Costs in Planning Appeals

RTPI East of England Planning Law Update

5 November 2021

Mary Cook, Partner & Barrister at Town Legal LLP

Local Government Act 1972, s.250(5)

- Under **s.250(5)** of the **Local Government Act 1972**:

*The Minister causing an inquiry to be held under this section **may** make **orders as to the costs of the parties** at the inquiry and as to the parties by whom the costs are to be paid, and every such order may be made a rule of the High Court on the application of any party named in the order.*

Town and Country Planning Act 1990

- Schedule 6, Paragraph 6(5) TCPA 1990 **extends** the power under s.250(5) LGA 1972 to the ‘appointed person’ (i.e. an inspector)
- Costs can now be awarded in cases involving written representations (s.322 and 322A of TCPA 1990).
- Awards of costs, however, should be in accordance with the guidance contained in the Planning Practice Guidance (a highly material consideration).

Circumstances, awards and who can apply?

- You can claim costs if someone involved in your planning appeal:
  - has **behaved unreasonably**; **and**
  - the unreasonable behaviour has directly caused another party to incur **unnecessary or wasted expense** in the appeal process.
- **Both** limbs must be made out (PPG ID16-030-20140306)
- So costs **do not** follow the event.
- An application can be for a **full** or **partial award**. Partial awards might be linked to one or more reasons for refusal. A losing appellant can still be awarded a partial costs award.
- **Both** the **LPA** & the **Appellant** can apply as well as other **rule 6** or **interested parties**.

“Unreasonable”?

- Unreasonable is used in its **ordinary sense <u>not</u>** the sense that lawyers use it when describing *Wednesbury* unreasonableness. (*Manchester CCv SSE & Mercury Communications Limited* [1988] JPL 774) and (*Swale BC v SSHCLG & Anor* [2020] EWHC 3482 (Admin))
- Unreasonable behaviour **during the whole planning application process** will be taken into account.
- Unreasonable behaviour may be **Procedural** or **Substantive**

Procedural/Substantive Unreasonable Behaviour

- Unreasonable **procedural behaviour** includes:
  - failure to meet deadlines;
  - failure of witness to attend;
  - failure to prepare resulting in an adjournment;
  - failure to attempt to resolve statements of common grounds or
  - withdrawing the application without good reason.
- Unreasonable **substantive behaviour** includes:
  - running points which have no legal basis;
  - running substantive points with no evidence or
  - failure to substantiate a reason for refusal.

Who do you apply to?

- You make a claim for an ‘award of costs’ to the **Planning Inspectorate**.
- If you’re successful, you’ll have to reach an agreement with the other party about how much they pay.
- Planning Inspectorate can do this **even if** nobody’s claiming costs against you.

Deadline to claim for costs

- The deadline depends on whether your appeal will be decided:
  - at a hearing or inquiry → apply **before it closes**
  - in writing → apply **when you apply for householder, commercial and tree preservation orders**, or **before the final comments stage** for anything else (i.e. written rep appeals)

- The deadline is different for claims about:
  - a site visit (e.g. someone didn't attend) → apply **within 7 days**
  - a withdrawn appeal or enforcement notice → apply **within 4 weeks**

Appealing decisions to award costs

- Appeals by judicial review are **very unlikely to be successful** given the discretionary nature of a costs award (R v SSE ex. parte London Borough of Ealing [1999] EWHC Admin 345).
- Court will only interfere in **exceptional circumstances** (Golding v SSCLG [2012] 1656 (Admin)
- Once the Planning Inspectorate has made an award for costs, it has no further role and it is **for the parties to negotiate** the award and agree arrangements for payment.
- If necessary, the parties can submit to a process called taxation using costs draughtsman to produce a schedule for the taxing master to consider
- **Failure to settle** an award of costs is **enforceable** through the Courts: Maiden London Ltd v Ruddick & Anor [2018] EWHC 3684 (QB).

Example (1): London Stansted Airport

- Appeal Ref: APP/C1570/W/20/3256619 London Stansted Airport, Essex - application to increase passengers from 35 to 43 million per annum.
- Council resolved to grant pp in 2018 and in 2020 resolved to refuse it; at appeal (30 days, 3 inspectors) by the time of exchange of evidence the Council position had reverted to 2018 position & witnesses said concerns re noise air quality & carbon emissions could be dealt with via planning conditions.
- A 22-page written application for costs was made after all evidence & closings by the appellant (i.e. late) but appellant had always said they were considering this.
- Appellant said no material change in policy or circumstances to warrant the change in position & all the witnesses agreed conditions could control concerns.

Example (1): London Stansted Airport (cntd)

- Council given **4 weeks** to reply so no prejudice to them (they said application came to late for them to deal with matters in evidence).
- The award of costs was sought to be challenged by way of JR in High Court "unprincipled as it was irrational" "spiteful" and "one that no right minded, impartial panel of inspector would have made".
  - Lang J 's order dismissing the application stated:*"The Panel set out cogent reasons explaining why it judged the Claimant to have acted unreasonably, resulting in unnecessary or wasted expenses, as described in the PPG. That was an exercise of judgment by the Panel with which this Court cannot properly interfere. The allegations of unprincipled and spiteful behaviour by the Panel are unfounded, in my view."*
- Council have **not** applied to renew their application. The parties will now have to negotiate the award.

Example (2): Ashill Land Appeal

- Costs application in Appeal by Ashill Land Ltd Ref: APP/X1925/W/21/3273701 regarding land in GB at Codicote. 2nd RFR prematurity & undermining public confidence withdrawn after cross examination on last day of inquiry
- Council behaved unreasonably with respect to its second reason for refusal by failing to provide evidence to substantiate that objection. The evidence relied upon consists of no more than a general assertion that public confidence would be undermined in the process because people do not like the proposal. The evidence has not grappled with the clear, reasoned advice from Officers nor provided support that the emerging local plan (the ELP) would be undermined.
- **Council's response**: Even if unreasonable, no extra expense incurred because third parties ran prematurity points and they maintained harm would still arise which needed to be weighed in the planning balance.

Example (2): Ashill Land Appeal(cntd)

- Whilst Council Members have the discretion to reject a recommendation made by its professional Officers, **evidence to substantiate each reason of a subsequent refusal of planning permission is still required**.
- The witness in cross examination further clarified that, whilst such concerns still amounted to a harm weighing against the scheme, he would not invite the Inspector to dismiss the appeal on that basis alone. On the final day of the Inquiry, the Council then withdrew the objection as a reason for refusal.
- **Costs awarded** - very little evidence offered by general supposition & no rebuttal of officers professional judgement

Example (3): Land West of Church Road

- Costs Appeal Decisions APP/U2235/W/20/3254134 & APP/U2235/W/20/3256952 in relation to Land West of Church Road, Otham, Kent.
- Two appeals by Bellway Homes; 440 & 441 homes; RFR raised highway safety & free flow of traffic CPRE, a Parish Council, MBC Labour Group & Maidstone Cycle Campaign Forum were rule 6 parties, site
- Policy SP3 identifies land to the south east of the Maidstone urban area, which includes the appeal site, as a strategic development location for housing growth with supporting infrastructure. It is defined as the South East Maidstone Strategic Development Location (SEMSDL). Amongst other things, the policy sets out that approximately 2,651 new dwellings will be delivered in this area on six allocated sites (policies H1(5) to H1(10)). Policy H1(8) relates to the appeal site.

Recovery of Costs in High Court

- In claims challenging the grant of a permission granted by a LPA or SoS on appeal developer/landowner is usually an interested party. For many years Courts relied on CoA case of ***Bolton MDC v SoS for Environment*** [1995]1 WLR 1176 to support the proposition that the losing party will not normally have to pay two sets of costs.
- ***R (Mount Cook Land Ltd) V Westminster CC*** [2003] EWCA Civ 1346 found that a defendant should generally get costs of filing an Acknowledgement of Service where permission not granted on the papers. If oral application made to renew neither the Defendant or IP need attend and if they do the costs of doing so are not generally recoverable.

Recovery of Costs in High Court

- ***CPRE Kent V Secretary of State for Communities & Local Government*** [2021] UKSC 36 was a case where a £10,000 cap applied, CPRE Kent did not get permission on paper and judge ordered 3 sets of costs amounting to £10,000.
- CoA concluded there was no general rule in planning cases which limits the number of parties who can recover their reasonable and proportionate costs of preparing an A/S and SGD.
- Where two sets of summary grounds of dispute, the utility of each & the extent to which one defendant should have anticipated the points of dispute raised by the other should be considered.