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 Harbour Conservancy 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 Harbour Conservancy 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 Harbour Conservancy 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 Harbour Conservancy 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 that 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 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 written application for costs by Chichester Harbour Conservancy (and the costs application by Chichester District Council) 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 Harbour Conservancy (CHC) was in accordance with this requirement and therefore there was no ground for refusing to hear 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 to prepare a response. 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 agreed at the inquiry and 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 a response was received it should be returned on the basis that a reasonable opportunity 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 that 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, which was met.

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 the key points of the application and responses were will be reported below, given that they were in writing and at the inquiry no addition was made orally to the application.

The submissions for Chichester Harbour Conservancy

8. A full award is sought on a substantive basis, namely that the making of the appeal was unreasonable and had no reasonable prospect of success. More specifically CHC argued that it was unreasonable for the appellants to proffer no detailed evidence in relation to landscape and visual mitigation in an enforcement inquiry concerning an AONB.

9. A partial award is sought on a procedural and substantive basis. CHC concluded that the appellants, despite being professionally represented throughout, had persistently shown a grave and fundamental disregard for proper procedure, timely submissions of evidence and appropriate preparation for the Inquiry. CHC submitted the net effect was that CHC was put to considerable additional expense through (i) having to attend many more days of Inquiry than would have been necessary had the case been properly prepared, and (ii) having to prepare evidence and submissions on subjects it would not have been necessary to prepare evidence and submissions on.

The submissions for the Appellants

10. The written response in part 1 covered general principles and general points on what was said to be a defective notice.

11. Under the general principles heading the point was 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.

12. 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.

13. Part 3 provides a short response to specific points taken by CHC in its costs application.

Reasons

14. 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.

Full award

15. In view of the nature of the allegations, the appellants were at serious risk of losing their homes in the event the notices, and more specifically notice BI/31 (material change of use), came into effect. In the circumstances, to appeal and to pursue a case that focussed on general and personal need for a pitch was reasonable. Time-limited planning permissions had to be considered. The appeals against the enforcement notices also included appeals on ground (g), which have been successful. The evidence on need, alternative sites and personal circumstances was very relevant to informing a conclusion on the reasonableness of the compliance periods.

16. A requirement to submit a detailed landscaping scheme, whether for the entire site or individual plots, was not supported by any reference to a development plan policy, CHC policy principle or national planning policy or guidance.

17. Unreasonable behaviour has not been demonstrated and a full award of costs is not justified.

Partial award

18. The application for a partial award was made in the context of the appellants being professionally represented throughout. In response Mr Masters referred to what he described as a very complicated enforcement appeal and maintained that the Council was as much to blame for poor preparation because of the confusion presented by the wording of the notice (BI/31).

19. The fact is that the appellants were professionally represented by a barrister very experienced in gypsy and traveller appeals and by a chartered town planner whose later experience includes over twenty years as a planning consultant and who assured me that he was very familiar with enforcement. If the notice was as defective as claimed by the appellants it is surprising that the matter was not raised before day 1 of the inquiry. The form and content of the enforcement notice do not amount to extenuating circumstances.

20. As to the second general matter raised in the appellant's 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.

Procedural point a[1]: Statement of common ground

21. Rule 16[2] 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. The Procedural Guidance states that with the agreement

[1] The sub headings relate to each procedural point set out in the costs application
[2] The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 SI 2002/2685

of the appellant and the local planning authority a Rule 6 party can also enter into a statement of common ground. If the Rule 6 party wishes to do so contact should be made with the appellant and the local planning authority at the earliest opportunity[3].

22. Therefore a statement of common ground is prepared jointly, not just by the appellant. There is no indication that CHC as a Rule 6 party requested involvement. Even if a statement of common ground had been submitted in accordance with Rule 16 the timing would not have allowed for it to be taken into account in Mr Lawrence's proof[4], which also had to be submitted 4 weeks before the inquiry. Furthermore, Mr Lawrence's proof is directed at making the case for CHC with appropriate reference to the site description, planning history, planning policy and so on. It is unlikely that a statement of common ground would have overcome the need for Mr Lawrence to address the topics in his proof. No unreasonable behaviour has been demonstrated.

Procedural point b: Appeal on ground (b)

23. The issue is not the raising of a ground (b) appeal but the timing and form of presentation.

24. The Planning Practice Guidance 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[5]. In the appeal against enforcement notice BI/31 ground (b) was not identified on the appeal form at this initial stage.

25. Rule 6[6] 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).

26. Against this background to introduce a ground (b) appeal 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.

[3] Guide to Rule 6 for interested parties involved in an inquiry – enforcement appeals and certificate of lawful use or development appeals – England April 2016 paragraphs 4.1-4.3
[4] Mr Lawrence was CHC's planning witness
[5] Planning Inspectorate Procedural Guide – Enforcement Notice Appeals England March 2016 paragraph 2.5.1
[6] The Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 SI 2002/2685

27. I ruled on day 4 of the inquiry that I would accept the ground (b) appeal. Addressing the merits of the matter in evidence and/or submissions would not necessarily amount to extra expense. However, late submission can result in extra preparation time, and hence expense, from having to work late in the evening during the event or outside planned hours, with consequent higher charges for work undertaken. The probability is, as CHC stated, that such unnecessary expense was incurred in this case. A partial award of costs is merited, limited to the unnecessary additional expense, associated with preparatory work, which would not have arisen otherwise.

Procedural points c to f

General comments

28. The next four procedural matters on which CHC seek an award of costs all relate to the proceedings on day 1 of the inquiry and to the appellants' requests for an adjournment. My note of the proceedings records that Mr Masters applied for an adjournment of the inquiry, made apologies to the inquiry for doing so and acknowledged the availability of the costs regime to the other participants. He described the problems that he had: no proof from his main planning witness (only a rule 6 statement), no proofs from the appellants and the impossibility of starting his case because he had no proper instructions. He also recognised that the inquiry had been set down for some time but because of recent events, new evidence of residents was required.

Procedural point c

29. There is no requirement in the Inquiry Rules for a witness to produce a proof of evidence. However, I agree with CHC that Mr Masters informed the inquiry that he had expected proofs from each of his clients but when he had chased the matter up he found none had been done. Mr Masters explained that the proofs were necessary in order to deal with detailed matters raised by the Council's planning witness Mrs Archer (which challenged the appellants' gypsy status). There is nothing in my note to suggest that written statements were to be prepared in response to the wording of the enforcement notice.

30. In a Pre-Inquiry Note 2[7] I had identified as a matter for consideration the ability to grant planning permission for the whole or any part of the matters constituting the breach of planning control or in relation to the whole or any part of the land to which the notice relates. At no time before or in opening of the inquiry, prior to the request for an adjournment, (nor at any time during the inquiry) did I indicate that I was going to approach the individual pitches as individual planning units. Accordingly I do not accept the points made in the appellants' response to this element of the costs application.

31. In conclusion, there was unreasonable behaviour in failing to ensure that witness statements were submitted in a timely fashion. As a result time was spent at the inquiry in an application for an adjournment, in hearing responses to that application and in ruling on the request. Following that ruling time was spent in hearing and considering a second application for an adjournment to the following morning. A reason for this request was to enable progress on witness statements. All the time involved in relation to the applications for

[7] Pre-Inquiry Note 2 was circulated to all parties on the morning of day 1 of the inquiry

adjournments unnecessarily prolonged the inquiry and led to unnecessary expense for CHC.

Procedural point d: representation

32. A limited amount of time was spent at the inquiry in trying to establish who had submitted the appeals, which of those appeals were before the inquiry and who else Mr Weymes and Mr Masters were representing. However, this matter was pursued primarily by myself in writing to save inquiry time and it was not one of the reasons behind the request for an adjournment on day 1.

Procedural point e: evidence of Mr Soltys

33. According to my notes of the proceedings, the point raised early on in the appellants' request for an adjournment was that Mr Crandon (the appellants' landscape witness) had not had the chance to deal with the proof of evidence submitted by Mr Soltys[8]. No additional time was spent on this matter over and above the time spent on the adjournment requests.

Procedural point f: witness attendance

34. In the first application for an adjournment, Mr Masters acknowledged that two of his witnesses Mr Crandon and Dr Murdoch were not available to attend day 1 of the inquiry because they were at a hearing in Kent. The non-availability of Mr Crandon in particular was cited in the second request for an adjournment to the following day and also caused time to be spent debating the order of proceedings in hearing the Council's evidence. When ruling against the applications for an adjournment I described the reason for non-attendance by expert witnesses to be unacceptable. With reference to the Planning Practice Guidance failure to attend an inquiry without good reason is an example of unreasonable behaviour. Consideration of the implications of the non-availability led to an increase in the time spent considering adjournments and as a result unnecessary expense was incurred by CHC.

Procedural point g: inquiry overrun

35. CHC submitted that timely production of proofs and a statement of common ground would have significantly shortened inquiry time by a number of days. The appellants' response, linking a lack of proofs to an enforcement case, is not to the point.

36. The inquiry sat for a total of seven days compared to the original three days allocated. The issue of the time spent in dealing with requests for adjournments on day 1, in part to enable proofs to be prepared, has been dealt with above. Without the witness statements and the supplementary proof from Dr Murdoch, the inquiry would probably have been longer. Given the apparent very limited degree of cooperation between the parties it is unlikely that their earlier submission would have resulted in a schedule of agreed matters/matters in dispute.

37. A signed statement of common ground between the Council and the appellants was handed in to the inquiry on 31 March 2017. In view of its limited content

[8] In my ruling I concluded that the appellants had sufficient time to consider and respond to the landscape evidence of Mr Soltys on behalf of the Birdham Village Residents Association (BVRA) given that the evidence had been sent to Mr Crandon and Mr Weymes on 24 January 2017.

its earlier production probably would not have assisted in reducing the length of the inquiry.

Procedural point h: withdrawal of grounds (e) and (f)

38. The Planning Practice Guidance encourages appellants to withdraw their appeal at the earliest opportunity if there is good reason to do so. I raised questions about the pursuit of appeals on grounds (e) and (f) in Pre-Inquiry Notes 1 and 2.

39. 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).

40. The short point made by CHC is that the late withdrawal of grounds (e) and (f), without any reason being given, caused CHC to have to prepare for addressing grounds which were not proceeded with. The appellants submit that their withdrawal saved time and is not a costs issue.

41. The appeals on ground (e) were withdrawn because whilst service was still an issue the appellants accepted that it was impossible to show prejudice. This amounted to unreasonable behaviour because of the failure to substantiate a case. However, I would expect an appeal on ground (e) to be addressed primarily by a local planning authority because the issues relate to matters regarding the service of an enforcement notice. CHC has not explained why it would have to prepare to comment on ground (e). Consequently CHC has not demonstrated unnecessary expense was incurred.

42. As to the ground (f) appeals, there is limited evidence as to what consideration CHC gave to the matter. Mr Lawrence's proof of evidence, for example, does not consider the matter. Nevertheless the ground (f) appeals were not based on a coherent argument and were unsubstantiated. CHC's barrister Mr Stemp would have carried out preparatory work to deal with any ground (f) issues that may arise and to support the submission made in opening. Therefore the two tests are met in relation to ground (f).

Procedural and substantive point i

43. When the appeals against the enforcement notice BI/31 were confirmed as valid the timetable allowed for a final draft of a planning obligation to be submitted no later than 10 days before the inquiry opened. Early attention to the mitigation for the Special Protection Area would have been good practice. However, in view of the generally accepted timescales for completion of planning obligations, the payment of a contribution on day 2 of the inquiry did not amount to unreasonable behaviour.

Procedural point j

44. No details were provided on the 'late submissions of evidence from Mr Weymes' or the additional preparation that is said to have been carried out. However, the concern centred on the absence of a clear planning balance in Mr Weymes' written evidence and his lack of consideration of the special duties of decision

makers in respect of the AONB. In response, the statement of case was described by Mr Masters as short, clear and to the point.

45. In relation to this inquiry a reasonable expectation would be for a professional planning witness to carry out a planning balance in a proof of evidence, with detailed consideration of the relevant policy tests. That was not done, a contributory factor being the submission of a rule 6 statement of case at proof of evidence stage. Another factor was the timing of the submission of the written evidence by Dr Murdoch and Mr Crandon.

46. In the event a planning balance was outlined very briefly as part of Mr Weymes's evidence in chief. CHC had to pursue the matter through cross-examination. The probability is that proper attention to the issue would have saved about 30 minutes of inquiry time and CHC's preparation time. Unreasonable behaviour and unnecessary expense has been demonstrated on this matter.

Conclusions

47. The application for a full award of costs does not succeed.

48. There is not the evidence to support a conclusion that failings on the part of the appellants meant CHC had to attend "many more days of Inquiry" than would have been necessary. However, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated on certain procedural matters. The first is in relation to the late submission of appeals on ground (b). Secondly inquiry time was unnecessarily lost by the requests for an adjournment on day 1 as a result of a failure to submit evidence in a timely fashion and the non-availability of expert witnesses. In my estimation the amount of wasted inquiry time leading to unnecessary expense on this matter was in the order of one and a half hours. Thirdly CHC incurred unnecessary expense in respect of preparatory work in response to the withdrawn ground (f) appeals. Finally the failure to address the planning balance led to additional preparatory work and inquiry time. A partial award of costs is justified for these reasons.

49. Following on from that conclusion, there is an issue as to who should be named in the Costs Order.

50. 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.

51. In the decision document on the appeals I set out that in respect of some of the appeals against enforcement notices BI/30 and BI/31, the appellant had 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.

52. 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.

53. 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, CHC consistently refers to the appellant or the appellants in its costs application.

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

Costs Order

55. 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 Harbour Conservancy, the costs of the appeal proceedings described in the heading of this decision limited to those costs unnecessarily incurred:

    - as a result of additional preparatory work by CHC on submissions and / or evidence in association with the appeals on ground (b);
    - by reason of attendance for the additional time at the inquiry on day 1 associated with the two applications made by the appellants for an adjournment of the inquiry;
    - on preparatory work in response to the withdrawn ground (f) appeals;
    - on additional preparatory work and inquiry time spent on exploring the planning balance with the planning witness for the appellants;

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

56. 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