Planning Inspectorate

Costs Decisions

Inquiry held on 9 January 2024

then on 14, 15,16, 17, 21, 31 January, 27 and 28 February 2025

Site visits made on 14 and 17 January 2025

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 July 2025

Costs application A)
In relation to Appeal Ref: APP/B0230/C/22/3296488
Land at Shire House, 400 Dallow Road, Luton LU1 1FF

- The application is made under the Town and Country Planning Act 1990 (the Act), sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Devonhurst Investments Limited for a partial award of costs against Luton Borough Council.
- The inquiry was in connection with an appeal against an enforcement notice alleging the change of use of the Land from an employment use to a residential use comprising of approximately 109 self-contained residential units; and the erection of three two storey structures used to accommodate multiple self-contained residential units.

Costs application B)
In relation to Appeal Ref: APP/B0230/C/22/3296488
Land at Shire House, 400 Dallow Road, Luton LU1 1FF

- The application is made under the Town and Country Planning Act 1990 (the Act), sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Luton Borough Council for a partial award of costs against Devonhurst Investments Limited.
- The inquiry was in connection with an appeal against an enforcement notice alleging the change of use of the Land from an employment use to a residential use comprising of approximately 109 self-contained residential units; and the erection of three two storey structures used to accommodate multiple self-contained residential units.

Decision (A)

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

Decision (B)

2. The application for a partial award of costs is allowed in the terms set out below.

Preliminary Matters

3. It is normal procedure to refer to the applicant for costs as the “applicant”, the responded for costs as the “respondent” and I have used that within the formal awards below. However, given that there is merit in combing both decisions in one document, I will generally refer to the appellant and the Council to hopefully save confusion between the 2 decisions.

4. The appellant made an application for costs before the start of the resumed inquiry. They added a further application regarding the resumed event.

The submissions and responses

5. The costs applications were both entirely submitted in writing. The responses were also in writing. I will not therefore reproduce the cases here. The inquiry was closed in writing after the costs procedures were completed.

Reasons

6. 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.

Costs application (A)

Adjournment on 9 January 2024

7. The Council did not notify all of the residents of the 109 flats at Shire House prior to the inquiry when it originally opened on 9 January 2024. This resulted in the appointed inspector adjourning the event.

8. The Case Management Conference that took place on 13 November 2023 set out, according to the post-conference note by the original inspector, the importance of considering the Human Rights and the Public Sector Equality Duty due to the people living at the site and how residents would be affected by the notice. It was clearly important when considering these matters to notify existing residents of the inquiry so that they could engage with the process. Of particular importance is the is Article 3(1) of the United Nations Convention on the Rights of the Child requiring "in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

9. The Council is a public body that should act in the public interest and in accordance with the above requirements. I am not persuaded by their argument that they had not held an inquiry where occupants needed to be notified for an extended period of more than 4 years, as being a suitable explanation for not doing so in this case. There are however additional safeguards which might have prevented this from happening.

10. The provisions of Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002, Rule 9(5) state that the Secretary of State may (my emphasis) in writing require the local planning authority to take a number of steps. This includes at 9(5)(b) "*to send a notice of the inquiry to such persons or classes of persons as he may specify*" or (9)(5)(c) "*to post a notice of the inquiry in a conspicuous place near to the land, within such period as he may specify within such period as he may specify*." Guidance such as the 'Procedural Guide: Enforcement notice appeal – England' also reiterates this including versions that were in place before the inquiry was opened.

11. The letters that were sent out by the Planning Inspectorate fixing the date of the inquiry as 9 January 2024 were sent on 16 November 2023 and did not request any publicity. Having interrogated the casefile there was no other letter from the planning inspectorate prior to the opening of the inquiry on 9 January 2024, requiring notifications or a site notice. Whether or not a site notice had been required to be posted on site, that would not have adequately overcome the

potential prejudice caused to the people living with Shire House had the inquiry continued on 9 January 2024. The people most directly affected by the enforcement notice are those who would potentially be losing their homes and who needed to know about it so that their human rights and the best interests of any resident children were properly considered.

12. The Council should have known to inform occupants who would be directly affected by the enforcement notice, about the inquiry given the potential consequence for those people. However, these circumstances were not assisted by the lack of advice to do so by the Planning Inspectorate.

13. Furthermore, the appellant states, and it is not disputed by the Council, that they had emailed prior to the opening of the inquiry requesting confirmation that the residents had been notified. I am not told how long before the inquiry that email was sent but if that had been confronted by the Council and if the Planning Inspectorate case officer been made aware, the first Planning Inspector may have been able to advise on whether the inquiry could be opened on 9 January 2024. It may have prevented all involved from having to travel to the venue.

14. The Council did behaved unreasonably in these matters.

Failure/late engagement with Statement of Common Ground (SOCG), draft conditions and CIL compliance statement

15. A SOCG is required by the regulations and confirmed in advice to be submitted to the Planning Inspectorate 4 weeks before the inquiry. That should be a single document compiled and signed by the main parties, identifying clearly what matters are agreed and which are subject to dispute between the main parties.

16. In this case, the appellant had submitted a draft SOCG to the Council on 12 December 2023, 4 weeks before the opening date of the of the inquiry (as well as draft conditions). The Council had not been given much opportunity to agree the SOCG before the inquiry initially opened, therefore. Following the adjournment, however there was a significant period of delay before a further date could be organised. I recommenced the inquiry on 14 January 2025, over a year later. There was an opportunity in the interim for the main parties to work together to narrow the matters in dispute constructively or at least agree the SOCG before the resumption. It was not until the week prior to the resumed inquiry that Mr Oteng for the Council made changes to the SOCG.

17. The PPG makes it clear as examples of unreasonable behaviour with respect to procedural matters, lack of co-operation, failure to adhere to deadlines and not agreeing a statement of common ground in a timely manner. I did not receive a document signed by both the Council and the appellant until the second day of the resumed inquiry which was unhelpful to me. The Council's behaviour with respect to the SOCG was unreasonable.

18. The submission of revised draft conditions and Community Infrastructure Levy compliance statement late were less critical in my view to how the inquiry proceeded. I did at least have a good idea of the position of each of the main parties by the time of the round-table discussion on planning conditions and the planning obligation. The planning obligation was not finalised and dated until after the last sitting day although similar drafts were available to all well before that point.

These matters although frustrating and contrary to the relevant advice, on balance did not involve unreasonable behaviour in the context of the case.

Additional matters raised concerning population 'importation'

19. The issue of importation of housing need from adjoining boroughs developed during the inquiry. Ms Davies proof of evidence had however clearly explained that her company works in partnership with London boroughs and that they had been approached with that need in mind. This could have triggered the earlier confrontation of the matter by the Council whereas they did not do so explicitly until Mr Oteng, their planning witness, gave evidence in chief.

20. There was no dispute between the main parties about the general housing needs of the Council area. However, the Council raised this matter explicitly for the purpose of trying to show that Shire House is a cause of increased pressure on demand for housing in Luton rather than a solution to meeting existing needs. In the circumstances I took a different view of the significance of this in my decision. To make so much of the point at a late stage was unreasonable.

Application of the wrong tests

21. Mr Dunne in giving evidence for the Council gave a view, with respect to the appeal under ground (c), that the change of use had not been completed within the 3 years required by the provisions of the General Permitted Development Order[1] (GPDO) Schedule 2, Part 3, Class O. I found Mr Dunne's evidence to include a reasonable explanation of what he saw when he visited the appeal site and he made some honest admissions of factual matters, such as dates of photographs, that had not been correct. He concentrated on the safety and completeness of the building rather than looking in the round as the case law has indicated should be the case. However, I understood his evidence and could make my own views on the evidence he gave. Along with the legal submissions, I could set his evidence in the correct context as I think the appellant could have too.

22. Mr Dunne's evidence did not unreasonably pursue the wrong legal tests. I also felt that the requirements of the notice as considered under ground (f) were reasonably made by the Council and I have explained my reasoning in the appeal decision.

Substantiation of the Council's case and availability of witnesses

23. I have dismissed the appeal on grounds (b), (c) and also on ground (a) in respect of retaining the development as constructed. To that extent, the Council did substantiate their case. They defended their reasons for issuing the notice.

24. However, I did find in cross examination that Mr Oteng would not answer questions put to him and repeated some points out of context. He did also concede that some of the additional matters in dispute that had been added to the SOCG were not good points which at least minimised the effect of those issues.

25. The appellant's case on grounds (b) and (c) involved a great deal of discussion regarding correspondence including messages exchanged on mobile phones between Mr Akbar and officers of the Council, some of whom hold or held senior positions. It would have been helpful to the inquiry if those officers of the Council who were involved once the development of the site was under scrutiny following

[1] The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)

the processing of the GPDO application, could have been on hand to provide first hand evidence.

26. That particular line of evidence did not reflect well on the planning system as a whole or the way in which these procedures have led to difficulties of implementation and interpretation. From the context of the correspondence, it appears that the Council had struggled with some of those matters amongst a workload of other cases. It can be seen from some of the messages that the officer in question was under pressure whilst apparently trying to be helpful to Mr Akbar by over-promising the service they could offer. Mr Dunne and Mr Oteng had to try and answer for those officers. This part of the inquiry may well have been simplified if those officers had provided statements and had been available for cross examination to explain more, in reaction to what Mr Akbar had set out in his evidence. The appellant's point that some of those officers attended the inquiry at times is not disputed by the Council.

27. Additionally, as well as the lack of officers who had direct first-hand knowledge of the site and the case, the Council did not provide any expert regarding its social housing functions. Mr Oteng did provide some effective support for the Council's case in that respect but he is not a housing officer.

28. It could have assisted the inquiry to hear more first-hand evidence from those officers who had been involved in the complex history of the development. It was the Council's choice of who should appear on their behalf to defend the appeal and I found that the officers who did appear did do a reasonable job of substantiating the case. However overall, I did find that the lack of these witnesses did not assist the inquiry and the reasons were not explained. This possibly lengthened the inquiry due to the intense and lengthy cross-examination of the witnesses who did appear but who did not have all the answers requiring first-hand knowledge.

Conclusions regarding costs application (A)

29. The adjournment on 9 January 2024 clearly caused wasted expense for the appellants because their team had travelled to the venue expecting at least a 3 day inquiry. The Council should have notified residents of the inquiry. The lack of confirmation by the Planning Inspectorate that they needed to do so does not devolve the Council of their responsibilities to act in the public interests given the legal duties which I have set out above. There would clearly be common areas of work that had been done which were relevant to the continuation of the inquiry but there was also wasted time, other costs and then additional work to prepare for the resumption of the inquiry.

30. Some matters changed by the Council in the SOCG were not forcefully pursued through the inquiry. Some concessions were made when Mr Oteng was cross-examined which prevented those points taking up more time. The appellant did have to consider the changes made at the late stage in order to test the Council's witnesses all of which contributed to the unnecessary lengthening of the inquiry. These factors did lead to some wasted expense as did the lack of first-hand evidence by officers of the Council who had been involved in the case when development started on site. I do not consider however that this included the point made late by the Council regarding importation of housing needs as it did not lengthen the inquiry.

31. A partial-award of costs is justified with respect to this first costs claim.

Costs application (B)

Ground (b)

32. Mr Hepher's evidence regarding the interpretation of the definition of development within s55 of the Act relied heavily on the concept in the Burroughs Day[2] authority. These matters are fact and degree judgements and I disagree with many of Mr Hepher's expressed views. Having a different opinion from a Planning Inspector is not however in itself an indication of unreasonable behaviour. I have described differences in my opinions contrasting substantially with some of Mr Hepher's within the appeal decision. I also consider that there are clearly places from where the changes would be perceptible, but which have not been fully considered or accepted by the appellant.

33. The Council however considers that in applying these judgements there was over reliance upon Burroughs Day which is old law and suggesting that the later Haringey[3] case should have applied. In my decision I have referred to both because one doesn't seem to me to entirely supersede the other and the circumstances of the cases were quite different. However, the lack of reference to Haringey is conspicuous by its absence in Mr Hepher's proof when it is a case which clearly relates to similar considerations and is much more recent.

34. Looking at the facts that can be ascertained and the degree of changes that have occurred, the appellant in their case was asking me to stretch the boundaries of what could be reasonably considered as not constituting development for the purposes of s55 of the Act. That is the case even when considering the Burroughs Day principles alone. The reliance upon that case does appear to have skewed Mr Hepher's judgement to an unwarranted degree. His expression that the new appearance is "strikingly similar" is somewhat difficult to reconcile with the facts. I consider that the facts were clear and attempted line of argument on ground (b) stood little chance of success and were therefore unreasonably argued.

35. The facts about the construction works are understandable from the information provided by the appellant along with those from the Council. The reproduction of the construction contract may have assisted the inquiry but given the other evidence it seems unlikely that it would have made much difference. It was not unreasonable to not produce the contract.

Ground (c)

36. The failure on ground (b) severely undermines the appellant's case on ground (c) as well. It could also not reasonable be argued that the change of use did fall within the limitation of GPDO at Schedule 2 Part 3, Class O.

Ground (a)

37. Dealing first with the issue of Option 2, which has been approved in my appeal decision, whilst this may not have been covered by the appellant's statement of case, it was introduced early on with draft plans and importantly, the evidence about daylight and sunlight deal with it in detail. In any deemed planning application in an enforcement appeal, I am given, under the provisions of s177(1) of the Act, the option to consider whether the whole or any part of those matters as

[2] Burroughs Day v Bristol CC [1996] 1 PLR 78; 1 EGLR 167
[3] Haringey LBC v SSCLG & Muir [2019] EWHC 3000 (Admin)

alleged should be given a grant of planning permission. It was not unreasonable for the appellant to emphasise that option within their evidence.

38. Regarding the importation of a population from London boroughs, the Council themselves did not raise this until Mr Oteng gave his evidence and then in closing submissions. The broad concepts of the development being occupied by people who were being rehomed from London was raised on behalf of the appellant in Ms Davies' evidence. The Council had not grappled with that earlier. It was not unreasonable for the appellant to not grapple with it wholly to the extent that the Council wanted them to.

39. With respect to the cumulative impacts of design deficiencies, the appellant was certainly emphasising some elements and playing down others although that is the nature of such appeals. There was a concentration by both parties, understandably, on space standards which is a material consideration. The appellant was right to point out that there is not a development plan policy that has incorporated those. There was, as the Council point out, an approach of averaging out some of those deficiencies. Each flat is a discrete entity and a drop below the guidance in 1 flat is not improved by an increase in the size of another flat. I did not give this averaging out a great deal of weight other than as giving a general overview to build up an overall picture. This was a public inquiry where the Council had that evidence and were able to cross examine the witnesses to draw out the weaknesses in the approach and this was not an unreasonable way of proceeding by the appellant.

40. The lack of acknowledgement about the consequences of providing external amenity space within the development was also underplayed by the appellant. The alternative existing park cannot qualitatively be considered to have the same function. I understood both main parties' cases about this and the appellant's position was not unreasonable.

Ground (f)

41. It is a matter for me to consider whether there are any obvious alternative or lesser steps which would achieve the purposes of the notice with less cost and disruption than the requirements as set out on the notice. These matters can be complex particularly when the planning merits are also being considered. I agreed in my decision with the Council that it was not disproportionate to seek the removal of kitchens and bathrooms for reasons I set out. I also agree with the Council for reasons I explain, given the lack of any clear prospect of knowing what would happen within the building upon compliance with the notice, that there was not an obvious alternative to the requirements in front of me. However, these were not unreasonable matters to argue on behalf of the appellant.

. **Conclusions regarding costs application (B)**

42. A lot of time at the inquiry and in preparation for it was spent on the ground (b) arguments and that unreasonable behaviour has therefore resulted in wasted expense as it did with respect to ground (c).

Costs Order (A)

43. 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 Luton Borough

Council shall pay to Devonhurst Investments Limited, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in the adjournment of the inquiry on 9 January 2024; not adhering to a timely submission of changes to the draft Statement of Common Ground as well as adding to disputed issues within that Statement of Common Ground which were subsequently not pursued; such costs to be assessed in the Senior Courts Costs Office if not agreed.

44. The applicant is now invited to submit to Luton 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.

Costs Order (B)

45. 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 Devonhurst Investments Limited shall pay to Luton Borough Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred the appeal on grounds (b) and (c); such costs to be assessed in the Senior Courts Costs Office if not agreed.

46. The applicant is now invited to submit to Devonhurst Investments Limited, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Andy Harwood

INSPECTOR