

Costs Decision

Inquiry held on 24 September 2024 and 2 October 2024

Site visit made on 2 October 2024

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 December 2024

Costs application in relation to Appeal Ref: APP/A0665/C/23/3315161

- 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 Tile Farm Off Road Limited for a full award of costs against Cheshire West and Chester Council.
- The inquiry was in connection with an appeal against an enforcement notice alleging without planning permission a material change of use of the Land to a mixed use of agriculture, haulage operation with associated vehicle parking, residential, livery stables, the keeping/exercising of horses and MX quad bike/off road bike riding, motocross track and clay pigeon shooting use.

Tile Farm, Wicker Lane, Guilden Sutton, Chester, Cheshire CH3 7EL

Decision

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

Reasons

2. 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.
3. The applicant submitted a written application for costs during the Inquiry. The applicant submits that the Council has been substantively unreasonable, which has caused it to incur significant costs in fighting the appeal. The main thrust of the applicant's case is that the Council has been substantively unreasonable in resisting the Appeal, as it had no real prospect of resisting the Ground (d) appeal given the overwhelming nature of the applicant's unchallenged evidence.
4. The PPG sets out 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, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. The applicant points to the volume of evidence it provided in support of its case. To put it in context, the Council had previously refused a Lawful Development Certificate (LDC) in November 2022 for the same development. The applicant had previously provided this evidence to the Council and so this evidence was all available to it before it took enforcement action.
5. The applicant suggests the Council was relying on hyper-critical 'quibbles' with individual elements of evidence rather than examining the evidence base as a whole. It is suggested that this is where the central unreasonableness lies.

6. While the evidence provided by the applicant was voluminous and consisted of documentation previously provided to the Council, the LDC application was refused, and the evidence not tested at appeal. Its decision not to appeal is a matter for the applicant and does not indicate an acceptance that the refusal was justified. Nevertheless, this appeal concerns an enforcement notice. It is not disputed that the alleged material change of use has occurred and the applicant has not submitted an appeal under ground (b).
7. The Council has set out within its statement of case and within the proof of its planning witness, why it was defending the appeal. This includes details of noise complaints and the implications of these in terms of the level of use claimed prior to 2021. I note the Council's stance throughout this Appeal, as evidenced by the Statement of Common Ground and confirmed during the Case Management Conference (CMC), has been that there is no factual dispute. Furthermore, the Council did not seek to test the appellant's evidence under affirmation, despite being given repeated opportunity to do so. I agree that this is highly unusual, particularly given the Council's critiques of the appellant's evidence¹. It is not clear how the Council could have obtained the clarity it seemingly needed through a round table discussion.
8. Nonetheless, despite the volume of evidence provided by the applicant, there were, in my view, a number of ambiguities in the evidence, which I sought to clarify during the Inquiry. For example, the difference between the different terms used within the evidence, e.g., 'bike', 'quads', 'buggies', and how the practice track and trails operate. I also sought clarification regarding various documentary evidence and its link to the planning unit, as well as matters which appeared to contradict the appellant's claim, such as advertising, insurance documentation and Companies House information.
9. Moreover, the appellant's detailed evidence for the track and trail use was limited beyond 2021. While these ambiguities were addressed during day one of the Inquiry, it was, in my view, necessary to test the evidence under affirmation. Consequently, even if I were to agree that the Council had been unreasonable in refusing to test the evidence under affirmation, the Inquiry would still have been necessary.
10. I agree that the Council's case has, at times, lacked clarity. As pointed out by the applicant, it is unclear when the Council believed the material change of use to have occurred, or whether it believed there had been multiple changes of use over the material period, or one material change of use that had occurred less than 10 years ago. In its costs response, the Council suggests it would have considered over 28 days to be a material change and that it set this out in its proof of evidence and confirmed at the round table. However, Mr Bannister refers to 14 days in their proof of evidence for MX bikes, and also referred to this during the Inquiry. I do find the Council's case to be ambiguous in this regard.
11. While it is a matter of planning judgement as to when a material change of use would have occurred, it is not clear to me that the Council has considered it in the round. Rather, the approach seems to have been to try and apply different time periods to different parts of the mixed use, based upon permitted development rights set out in Schedule 2, Part 4, Class B of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as

¹ As detailed in Mr Bannister's Proof of Evidence.

- amended)(the GPDO)². I agree with the applicant that this is a flawed approach. Had the Council considered this matter properly, it may have drawn a different conclusion.
12. Nonetheless, given the various matters raised within Mr Bannister's proof and indeed the matters raised by interested parties, I consider this is unlikely to have avoided the need for day one of the Inquiry. Consequently, even if I were to conclude that the Council has been unreasonable in this regard, the appeal and day one of the Inquiry would still have been necessary.
 13. Towards the end of day one of the Inquiry, the Council's planning witness confirmed that they were satisfied that the evidence was compelling and that it shows 10 years continuous use³. The Council has a duty to keep the case under review. However, despite the Council's acceptance of the view reached by its planning witness on day one of the Inquiry, the Council did not withdraw the enforcement notice, necessitating a further day of Inquiry time.
 14. Given the period of time between day one of the Inquiry and its resumption, the Council had sufficient time to consider its position in this regard. Moreover, despite its position that the ground (d) cannot succeed, the Council has persisted in defending the appeal under ground (g). This is unreasonable and has caused the appellant to incur wasted expense in attending the second day of the Inquiry and responding to matters raised following the final adjournment on day one of the Inquiry.
 15. While the Council requested that the appeal was dealt with by the written representations procedure, it will have been well aware of the criteria for determining the procedure for planning, enforcement, advertisement and discontinuance notice appeals, which advises an inquiry would be appropriate if, the appeal has generated substantial local interest to warrant an inquiry as opposed to dealing with the case by a hearing and, in an enforcement appeal, evidence needs to be given on oath (For example where witnesses are giving factual evidence about how long the alleged unauthorised use has been taking place).
 16. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred and a partial award of costs is justified in respect of the applicant's costs in dealing with matters raised following day one of the Inquiry and attending day two of the Inquiry.

Costs Order

17. 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 Cheshire West and Chester Council shall pay to Tile Farm Off Road Limited, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in defending the appeal following day one of the Inquiry, i.e., costs incurred after 2 October 2024; such costs to be assessed in the Senior Courts Costs Office if not agreed.

² And the preceding Order

³ Notwithstanding the Council's costs response refers to Mr Bannister being satisfied that the material change of use had been demonstrated.

The applicant is now invited to submit to Cheshire West and Chester 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.

M Savage

INSPECTOR