The Planning Inspectorate

Costs Decision

Inquiry held on 7, 8 and 9 February, 27 and 31 March, 7 April and 22 May 2017
Site visit made on 20 March 2017

by Diane Lewis **BA(Hons) MCD MA LLM MRTPI**

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

Decision date: 02 August 2017

Costs application in relation to Appeals concerning Land north west of Birdham Farm, Birdham Road, Birdham, Chichester PO20 7BU

Appeal Ref: APP/L3815/C/15/3065780

- 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 Chichester District Council for a full or in the alternative a partial award of costs against Mr William Hughes.
- The inquiry was in connection with an appeal against an enforcement notice (ref BI/24) alleging without planning permission the change of use of the land to use for the stationing of caravans for the purposes of human habitation.

Appeal Ref: APP/L3815/W/15/3132281

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Chichester District Council for a full or in the alternative a partial award of costs against Mr William Hughes.
- The inquiry was in connection with an appeal against the refusal of planning permission for a single pitch site including the provision of a utility building for settled gypsy accommodation together with existing stables.

Appeal Ref: APP/L3815/C/15/3136977 (and 4 related appeals)

- 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 Chichester District Council for a full or in the alternative a partial award of costs against Mr Wayne Smith, Mr William Hughes, Mr Wayne Goddard, Mr Frazer Sibley and Mr Dan Hughes.
- The inquiry was in connection with an appeal against an enforcement notice (ref BI/30) alleging without planning permission the excavation of land and the deposit of hardcore to form an access track and hardstandings and the erection of gates and fences.

Appeal Ref: APP/L3815/C/16/3148236 (and 13 related appeals)

- 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 Chichester District Council for a full or in the alternative a partial award of costs against Mr Wayne Goddard, Mr William Hughes, Mr Frazer Sibley, Ms Kathy Boyden, Mr Daniel Hughes, Mr Keith Hughes, Mr Paul Watson, Ms Lauren Hughes, Mr Glen Keet, Mrs Kimberley Goddard, Mrs Bonnie Hughes, Ms April Lamb, Ms Carla Baker, and Mrs Katie Keet.
- The inquiry was in connection with an appeal against an enforcement notice (ref BI/31) alleging without planning permission a change in the use of land to a mixed use for use as a residential caravan site, the storage of caravans and for the keeping of horses.

Decision

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

Procedural matters

2. At the inquiry on 7 April I requested in accordance with good practice that if there was to be an application for costs a written application should be sent to the Planning Inspectorate and to the party against whom the claim was made in advance of the last sitting day of the inquiry and preferably on 15/17 May. This procedure had been flagged up previously in Inquiry notes 1 and 3.

3. The application for costs by Chichester District Council (and the costs application by the Chichester Harbour Conservancy) was handed in at the start of proceedings on the last sitting day of the inquiry. Mr Masters, the barrister representing the appellants and residents of the development, requested that the application be turned away because it had not been submitted in accordance with the stated timescale. In the alternative, in the event that the application was accepted, time was required in order that instructions could be taken on a response and an adjournment of the inquiry was requested.

4. The Planning Practice Guidance states that a costs application must be made to the Inspector before an inquiry is closed. The application by Chichester District Council was in accordance with this requirement and therefore there was no ground for refusing to accept the application.

5. The procedure set out in the Planning Practice Guidance is that the Inspector will hear the application, the response by the other party and then the applicant will have the final word. The Guidance also states that for inquiries, the party against whom an application has been made will have an opportunity to reply either at the event or in writing. I decided that because no advance sight was given of the content of the application the appellants should have time to consider the matters raised. I requested that a written response should be submitted by Friday 26 May, which allowed four days. Following a further request from Mr Masters I agreed that the appellants' response should be submitted to the Planning Inspectorate by 1600 hours on Tuesday 30 May and that a final response from the applicant should be submitted to the Planning Inspectorate by 1600 hours on Friday 2 June. This timescale was confirmed in writing to all main parties on 23 May.

6. A response on behalf of the appellants was not received on 30 May. On 2 June an email from Mr Weymes (the appellants' planning agent) to the Planning Inspectorate gave assurances that a response would be submitted by 1600 hours on Monday 5 June 2017. Whilst I did not agree to this delay, I checked with the office just after the appellants' own deadline by which time nothing had been submitted. I instructed that if anything was received it should be returned on the basis that a reasonable and indeed a generous timescale had been allowed. A response to the costs application was submitted at 1627 hours on 5 June and the appellants' representatives were informed by the Planning Inspectorate that the comments would not be taken into consideration. A request was made by Mr Masters that the matter be reconsidered. I decided on balance to accept the response in fairness to the appellants. A revised timescale was set for submission of a final response from the applicant. The Council submitted its final response within that timescale.

7. With reference to the Planning Practice Guidance in deciding whether an award of costs will made against the appellants I will take all evidence into account alongside any extenuating circumstances. Only key points of the written submissions and responses will be reported below. At the inquiry no additional points were made orally.

8. The schedule of the appeals heard at the inquiry is set out above. In stating in the bullet points whom the costs application is made against I have listed the names of all those appellants who had live appeals before the inquiry. Some of the original appeals had been closed or withdrawn at an earlier date.

9. The front page of the Council's application for Costs states the names of the 'Appellants', which includes the names of people where the appeal had been closed (Mr and Mrs Sullivan, Mr Rodgers), withdrawn (Mr Morley) or no appeal made (Mr J Sullivan Jr). Clearly the application is not able to be made against these people.

The submissions for Chichester District Council

10. The Council seeks principally a full and/or partial award of costs on procedural grounds and considered that 7 of the 10 examples of unreasonable behaviour given in the Planning Practice Guidance were present in the appellants' conduct of the case.

11. Further and/or alternatively a full and/or partial award of costs is sought on substantive grounds on the basis that the development is not in accordance with the development plan and no other material considerations are advanced that indicate a decision should be made otherwise.

The response by the appellants

12. The written response in part one covered general principles and general points on what is said to be a defective notice.

13. Under the general principles heading the point is made that the appellants were inexperienced in defending gypsy cases but that should not be interpreted as unreasonable behaviour. The appellants were bound to resist the actions pursued by the Council, an inquiry was inevitable and no time was lost. Even if information came late it did not add to the length of the inquiry, which would have lasted for the length that it did in any event.

14. The defective nature of the enforcement notice, primarily its global wording, caused real prejudice to the appellants. Had each pitch been served with an individual enforcement notice to start with, preparation would have been handled differently. The failure to present a clear case for the appellants at the start was as much a process of the defects in the notice as anything else. The suggestion that there were never any prospects of the appeal proceeding was wrong because in the main the enforcement action concerns the right of each appellant to a home and family life and to quiet enjoyment of their property. Proper inquiries as to human rights would always have to have been made and no time was lost as a result.

15. Part two provides a short response to specific points taken by the Council in its costs application.

Reasons

16. 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.

17. The word 'unreasonable' is used in its ordinary meaning. Discretion is able to be used when deciding an award, enabling extenuating circumstances to be taken into account. The appellants submitted that inexperience should not be interpreted as unreasonable behaviour. I recognise that the appellants and residents on the site were unlikely to be familiar with the full extent of planning guidance and procedures. However, they were professionally represented throughout by a chartered town planner whose later experience includes over twenty years as a planning consultant and who assured me at the inquiry that he was very familiar with enforcement. The appellants also engaged a barrister who is very experienced in gypsy and traveller appeals. In this case inexperience is not an extenuating circumstance.

18. In view of the emphasis in the appellants' response, it is worth confirming at the outset that I have not found enforcement notice BI/31 invalid and the ground (b) appeals against the notice did not succeed. In other words the notice was not defective. The full reasoning for this conclusion is set out in the appeal decision.

19. Within the response on behalf of the appellants certain submissions imply unreasonable behaviour by the Council. The appellants did not make an application for costs and therefore such submissions will only be considered as part of and informing the appellants' response.

Procedural grounds

Provision of evidence and information

20. In the Planning Practice Guidance, an example of unreasonable behaviour is resistance to or lack of cooperation in providing information.

21. I disagree with the appellants that the nature of the enforcement proceedings caused difficulties in providing information. Information on personal and travelling background was included in the design and access statement with Mr Hughes's planning application. Mr Weymes in December 2015 submitted information on gypsy status and personal circumstances in response to a request from the Planning Inspectorate regarding the appeals against notice BI/30. Not all appellants responded either because of being away travelling or because of the lack of literacy skills. In respect of the later set of appeals (re notice BI/31) the Council's human rights information forms were completed and submitted in June 2016. The appellants were willing to provide personal statements and to give evidence at the inquiry. Therefore I do not consider that there was resistance by the appellants in providing up to date information.

22. The efforts to clarify who had appealed and which appeals were before the inquiry was a separate issue.

Delay and deadlines

23. Rule 15 requires that where a person is to give evidence by reading a proof of evidence, the proof should be submitted no later than 4 weeks before the date fixed for the holding of the inquiry[1]. The Planning Practice Guidance lists 'delay in providing information or other failure to adhere to deadlines' as an example of unreasonable behaviour.

24. There was a failure by the appellants to adhere to deadlines in submitting proofs of evidence. The 'rebuttal proof' of Dr Murdoch was submitted on 25 January 2017 and the 'rebuttal proof' of Mr Crandon was submitted on 26 January 2017. In my view they were proofs of evidence and they included new matters that had not formed part of the appellants' statements of case. They should have been submitted by 10 January and there was nothing to show that the delay was due to exceptional or unforeseen circumstances.

25. Furthermore at the start of the inquiry the appellants' Counsel applied for an adjournment of the inquiry in order that, amongst other matters, personal statements could be prepared. At that time the request was in part justified by new families moving onto the land at the beginning of January 2017.

26. My conclusion is that there was no good reason for the delay in providing information and failure to adhere to deadlines in respect of proofs of evidence and witness statements. Unreasonable behaviour occurred.

Adequacy of information

27. Essentially the Council submitted that information on personal circumstances had to be requested through cross examination, which in turn added substantially to the length of the inquiry. In response, the appellants submitted that it was the duty of the Council to make welfare inquiries before issuing the notice.

28. There was no indication that prior to the inquiry the Council had requested information on specific matters to enable the appellants to better understand the level of detail that was of interest to the Council. I found helpful the personal statements that were produced and the oral evidence. By reason of the number of families, their evidence took about one and half days of the seven sitting days, time which was necessary and well spent, given that gypsy status was in dispute and homes are at risk. The probability is that the Council would have wished to subject written evidence to cross examination. No unreasonable behaviour has been demonstrated.

Extra expense

29. The Planning Practice Guidance identifies as an example of unreasonable behaviour 'introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen'. The Council's submission focuses on the extra preparatory work and not the additional inquiry time spent in considering the requests for adjournments.

[1] The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 SI 2002/2685

30. As indicated in the Council's submissions, when the appellants' Counsel applied for an adjournment of the inquiry on day 1 he appeared to accept that the Council's remedy for the appellants' failures in and inadequate preparation was through the costs regime. The failure was not associated solely with a lack of witness statements. Other shortcomings acknowledged by Mr Masters included no proof from his main planning witness and the impossibility of starting his case because he had no proper instructions. Procedural requirements were not adhered to and unreasonable behaviour occurred.

31. The Council would have spent time in preparatory work and considering the evidence if it had been submitted in accordance with the stated timescales. Therefore the application should clearly demonstrate how the unreasonable behaviour has resulted in unnecessary or wasted expense. In this instance it is stated that the appellants' late rebuttal evidence and the additional supplementary evidence led in particular to Counsel's additional time reading and advising on such evidence. There is email correspondence to show that planned arrangements to consider the appellants' evidence were disrupted. The probability is that extra expense was incurred in preparatory work, expense that otherwise would not have arisen had the documents been submitted on time.

Grounds of appeal

32. An example of unreasonable behaviour is 'prolonging the proceedings by introducing a new ground of appeal or issue'.

33. The Planning Practice Guidance encourages appellants to withdraw their appeal at the earliest opportunity if there is good reason to do so. The Guidance also states that appellants are required to behave reasonably in relation to procedural matters on the appeal, for example by complying with the requirements and deadlines of the appeals process. Section 174(2) of the 1990 Act sets out the seven statutory grounds of appeal against an enforcement notice, any or all of which may be relied on. The Procedural Guide states that appellants should set out on which grounds they are making their appeal and provide supporting facts for each ground[2]. In respect of enforcement notice BI/31 ground (b) was not was identified on the appeal form at this initial stage.

34. Rule 6[3] states that the appellant shall within 6 weeks of the starting date of the appeal serve 2 copies of his statement of case on the Secretary of State and, in the case of an enforcement appeal, a copy on any person on whom a copy of the enforcement notice has been served. A statement of case means and is comprised of a written statement which contains full particulars of the case which a person proposes to put forward at an inquiry and a list of any documents which that person intends to refer to or put in evidence. No reference was made to a ground (b) appeal in the statement of case and hence no particulars of the case on ground (b) were provided. Similarly no details of a ground (b) appeal were set out in the document submitted at proof of evidence stage (entitled Appellants statement of case).

[2] Procedural Guide – Enforcement Notice Appeals England 23 March 2016 paragraph 2.5.1 (issued by the Planning Inspectorate)
[3] The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 SI 2002/2685

35. Against this background to introduce a ground (b) appeal (notice BI/31) on day 1 of the inquiry was unreasonable behaviour. Furthermore, it was not until 10 March, after the first main adjournment of the inquiry, that the basis of the ground (b) case was clarified, prompted by my Inquiry Note 1. Further submissions were made on the morning of day 4 of the inquiry leading to a ruling that I would accept the introduction of a ground (b) appeal. The unreasonable behaviour prolonged the proceedings by a good hour leading to unnecessary expense being incurred on behalf of the Council.

36. In respect of the appeals against enforcement notice BI/30, all the ground (e) appeals were withdrawn on day 2 of the inquiry and all appeals on ground (f) were withdrawn on day 6 of the inquiry. In respect of the appeals against enforcement notice BI/31, all the ground (e) appeals were withdrawn on day 2 of the inquiry. No appeals were made formally on ground (f).

37. The Council states that a substantial amount of inquiry time was wasted trying to understand whether any appeals were being pursued on grounds (e) and (f). According to my records 'substantial' is not an accurate reflection of the actual time spent on these grounds at the inquiry. Time spent on ground (e) was confined primarily to day 1 and amounted to at most some 30 minutes in the opening morning session. There was some discussion on the final sitting day on whether a ground (e) would be reintroduced. Mrs Archer's evidence on ground (f) was taken as read, with some 15 to 20 minutes of discussion during her cross examination.

38. There is force in the related point of the Council that the appeals on grounds (e) and (f) should never have been taken in the first place. No cogent grounds were presented on ground (e) and this ground was withdrawn on all appeals when it was accepted that no prejudice could be shown in the event the notice was incorrectly served. The case outlined on ground (f) was misconceived from the outset as shown through the responses by Mr Weymes to Pre-Inquiry Notes 1 and 2. This is not a situation where the appellants were unrepresented. My conclusion is that unreasonable behaviour occurred and the Council incurred unnecessary expense in addressing these grounds of appeal.

39. The Council has not based any claim for costs on the appeals withdrawn by others before the opening of the inquiry and therefore the response by the appellants on such a point is irrelevant.

Statement of common ground

40. Rule 16[4] states that the local planning authority and the appellant shall together prepare an agreed statement of common ground and shall send it to the Secretary of State and any person on whom a copy of the enforcement notice has been served not less than 4 weeks before the date fixed for the holding of the inquiry. Pre-Inquiry note 1 dated 30 January 2017 stated that no statement of common ground appeared to have been submitted. A signed statement of common ground was handed in on day 5 of the inquiry on 31 March 2017, after an adjournment period of about six weeks.

41. The Council stated that it prepared a draft on 1 February 2017 and repeatedly attempted to make progress on it. However, the Council has not catalogued or

[4] The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 SI 2002/2685

provided documents to show that the appellants 'failed repeatedly to work with the Council to prepare a timely statement of common ground' before the opening of the inquiry. The available documentation pre-inquiry indicates that little thought or work was done by either party on a statement of common ground to enable submission in accordance with the timescale set out in Rule 16. The email exchanges over the short period at the end of March into April 2017 were of a reasonable nature and indicated a degree of cooperation between the two parties. Unreasonable behaviour has not been demonstrated.

Substantive grounds

42. There were four separate appeals. In three of those appeals the homes of a number of the appellants and the homes of current residents are at stake. To say the appeals had no prospect of success fails to take account of the human rights and equality cases presented on their behalf and the potentially different balance in relation to time-limited planning permissions. I have found merit to some extent in the case presented on need. Also of relevance, the appeals against the enforcement notices included appeals on ground (g). Those grounds of appeal have succeeded, where the evidence on need, alternative sites and personal circumstances was very relevant. There was no unreasonable behaviour in appealing the enforcement notices and the refusal of planning permission.

Conclusions

43. There were a number of procedural failures that amounted to unreasonable behaviour. However, to succeed the second test on unnecessary/wasted expense also has to be met.

44. Unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated on the following procedural matters. The failure to adhere to deadlines and the introduction of fresh evidence necessitated extra expense in preparatory work that otherwise would not have arisen. Secondly, regarding the grounds of appeal, the very late introduction of the ground (b) appeal unnecessarily prolonged the inquiry proceedings. The making and withdrawal of the appeals on grounds (e) and (f) resulted in unnecessary expense in the time spent addressing the grounds of appeal, primarily in Mrs Archer's evidence (including written evidence) and the associated inquiry time spent in trying the clarify on what basis these grounds of appeal were made.

45. A partial award of costs is justified for those reasons.

46. Following on from that conclusion, there is an issue as to who should be named in the Costs Order, bearing in mind that some of the appellants no longer had an interest in the land, new residents had moved onto the land and neither the Council as applicant nor the appellants as the respondent made any distinction between the different appeals in the costs application and responses.

47. The Planning Practice Guidance advises that local planning authorities, appellants, interested parties who have taken part in the process, including statutory consultees, may apply for costs or have costs awarded against them. Furthermore, a costs order should identify the broad extent of the expense the

receiving party can recover from the party against whom the award is made. It does not determine the actual amount.

48. The decision document on the appeals sets out that in respect of some of the appeals against enforcement notices BI/30 and BI/31, the appellant sold his/her interest in the land after making the appeal. No letter of consent was submitted to confirm that the new landowner had taken over and was continuing the appeal. Consequently where plots of land had changed ownership during the appeal process the new owner would be treated as a third party and, in conjunction with that, the appeal continued in the name of the appellant.

49. At the inquiry Mr Masters and Mr Weymes confirmed that they were representing and presenting a case on behalf of all appellants and all additional residents who were in occupation on the appeal sites at the time of the inquiry. In other words they were acting on behalf of all the appellants and third party residents on the site. A reasonable expectation is that they would have alerted and fully informed all their clients about the inquiry procedures and the costs regime. The new residents took a full part in the process and as interested parties are not excluded from having costs awarded against them. The matters justifying a partial award of costs formed part of the joint case presented on their behalf at the inquiry.

50. However, the new residents were not responsible for making the appeals, they had not taken over any of the appeals and may not have been aware of a potential liability for costs. They did not have the status or responsibilities of an appellant as set out in the Inquiries Procedure Rules. Such considerations indicate that they should not be named in the costs order. Furthermore, the Council's costs application is not directed at the residents but only the appellants.

51. Weighing up all the considerations my conclusion is that only the appellants should be named in the costs order.

52. The Council asked that if an award is made the decision makes clear that the appellants are liable jointly and severally to any award made. I consider that it would not be appropriate to do so.

Costs Order

53. 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 the appellants, namely Mr Wayne Smith, Mr Wayne Goddard, Mr William Hughes, Mr Frazer Sibley, Ms Kathy Boyden, Mr Daniel Hughes, Mr Keith Hughes, Mr Paul Watson, Ms Lauren Hughes, Mr Glen Keet, Mrs Kimberley Goddard, Mrs Bonnie Hughes, Ms April Lamb, Ms Carla Baker and Mrs Katie Keet, shall pay to Chichester District Council the costs of the appeal proceedings described in the heading of this decision limited to:

    - those additional costs incurred in preparatory work as a result of the appellants' failure to adhere to deadlines and the introduction of fresh evidence on their behalf;

- the unnecessary expense incurred by reason of the additional inquiry time spent dealing with the introduction of appeals on ground (b) in relation to enforcement notice BI/31; and
- the wasted expense incurred in responding to the appeals on grounds (e) and (f) in relation to enforcement notice BI/30 and the appeals on ground (e) in relation to enforcement notice BI/31;

such costs to be assessed in the Senior Courts Costs Office if not agreed.

54. The applicant is now invited to submit to the above named appellants, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Diane Lewis

Inspector