other than ground (e)) would have been on a ground (a) appeal over the whole site. However, the pursuance of such an appeal was not in their hands as subsequent events showed. It was not unreasonable of the appellant to have taken the view that they were prejudiced, despite the inspector's judgment being that they were not.
22. As with much in planning, there is room for a range of reasonable judgments. It is simply not the case that the Appellant was engaged in a "game" with the Council.

The appeal on ground (c)

23. The Council alleges "numerous supervening events" amounting to material changes of use and the consequent loss of the right to revert to the lawful yard use accrued in the 2010 appeal decision. The Council also alleges it was unreasonable not to call expert planning evidence on whether there had been material changes of use under ground (c).
24. In this case, the key to making out an appeal on ground (c) was to establish the facts – what happened when. That is what the appellant sought to do.
25. It is settled case law that a change in user and even a change in use is not conclusive of that change having been "material" in planning terms. It was a perfectly reasonable judgment that the use made by Messrs King / Constable / Barrett was not materially different and it was not unreasonable to so submit to an expert tribunal like a planning inspector. It is not unreasonable to fail to call "expert planning evidence" on such matters. As set out in paragraphs 16 of the appellant's closing submissions, none of the investigations in 2014, 2016

and 2017/18 by the planning authorities resulted in any enforcement action alleging any such material change of use being taken to a conclusion.

26. Once Highways England vacated the land it is plain that the whole site became a single planning unit in a mixed use. The use made of the former compound for the storage of vehicles (first cars, then HGVs which had been on other parts of the wider site) and the arrival of the 'concrete' businesses on the site at the same time, amounted to a single material change of use. The various business moved fluidly around the site as is evidenced by the 2022 and 2023 aerial photographs. If any had allocated parts of the site in a lease they did not stick to it – the site management at this time was far too chaotic. That situation persisted until the Enforcement Notice was issued in November 2023.
27. The fact that the whole site was regarded by the Council as a single planning unit at this time is confirmed by looking at the Temporary Stop Notice alleging a material change of use of the whole site: "Without planning permission, a material change of use of the land to a mixed use comprised of open storage (Use Class B8) of plant, machinery , vehicles and miscellaneous commercial articles , airport car parking and shuttle services (Park and Ride) and the storage and distribution of aggregates and preparation and distribution of readymix concrete (the 'Unauthorised Use')". The activity required to cease was only the "Airport car parking and shuttle services and storage of vehicles". So, what was being alleged was a material change of use of the wider site (as a single planning unit).
28. Even if the inspector does not agree with the case advanced under ground (c), it was not unreasonable to advance such a case and nothing unreasonable in the conduct of the case thereafter. Again, if the inspector disagrees with the appellant's closing submissions on this ground of appeal that does not make the case unreasonable.

The appeal on ground (d)

29. The appellant relies on his closing submissions in response to this application for costs. In any event, this part of the case took so little time that it could not be said to have caused any real additional expense on the part of the Council.

The appeal on ground (a) and the deemed planning application

30. There are two parts to the Councils cost application: (a) an allegation that the 'very special circumstances' ("VSC") case was not supported by any evidence sufficient to demonstrate VSC; and (b) that the 'wrong baseline' was used in the BNG case.
31. The demonstration of VSC is quintessentially a matter of planning judgment. The Council has accepted that there were "other considerations" to weigh in the balance against "harms". The appellant relies on his closing submissions and the evidence of Mr Flawn in response to this application for costs. As submitted above, there is room for a range of reasonable judgments.
32. The Council's case on 'BNG baseline' is predicated on the statutory scheme, which does not apply in this case. It also relies on the guidance which applies when a landowner deliberately degrades land in order to reduce the predevelopment value of the land. The appellant has been accused of many things in this case, but not that. The approach adopted to the BNG baseline was entirely sensible. There is no requirement to restore the land to any

particular physical condition. Agricultural use of the land is the most likely if the Enforcement Notice is upheld.

The appeals on grounds (b) and (g)

33. The Council's approach to these grounds is odd. If the submission is that no appeal on these grounds could reasonably have been made, that is plainly unsustainable. Any variation of an Enforcement Notice reasonably necessitates a ground (b) appeal. If that is the only ground, then that might be dealt with in the manner suggested by the Council but not in the event that, as here, there other grounds to consider.
34. If the submission is that the costs of these grounds should be included in any full award of costs in the event that the submissions on the other grounds succeed, then in terms of actual inquiry time, the ground (g) appeal took very little, and the ground (b) discussion similarly did not take such time so as to have added additional days to the inquiry.

Appeal B

35. The Council submits that the appeal had no reasonable prospects of success because the "existing" use of the land as at the date of the application was not as applied for. Instead, the Council effectively submits that the use in the application had been superseded by the occupation of the land pursuant to the DCO. It would be quite wrong as a matter of public policy to regard the circumstances of this case as being a 'supervening event' leading to the loss of the accrued lawful use and the entitlement to an LDC. As at the date of the application the lawful use (whatever it was) remained as it was prior to the occupation by Highways England.
36. The Council also submits that in any event the appellant failed to provide "sufficient" evidence to show 10 years continuous use prior to the occupation by Highways England. That is simply not the case. There was evidence from the occupants and from air photos. There is room for a range of reasonable judgments on what amounts to "sufficient". There was no positive evidence (i.e. witnesses to say that the land was not actually being so used) from the Council. The evidential test in such matters is on the "balance of probability" only. There was no evidence brought before to this Inquiry to gainsay the evidence of Mr Matthew Ball.
37. The Council also claims an inconsistency with evidence at the previous inquiry. That is simply not factually correct. The previous inquiry concerned an Enforcement Notice issued in June 2007 and the evidence was understandably focussed on this date. Mr Matthew Ball's evidence to the current inquiry concerned his use of the yard from December 2007. Furthermore, the LDC application site was outside the red line of the 2007 EN and so the previous inquiry was not concerned with the LDC land at all. The plan attached to the 2014 Enforcement Notice that was ultimately withdrawn did include the bankside area which is first hand, third party evidence supporting the evidence of the appellant.

Conclusion

38. For reasons given above, the appellant submits that there was no unreasonable conduct on his part so as to give rise to a full or partial award of costs against him.

Reasons

39. 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 states that the right of appeal should be exercised in a reasonable manner and goes on to provide example of unreasonable behaviour which may result in an award of costs against an appellant. These examples include lack of co-operation with the other party or parties in providing information or in responding to a planning contravention notice, and where there is inadequate evidence to support grounds of appeal.
40. The Council set out its application in relation to each of ground of appeal pleaded in Appeal A and on Appeal B separately. The appellant responded in the same manner. I will therefore adopt that approach here.

Appeal A

The appeal on ground (e)

41. In many cases, ground (e) appeals cannot succeed because of the provisions in section 176(5) of the Town and Country Planning Act 1990 (the 1990 Act). This provides that, where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him. Consequently, in many cases it will make little difference as to whether they were properly served. In that scenario, an Inspector is normally bound to conclude that they were not substantially prejudiced.
42. For that reason, I always begin my consideration of an appeal on ground (e) with reference to section 176(5) of the 1990 Act. I did so in this case. I concluded on the evidence before me that none of the occupiers had been prejudiced by the way in which the notice was served. But that was a judgment call on my part, the outcome of which the appellant could neither have known nor predicted.
43. In any event, I had already found that the notice was properly served as required by section 172 of the 1990 Act. There were some points raised by the Council that the appellant could not or did not explain. The lack of response of the occupiers on the site to the envelopes containing copies of the notice affixed at various points around the site is a case in point.
44. I found the collective passivity of the occupiers of the appeal site to be quite remarkable. All the envelopes containing copies of the notice were clearly stamped with the words "IMPORTANT THIS COMMUNICATION AFFECTS YOUR PROPERTY" in large character in red ink. The Council could not have made it any clearer. And yet none of the occupiers sought legal advice or even subsequently made representations on the appeal once submitted. The appellant never did explain that away.

45. Nevertheless, looked at the round, the appellant did produce evidence in support of the appeal on ground (e). Witnesses were called and gave evidence under oath. Whether those witnesses actually assisted the appellant's case is an entirely different matter, but evidence was nonetheless adduced. At no point did I perceive the appellant to be engaging in any sort of game with the intention of avoiding or postponing enforcement action. Overall, I consider that the appellant did not act unreasonably in bringing this ground of appeal or in his behaviour in relation to it.
46. I must, however, deal briefly with the Council's point about the part played by the appellant's solicitor in all of this. When the appellant himself was giving his evidence to the Inquiry, I gained the distinct impression that he was implying that the failure to respond to the Council was down (in part at least) to inaction on the part of his solicitors. This was an important passage of evidence and I felt that it was necessary, and only fair, to afford Mr Ball's solicitors the opportunity to set out their version of events. I indicated as much to both advocates in a consultation outside of the Inquiry session during a break in the cross-examination of Mr Christopher Ball.
47. I therefore purposefully invited Mr Thomson to give evidence on behalf of the solicitors instructed by Mr Ball. I was both surprised and disappointed that Mr Thomson (or, for that matter, any other representative of the firm of solicitors instructed Mr Ball) did not avail himself of the opportunity offered. To my mind, that spoke volumes about the part played by Mr Ball's solicitors in the lack of communication with the Council, whether they were acting on Mr Ball's instructions or not. It did nothing to counter the point being made by the Council in this respect. If anything, it only served to reinforce the point the Council was making.

The appeal on ground (b)

48. Any variation of an Enforcement Notice reasonably necessitates a ground (b) appeal. In this case, there were other grounds of appeal to be considered and so evidence relating to ground (b) had to be submitted at the same time as that relating to the more substantive grounds.
49. That said, the appellant's contention that car breaking was not occurring on the site was shown to be wrong by the oral evidence of one his own witnesses. The appellant's argument that the preparation, storage and distribution of readymix concrete does not take place on the site was just pure semantics. In those respects, the appellant's behaviour in relation to the appeal on ground (b) was unreasonable.
50. As the appellant points out, the reality is that the appeal on ground (b) took up very little Inquiry time and did not form a significant element of the Council's written evidence. The unreasonable behaviour of the appellant therefore did not cause the Council much wasted or unnecessary expense. However, that goes to the quantum of any costs that may be awarded and is to be decided by another party outside of the application. It does not go to the question before me as to whether the appellant acted unreasonably in the first place.

The appeal on ground (c)

51. In this case, the main question raised under this ground of appeal was whether there had been any supervening events which resulted in the loss of the lawful

use right of the yard which was found to have accrued in the 2010 Appeal Decision. Both parties produced evidence, or at least submissions, to support their respective cases. Ultimately, I found the case presented by the Council to be persuasive and concluded, on the balance of probability, that there had been supervening events that constituted successive material changes of use of the land. But that was always going to be a matter of judgment on my part, based on weighing up the evidence presented and the submissions made by the respective parties.

52. I note the Council's point that the appellant provided no expert planning evidence at all on these issues. I did find that odd and was initially concerned that the Council could have been prejudiced insofar it had no opportunity to test the appellant's evidence through cross-examination. In the event, the reverse was true: the evidence of the Council's planning witness emerged essentially unscathed from cross-examination, such that I was able to place more reliance upon it than the appellant's untested submissions. But at no point did I draw any inference that the appellant's decision not to call an expert witness to give evidence on ground (c) went to the prospects of success on that ground.
53. Again, when looked at the round, I found nothing unreasonable in the appellant's behaviour in relation to ground (c).

The appeal on ground (d)

54. On the evidence submitted, or rather the lack of it, the appeal on this ground never stood a realistic prospect of success. Unusually, the appellant's case on this ground of appeal was wholly unsupported by documentary evidence. The appellant's cause was then not assisted by his principal witness appearing thoroughly confused as to where the caravan in which he purported to live for many years was actually positioned on the appeal site. Arguably, the appellant could not have known that his principal witnesses would hinder rather than advance his case. Nevertheless, the result was that the appellant's case on this ground of appeal was completely lacking any substance.
55. Again, the reality is that the appeal on ground (d) took up very little Inquiry time and did not form a significant element of the Council's written evidence. But that is again a matter to be decided by someone else at a later date, and is not the question before me.

The appeal on ground (a)

56. Right from the very outset, the appellant acknowledged that the breach of planning of planning control constituted inappropriate development in the Green Belt. Consequently, the appellant must have known right from the outset and even before making his appeal the test that he had to meet in order to succeed: namely that whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development. It bears repeating: the test is to clearly outweigh, not simply to outweigh.
57. Not only is that test set out in the Framework, the weight to be attached to harm to the Green Belt is set out there too. The Framework clearly states that it is substantial weight. I therefore had no discretion in that respect. So the

- appellant must have known from the very outset the hurdle that he needed to clear in order to get planning permission. It is a high hurdle.
58. Furthermore, the appellant knew from fairly early on that harm was alleged to the setting of various heritage assets close to the appeal site. The weight to be attached to any harm found in that respect is set out in the Framework too: it is great weight. So the appellant must have known from fairly on that he had to show very special circumstances to overcome the substantial weight to be afforded to harm to the Green Belt plus potentially great weight to any harm in relation to the setting of the heritage assets. And that is before any other harms are considered.
59. The appellant's response was to rely on three things: the fallback position arising from success on ground (c); economic benefits; and Biodiversity Net Gain (BNG). In the event, the appeal on ground (c) did not succeed and the anticipated fallback position fell away. That left just economic benefits and BNG to overcome the substantial weight afforded to harm to the Green Belt and potentially the great weight afforded to harm to the setting of the heritage assets. Remarkably, given that any harm to heritage assets would have automatically attracted great weight, no expert evidence was adduced in relation to that.
60. Even if the appellant's case on economic benefits and BNG had been strong, it was asking a lot for that to clearly outweigh the substantial weight afforded in Framework to the harm to the Green Belt. Assuming, as the appellant appears to have conceded, that there was harm to the setting of heritage assets, this would mean that both the economic benefits and the BNG would both have had to attract substantial weight in order to clearly outweigh the harm by reason of inappropriateness and any other harm, including to the setting of the heritage assets. That was a tall order and one that never looked to be achieved even on the best possible case. And that would be the equation even if I had found that none of the other harms alleged by the Council to have occurred.
61. In the event, the case advanced in relation to both economic benefits and BNG was far removed from being strong.
62. In respect of economic benefits, the evidence regarding the proposed use of the site was confined to a single-page table identifying the turnover and number of employees for each business. That evidence was short on detail and wholly unsubstantiated. Furthermore, and without any justification through evidence, the appellant sought to ascribe the same weight to these benefits as to the patently much greater benefits arising from a much larger development proposed on the same site only a couple of years previously. That was simply not credible.
63. The appellant's case on BNG was no better. The baseline was wrong. It initially relied on BNG being gained through a landscape scheme that was itself out of keeping with character and appearance. Whilst it was later accepted that an alternative scheme was needed, that came very late in the day. No consideration appeared to have been given as to whether the land was suitable for the measures proposed, either in terms of the soil type/quality or potential contaminants within the soil. I therefore have serious reservations as to whether the BNG claimed could even be delivered.

64. In the event, I attached only limited weight to both the economic benefits and the BNG. That was obviously nowhere near enough to outweigh the definitional harm to the Green Belt, let alone the other harms that I ultimately found. The appellant's evidence was weak in other areas too. In addition to there being no expert evidence in relation to heritage matters, the landscape evidence missed out several key viewpoints. There was no expert evidence in relation to the openness of the Green Belt. There was no meaningful response to the points made in the many representations that were received, including the specific and detailed concerns expressed by Mr Stopford in terms of the effect on his living conditions. The Council's allegation that the breach of planning control constituted Intentional Unauthorised Development was barely challenged.
65. The examples of unreasonable behaviour set out in the PPG include, where other material considerations are advanced, there is inadequate supporting evidence. That was the case across the board with the appellant's evidence in relation to the appeal on ground (a).

The appeal on ground (g)

66. Given that the appeal had been made on other grounds, the appeal on this ground could not reasonably have been addressed through a variation of the notice under section 173A or a written representation. I make no criticism of the appellant in that regard. But the Council has a valid point insofar as the issues raised under these grounds were not substantive. Indeed, it would be more accurate to say that they were non-existent.
67. The appellant initially contended for a compliance period of 15 months but presented no evidence whatsoever that this length of time was reasonably necessary to achieve the steps required by the notice. In cross-examination, the appellant did accept that the period of six months specified in the notice would be sufficient but, for the reasons set out in my main Decision, that can be put down to an understandable lapse in concentration. In the event, a mutually acceptable period of compliance was arrived at but not through any evidence advanced or actions by the appellant.
68. In my view, the inadequate supporting evidence provided under this ground of appeal constituted unreasonable behaviour for the purposes of the PPG.

Appeal B

69. It was agreed at the Inquiry that the LDC application site was incorporated within the land utilised for the construction of the realigned overbridge. That then being the case, the use of the land for which the lawful development was sought (the use as a builders yard and storage of commercial vehicles, equipment and building materials) could not possibly have subsisted on the date on which the application was made. Put simply, the land was by then subsumed by and lay beneath the works being undertaken by Highways England to realign the Lake End Road overbridge.
70. More importantly, the "use right" could not have subsisted on that date: the land was (a) no longer under the control of the applicant and (b) the site was being lawfully used for another purpose as part of a permanent development of the land. Consequently, there was no possibility that any lawful use rights that might have accrued could resume.

71. It follows that the LDC application could not possibly have succeeded. It was therefore unreasonable behaviour on the part of the appellant to even have submitted the appeal. This is compounded by the fact that the application was made at least 9 months after Highways England took occupation of the land. I am mindful that the appeal was against the failure of the Council to determine the application within the prescribed period and that, as such, the Council never set out its reasons why the deemed refusal was considered to be well founded prior to the appeal being lodged and until the appeal was lodged. Nevertheless, given that in my view the appeal never had any realistic prospect of success in the first place, it follows that the Council is entitled to its full costs in defending it.

Costs Order

72. 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 Mr Christopher Ball pays to Buckinghamshire Council partial costs of the appeal proceedings described in the heading of this decision, limited to the costs incurred by the Council in responding to the appeals on grounds (a),(b),(d) and (g) in Appeal A (APP/N0410/C/23/3336002), and the full costs for Appeal B (APP/N0410/X/22/3304031); such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to Mr Christopher Ball, 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