



Costs Decision

Inquiry held and site visit made on 8 April 2025

by L Douglas BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06th May 2025

Costs application in relation to Appeal Ref: APP/M3645/X/24/3357978

Parast, Broadbridge Lane, Smallfield, Surrey RH6 9RD

- The application is made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Ms Kelly McInnes for a full award of costs against Tandridge District Council.
 - The inquiry was in connection with an appeal against the refusal of a certificate of lawful use or development (LDC) for mixed use of open storage and parking.
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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 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 set out their grounds for a full award of costs in their Statement of Case, which do not need to be repeated. Additional points were made orally at the Inquiry covering the following claims: the Council's witness did not understand what the balance of probability test meant; the Council's witness did not apply the balance of probability test, and instead applied a higher 'certainty' test; the Council's witness assessed the evidence in a piecemeal manner, rather than considering all available evidence cumulatively; and the only evidence the Council relied upon to support its case were aerial photographs which do not contradict the applicant's case in the appeal.
4. In response, the Council claimed its witness accepted the correct test to be applied was the balance of probabilities, and that use of the word 'certain' related to her not being certain that test had been met. It was also claimed that although each piece of evidence was discussed individually in the written evidence, it was addressed cumulatively, and that the 2018 aerial photograph did not support the applicant's case in the appeal, with the Council's witness being concerned by gaps and a lack of continuity in the evidence.
5. It is clear that the Council's officer report contains significant errors which show that the use specified in the application form, for which an LDC was sought, was not properly assessed. These cannot be explained as minor administrative or typing errors when the report focuses on whether the site had been in a use falling within the B8 use class. This followed the applicant's Supplementary Planning Statement,

which continually refers to the site being used for 'B8 open storage' during the relevant period.

6. Overall, the Council's statement of case and the proof of evidence of Hannah Middleton indicate that the correct test of all the evidence was applied, where it was found that the available evidence was not sufficiently precise and unambiguous to show the use was lawful on the balance of probabilities. Section 2 of Ms Middleton's proof of evidence clarifies the correct test to be applied. Section 4 indicates a misunderstanding of how the correct test of the evidence should have been applied in practice, but section 5 goes on to briefly summarise the overall lack of precision and the ambiguity in all of the evidence, despite it being discussed individually in section 4.
7. During cross-examination Ms Middleton made errors explaining how the balance of probability test should be applied where different items were claimed to have been stored by different people in different parts of the same site, and how all of the evidence should be considered in the round, cumulatively. It should have been a straightforward matter to accept that if the available evidence showed there was a 51% chance a use was lawful, an LDC should be granted, which does not vary from case to case.
8. Notwithstanding the above, I have found that the evidence available when the initial application was considered was not sufficiently precise and unambiguous to show, on the balance of probabilities, that the site had been in a mixed use for open storage and parking purposes for a continuous period of at least ten years without substantial interruption on the date of the application. It was only shown that it was more likely than not such a use was lawful following Mr Langley's oral evidence and a site visit to identify items shown in aerial photographs.
9. Views of the appeal site from the entrance gate were insufficient to identify items which can be seen in aerial photographs. Had Ms Middleton entered the site and carried out a comprehensive site visit when considering the application, she may have been able to identify what was referred to as the mobile home shown in photographs since at least May 2007, the small caravan shown in the photographs since at least September 2018, and the dilapidated banger racing cars in the photograph dated April 2020. However, there would have remained significant ambiguity in the evidence as to how the site had been used over the relevant period, especially with regard to parking.
10. I have found that it is more likely than not that the mixed use was lawful on the date of the application, but this is only having heard Mr Langley give evidence under sworn affirmation. In that evidence he explained for the first time: prior to 2018 he visited the site on a monthly or yearly basis to see Mr Vurc or to collect wood; Mr Vurc often had lorries visiting the site to drop off or pick up wood, some of which would be loaded and parked overnight in preparation for deliveries; Mr Vurc has been ill since 2017/18 which was why the site had become overgrown and "almost abandoned" prior to Mr Langley purchasing it, as seen in the September 2018 aerial photograph; chalk was still present underneath the weeds in 2018 (which can be seen in previous aerial photographs); and that some items shown in the aerial photographs could be identified. Furthermore, it was new evidence that on the basis of his visits to the site before he bought it, Mr Langley could say the site had been used "for the same sort of thing" throughout Mr Vurc's and his ownerships.

This oral evidence addressed the lack of precision and the ambiguity in the available evidence prior to the Inquiry.

11. I therefore find that the Council acted unreasonably in incorrectly assessing the lawfulness of a different use to that for which an LDC was sought in its officer report. However, it is likely that the application would have been refused had it been assessed correctly on account of the evidence available at that time not being sufficiently precise and unambiguous to show whether the use stated in the application form was lawful on the date of the application, on the balance of probabilities. It was not therefore unreasonable for the application to have been refused on the evidence available at that time. With this in mind, not all of the costs incurred by the applicant in the appeal process were unnecessary or wasted and directly caused by the Council's unreasonable behaviour.
12. The applicant has made written submissions highlighting the Council's unreasonable behaviour and time was spent during the Inquiry making oral submissions on the Council's unreasonable behaviour and cross-examining Ms Middleton on points relating to how she assessed the evidence and whether she understood and correctly applied the balance of probability test. That line of cross-examination was a direct result of mistakes in the Council's written submissions, particularly section 4 of Ms Middleton's proof of evidence. Time would have also been spent by the applicant preparing to deal with these matters at the Inquiry. The applicant would not have needed to spend time on these matters had the Council not acted unreasonably.
13. For the reasons given above, unreasonable behaviour resulting in unnecessary or wasted expense has occurred in respect of the manner in which the Council assessed the initial application, the lack of clarity as to how the balance of probability test was applied in the Council's written submissions, and the lack of clarity in Ms Middleton's oral evidence as to how the balance of probability test should be correctly applied. The Council's decision to refuse to issue an LDC was not, however, unreasonable, considering the lack of precision and the ambiguity of the available evidence at that time. A partial award of costs, rather than a full award, is therefore warranted.

Costs Order

14. 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 Tandridge District Council shall pay to Ms Kelly McInnes, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in identifying, raising and addressing the Council's unreasonable behaviour outlined above, in preparing to deal with that unreasonable behaviour at the Inquiry, and in cross-examining Ms Middleton on matters relating to that unreasonable behaviour, including on how the balance of probability test should be correctly applied; such costs to be assessed in the Senior Courts Costs Office if not agreed.
15. The applicant is now invited to submit to Tandridge 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 Douglas INSPECTOR