The Planning Inspectorate

Costs Decisions

Hearing held on 21, 22 & 23 May 2024

Site visit made on 21 May 2024

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 September 2024

Costs applications in relation to Appeal Ref: APP/U3100/C/23/3335908
Land at Former Coal Yard, Thrupp Lane, Radley Abingdon, Oxfordshire OX14 3NG

- The applications are made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The applications are made by Oxford Skip Hire Ltd for a full award of costs against Oxfordshire County Council and by Oxfordshire County Council for a partial award of costs against Oxford Skip Hire Ltd.
- The hearing was in connection with an appeal against an enforcement notice alleging the material change in the use of the land from a coal yard to the importation, storage, processing, and transfer of waste material (the unauthorised waste use), the parking of vehicles and storage of plant, machinery, containers, skips and vehicles associated with the unauthorised waste use, and operational development comprising the erection of a fixed canopy building covering the unauthorised waste sorting area, the erection of a portakabin style office/facilities building, and the siting of paraphernalia associated with the unauthorised waste use.

Decisions

1. The application by Oxford Skip Hire Ltd for a full award of costs against Oxfordshire County Council is allowed in the term set out below.

2. The application by Oxfordshire County Council for a partial award of costs against Oxford Skip Hire Ltd is refused.

Preliminary Matters

3. 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.

4. The term "unreasonable" is used in its ordinary meaning, and not in the stricter public law definition of "Wednesbury" unreasonable[1].

5. The appellant made a verbal application for costs during the Hearing and the Council made an application for costs in writing following adjournment of the Hearing. Both parties have been given the opportunity to respond to each other's applications for costs.

[1] Wednesbury unreasonableness is a decision that is so unreasonable that no reasonable authority would ever consider taking it.

Costs Application by Oxford Skip Hire Ltd

6. A verbal costs application was made on behalf of the appellant during the hearing, as follows:

7. The applicant is seeking a full award of costs on 2 grounds:

8. Firstly, should the enforcement notice be quashed, that would be the result of defective drafting and poor investigation. The Council has failed to carry out appropriate investigations prior to issuing the enforcement notice which has become apparent during the hearing, when the Council has confirmed that they are seeking to amend the notice to fit in with the evidence given at the hearing by the appellant. The poor investigation has resulted in an enforcement notice, including the plan that cannot be relied upon for the purposes of the appeal, which has been demonstrated by the Council's request to amend the red line boundary.

9. The PPG in respect of enforcement says, for enforcement action, local planning authorities must carry out adequate prior investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place, or ensured that it was accurate.

10. If the enforcement notice is withdrawn without sound reason, or with avoidable delay, giving rise to unnecessary or waste expense for another party, an application for costs can be made. The applicant states the same logic holds where an inspector quashes the notice.

11. Even if it the notice is not quashed, it was necessary to redraft the plan of the notice several times during the hearing and take up considerable hearing time on the issue of amendment, followed by another amendment, which is all a product of defective drafting and poor investigation.

Reasons

12. As set out in my decision letter, I have found the appeal site comprises part of a mixed use and that the enforcement notice is invalid beyond correction. However, this does not automatically mean that an award of costs is justified. The Council's position is that, so long as I am satisfied that its investigation was both adequate and diligent, there should be no award of costs.

13. In response to the appellant's application for costs, the Council has set out details of the investigation it undertook prior to serving the enforcement notice. The Council states the site, or its vicinity, was visited by officers on 14 different occasions between 5 April 2022 and 28 November 2023.

14. The Council advises that, on some occasions, officers elected to observe the activities on the site from the adjacent permissive path and not enter the site itself because representatives of the appellant have been uncooperative and at times belligerent. Nevertheless, it is clear from the Council's own evidence it has been able to access the site on multiple occasions.

15. To gather further information about the activities on the site, the Council issued Planning Contravention Notices (PCNs) dated 28 July 2022 (issued to Oxford Skip Hire Ltd) and 16 November 2022 (issued to the owner of the site, Manor Mix Concrete Ltd).

Planning Contravention Notice dated 28 July 2022

16. The first PCN, which I shall refer to as PCN(A), asked questions about a part of the former coal yard, within the west of the site. The red line boundary shown on the plan attached to PCN(A) did not reflect the enforcement notice plan red line boundary (which included the access road and weighbridge) or the area of land subject to an environmental permit, which includes a section of land occupied by Manor Mix (at the time of my site visit).

17. Although the plan showed the rest of the former coal yard, nearby properties Conchiglia and Rettford, as well as Thrupp Lane and surrounding fields, the red line boundary was drawn around a much smaller part of the site, within the western part of the former coal yard.

18. I note that the appellant did not identify, in response to question 4 of PCN(A), other persons who have an interest in the land. However, the appellant's response to question 2 confirms it is a tenant, and provides details of the landowner. The appellant states its responses were based upon the questions being directed at the appellant and its operations on the western part of the site. It likely would not have occurred to the appellant to mention sharing of AdBlue, for example, in its response.

19. While the appellant did not provide commentary on its activities outside the red line boundary, the PCN did not ask questions about the wider site and so the recipient of the PCN was under no obligation to provide information about any activities carried out outside of the red line boundary.

Planning Contravention Notice dated 16 November 2022

20. The second PCN, which I shall refer to as PCN(B), asked questions about the overall former coal yard site, as well as questions about an area of land within the western part of the site, labelled 'Area A'. Although there is some overlap, Area A was drawn more widely than the area drawn for PCN(A) and included land which, at the time of my visit, was occupied by Manor Mix Concrete Ltd.

21. PCN(B) asked questions about the activities of the wider former coal yard site. When asked to identify the businesses that operate from "the Land" (the entire former coal yard site) the recipient of the PCN identified Oxford Skip Hire, Manor Mix Concrete, N.Johnson Motor Company, Cool Trailers and H&S Fencing. The recipient of PCN(B) did not identify where these businesses operate within the site, nor was this explicitly asked. It is not clear that the Council properly considered the implications of the responses it received.

22. It would have been open to the Council to request further information following receipt of PCN(B), however, while the Council wrote to Manor Mix Concrete Ltd[2] requesting the signature page and copy of the waste licence, there is no evidence that the Council requested further information regarding the use of the wider site from the appellant or Manor Mix Concrete Ltd.

23. The Council advise that a meeting was held with the appellant on 15 September 2022 to discuss 'the PCN responses'. However, PCN(B) was not issued until 16 November 2022 and so discussion was likely to be focussed on the area of land identified in PCN(A). Details of the meeting have not been

[2] Email dated 19 January 2023 appended to PCN(B)

provided. Nevertheless, the Council does not suggest that the appellant was obstructive during that meeting or would not answer its questions.

24. The Council suggests the reasonable conclusion to be drawn from the responses provided to the PCNs was that the appellant's waste use was located in the western area of the wider site. However, the enforcement notice plan was drawn more widely than the land identified in PCN(A), to include the entrance, weighbridge and an area of surrounding land.

25. A Committee report, dated 5 June 2023, included a plan of "the Land", which showed a red line boundary drawn around the entire former coal yard site. The presence of other businesses within the site is noted within the report, however, no distinction is made between the parts of the site the Council considered were the target of enforcement action and those it considered were not.

26. An expediency update note, dated 30 November 2023, considers matters following the Committee report, however, this report does not set out the Council's consideration of the planning unit or the other activities within the former coal yard site. Furthermore, it does not include an updated plan, nor does it explain why the Council considered the area identified in the enforcement notice plan should be chosen.

27. The enforcement notice plan does not correlate to the area identified in PCN(A), PCN(B) or the Committee report, rather it correlates to an area of land identified by the appellant in a planning application it submitted. It seems likely, therefore, that the Council based the area for the enforcement notice plan on the application submitted by the appellant, rather than its own investigations. While this in itself, is not inherently wrong, a planning application boundary proposed by an applicant is not determinative of a planning unit and so should not have been relied upon in isolation.

28. Councils are expected to follow well-established case law. The Concept of the planning unit and mixed use is not new, indeed the Council's solicitor referred to *Burdle*[3] during the Hearing. The Council clearly considered it necessary to serve a PCN enquiring about the wider site. During its investigation, the Council's focus, as a waste planning authority, understandably appears to have been on the appellant's waste management activities.

29. However, I would still expect there to be some evidence of the Council's consideration of the uses of the wider site prior to the service of the notice and any implications for the allegation. Had the Council carried out a diligent investigation and properly considered whether the former coal yard was in a mixed use, it is likely it would have explored this further through questioning of the appellant. This may have resulted in the Council drafting the enforcement notice differently.

30. The Council states that it drew the enforcement notice boundary too widely by including land which is used by other occupants of the wider site and suggested corrections to the enforcement notice plan during the Hearing. The Council maintains the position that the parts of the site that are in the exclusive occupation of the appellant constitute a distinct planning unit. However, as set out in my decision letter, I have disagreed with the Council in this regard.

[3] *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207

31. I accept my conclusions regarding the planning unit and mixed use of the site are a matter of judgement. However, while the Council suggests it had properly considered whether the whole site was in mixed use prior to issuing the enforcement notice, the evidence suggests otherwise. It seems unlikely the Council properly put its mind to whether or not the appellant's activities formed part of a mixed use when drafting the notice. This, in my view, is unreasonable and has resulted in an allegation which is incorrect and the quashing of the notice.

32. Though the appellant does not dispute that there has been a breach of planning control, nor did the appellant raise concerns regarding the validity of the notice in advance of the hearing, it is for the Council to draft an enforcement notice which is accurate.

33. The enforcement notice allegation refers to a material change of use and operational development. However, for the reasons set out in my decision letter, I have declined to use my powers of correction to delete reference to the material change of use and I have quashed the notice.

34. The appellant has incurred wasted expense in appealing the enforcement notice, in preparing for the Hearing, in attending the Hearing and in submitting and responding to the Council's claims for costs. I therefore find that unreasonable behaviour resulting in unnecessary or waste expense, as described in the PPG, has been demonstrated and that a full award of costs is justified.

35. I note that various documentation has been submitted to the appeal, which was produced to accompany a planning application for the site. For the avoidance of doubt, costs incurred in preparing documentation for other proceedings are ineligible.

Costs application by Oxfordshire County Council

Reasons

36. The Council applied for a partial award of costs on two bases, which I shall deal with in turn. Firstly, the Council applied for a partial award of costs, being its costs of the second and third days of the hearing. The main thrust of the Council's case is that the appellant failed to provide full information when responding to the PCN, only provided evidence (and advanced the case) at the hearing that the appeal site is in a mixed use and failed to cooperate with the Council's request to agree areas which were exclusively used by the appellant for its waste operations.

37. The PPG states that appellants are required to behave reasonably in relation to procedural matters on the appeal. Examples: resistance to, or lack of co-operation with the other part in providing information or in responding to a planning contravention notice[4].

38. PCN(A) asked questions about the western part of the site. Although the plan attached to the PCN shows the wider part of the site, the PCN asked questions about "the Land" and not the rest of the former coal yard. While the appellant did not indicate that it carried out its activities anywhere else on the wider site, it was not unreasonable for the appellant to limit its responses to the western

[4] Paragraph 052 Reference ID: 16-052-20140306

part of the site, since this is what PCN(A) specifically asked about. The appellant limited its responses to the Council's questions and was not unreasonable in doing so.

39. PCN(B) requested a copy of the appellant's lease, which was not provided. However, it was Manor Mix Concrete Ltd who did not provide a copy of the lease. The appellant cannot therefore be criticised for the omission. It was open to the Council to request a copy of the lease from the appellant or reiterate its request to Manor Mix Concrete Ltd. Furthermore, it appears the Council did not request copies of leases for other parts of the former coal yard site.

40. Although the appellant provided evidence during the Hearing regarding its use of the wider former coal yard site, this was in response to a question I raised regarding the allegation. Responding to this question during the hearing to enable me to try and get the notice in order was not unreasonable. The fact that the appellant did not raise this matter in advance of the Hearing was not unreasonable, since it was not the appellant who raised it during the Hearing.

41. The appellant's position at the Hearing was that the appeal site comprises part of a mixed use and that the enforcement notice could not be corrected. The Council suggests that the appellant failed to cooperate regarding the identification of areas of exclusive occupation and use, however, this discussion was tied up with discussions regarding revisions to the enforcement notice plan and given the appellant's position, it is understandable that it was unable to agree that the red line should be drawn around a smaller area.

42. During the Hearing, the appellant provided an annotated plan, in response to a question I asked about the appellant's use of the former coal yard site. I adjourned the Hearing for around 10 minutes to enable the appellant to produce the plan, which the Council was then able to comment on. Although this plan was provided during the Hearing, it was open to the Council to have made such an enquiry prior to serving the enforcement notice. It did not. I do not consider the appellant has been unreasonable in this regard.

43. The Council suggests the appellant's PCN response failed to include details of the portakabin building, which was sited within the area of the "Land" shown on the PCN notice. While this may be due to the appellant's interpretation of what is a building or a structure, its omission in this regard has not had a bearing on the case. The Council has, by its own admission, been able to visit the site and assess whether buildings were present within the site.

44. The Council has also applied for costs on the basis that the appellant acted unreasonably by informing it two working days before the deadline for both parties to submit their Statements of Case, that the appellant was no longer seeking permission for operational development comprising the erection of a fixed canopy building covering the unauthorised waste sorting area and the erection of a portakabin style office/facilities building.

45. Although the notice identifies both a material change of use and operational development, as set out in my decision letter, I have found correcting the notice to delete reference to the material change of use would not be acceptable as it would fundamentally change the notice and cause injustice.

46. Moreover, even if I were to conclude that the appellant was unreasonable for confirming it was no longer seeking permission for the operational development when it did, since the harms concerning the operational development were

bound up with the harms relating to the alleged material change of use, there would have been negligible wasted expense in dealing with it through the appeal. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Costs Order

47. 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 Oxfordshire County Council shall pay to Oxford Skip Hire Ltd, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.

48. Oxford Skip Hire Ltd is now invited to submit to Oxfordshire County Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

M Savage

INSPECTOR