

DERBYSHIRE COUNTY COUNCIL

REGULATORY – PLANNING COMMITTEE

11 July 2016

Report of the Strategic Director – Economy, Transport and Communities

6 Item for the Committee's Information

CURRENT APPEALS/CALLED IN APPLICATIONS

Planning Reference	Date	Appellant	Location	Description of Development	Decision
<p>Planning Reference CL8/0114/153</p> <p>PINS Reference APP/U1050/X/14/2 225279</p> <p>Public Inquiry 12 May 2015 was abandoned due to shortage of time. New inquiry date set for 1 December 2015.</p>	30 September 2014	Donald Ward Limited	Land at Griffon Road, Quarry Hill Industrial Estate, Ilkeston	Certificate of lawful use for storage of metals, scrap and waste metals and waste materials and waste recycling.	<p>Appeal withdrawn by appellant on 25 November 2015. Following abandonment of the earlier Inquiry in May this year, the new inquiry date set for 1 December 2015 was unable to proceed because of the late withdrawal of the appeals (25 November 2015) by the appellant.</p>
<p>Planning Reference CL8/0114/154</p> <p>PINS Reference APP/U1050/X/14/2 225276</p> <p>Public Inquiry 12 May 2015 was abandoned due to shortage of time. New inquiry date set for 1 December 2015.</p>	30 September 2014	Donald Ward Limited	Land at Griffon Road, Quarry Hill Industrial Estate, Ilkeston	Certificate of lawful use for processing, recycling and storage of metals, scrap and waste metals and waste materials (including vehicle dismantling).	<p>Appeal withdrawn by appellant on 25 November 2015.</p> <p>Following abandonment of the earlier Inquiry in May this year, the new inquiry date set for 1 December 2015 was unable to proceed because of the late withdrawal of the appeals (25 November 2015) by the appellant.</p>

At the abandoned Planning Inquiry in May 2015, the Council submitted a Costs Application. Following the appellants late withdrawal of the appeals in November 2015, referred to above, the Council submitted a further Costs Application to PINS. A partial award of the Council's costs against the appellant has been allowed. The formal decision is summarised below.

In planning appeals, parties are expected to meet their own expenses irrespective of the outcome. Costs are only awarded on the grounds of unreasonable behaviour resulting in unnecessary or wasted expense.

The Costs Application was in two parts. The first related to the costs associated with the abandoned public inquiry of 12 May 2015, and the second related to the costs associated with preparing for the rearranged public inquiry scheduled for 1 December 2015.

The Secretary of State (SoS) concluded, in agreement with PINS, that for the initial abandoned public inquiry, it has not been shown that unreasonable behaviour by the appellants had caused the Council to incur unnecessary or wasted expense. No award of costs was made in respect of this part of the claim.

Regarding the second claim, the appellants, having been informed of the new public inquiry date of 1 December 2015 in June 2015, and further correspondence from PINS in November 2015, decided to withdraw the appeals, without any prior warning, less than a week before the public inquiry was due to open. This followed a late request by the appellants for the Council to agree a deferral of the public inquiry pending the outcome of a further submitted application for a Lawful Development Certificate.

The SoS concluded that it was not demonstrated that the appeals were withdrawn as a result in a material change in the Council's position or any other material change in the circumstances relevant to the planning issues arising on the appeals. It was concluded that the decision to withdraw has resulted in the Council incurring wasted expense and that the appellants acted unreasonably by withdrawing the appeals.

An award of costs against the appellants for the Council's wasted expenses in preparing the cases from 29 June 2015 was made. The SoS does not decide the amount of costs payable. This is established by agreement of the relevant parties or, failing this, via the Senior Courts Costs Office. The decision to award costs, or a partial award of costs, has no statutory provision to be challenged other than an application for judicial review within six weeks of the decision, that is, by 19 July 2016.

A copy of the decision is attached.

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Strategic Director – Economy, Transport and Communities

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Your Ref: SB/LE/63478

Our Ref:

(1) APP/U1050/X/14/2225276
(2) APP/U1050/X/14/2225279

Date: 6 June 2016

Dear Sir,

LOCAL GOVERNMENT ACT 1972 - SECTION 250(5)
TOWN AND COUNTRY PLANNING ACT 1990 – SECTIONS 195 AND 322
LAND AT GRIFFON ROAD, QUARRY HILL INDUSTRIAL ESTATE, ILKESTON,
DERBYSHIRE
APPEALS BY DONALD WARD LIMITED
APPLICATION FOR COSTS

1. I am directed by the Secretary of State for Communities and Local Government to refer to the Planning Inspectorate's letter of 4 December 2015 confirming the withdrawal of the appeals by Donald Ward Limited. The appeals were against Derbyshire County Council's decisions dated 18 July 2014 to refuse:

- (1) to grant a lawful development certificate (LDC – reference CL8/0114/154) for use of the processing, recycling and storage of metals, scrap, and waste materials (in a manner as described in the decision notice)
- (2) to grant a LDC (ref: CL8/0114/153) for the storage of metals, scrap and waste materials, and waste materials and waste recycling

on land described above.

2. This costs decision letter deals with the Council's application for a full award of costs against the appellants. The application was made, effectively, in two parts:

- (i) The Council's initial costs application was made, on procedural grounds, to the Planning Inspector (Mr B Barnett) at the inquiry into the appeals as held on 12 May 2015. He also heard the appellants' response to the costs application. Both parties' submissions have been summarised by the Inspector in his costs report to the Secretary of State, a copy of which is enclosed and forms part of this costs decision letter. His conclusions on the costs application are at paragraphs 9 to 16 of the report.

The Inspector recommended that the partial application for costs be refused.

In the circumstances described by the Inspector at paragraph 1 of his costs report the inquiry was aborted but arrangements were to be put in hand for another inquiry and with a different Inspector¹. By way of explanation to relevant officers in the Inspectorate the Inspector also provided a file note (not copied to the principal parties). An inquiry date of 1 December 2015 was arranged but this did not take place because the appellants informed the Inspectorate, on 25 November 2015, that the appeals had been withdrawn. The appellants' agents stated that the decision was taken in the light of the Council's refusal to agree to postpone the inquiry to enable fresh LDC applications to be considered.

(ii) Following the withdrawal of the appeals the Council's letter of 18 December 2015 submitted information in support of an application for a full award of costs. Reference was made to the late withdrawal of the appeals. The appellants' agents, Gately PLC, replied to the costs application on 18 January 2016. The Council commented further on 25 January 2016. As the costs submissions have been made available to the parties it is not proposed to summarise them. They have been carefully considered.

Summary of the decision

3. The costs application succeeds to the extent that a partial award of costs is being made. The Formal Decision and Costs Order are set out at paragraphs 13 and 14 below.

Basis for determining the costs application

4. In LDC appeals (as for appeals in general) the parties are normally expected to meet their own expenses irrespective of the outcome. Costs are awarded only on the grounds of unreasonable behaviour resulting in unnecessary or wasted expense. The application for costs has been considered in the light of the relevant part of the Government's Planning Practice Guidance (PPG), the Inspector's costs report, the appeal papers, the parties' written costs correspondence and all the relevant circumstances.

Conclusions

Part (i) of the costs application

5. Having carefully considered the costs report the Secretary of State agrees with the inspector's conclusions. While the procedural conduct of the appellants can be regarded as being "unreasonable" it would appear that even if their case had been better prepared and presented there was no certainty that, in any event, the inquiry could have been completed in the one day allocated by the Inspectorate. And because of the unfortunate lack of availability of the parties' advocates it was not possible for the Inspector to continue with the inquiry in the days available to him following 12 May 2015. It was therefore necessary to arrange a fresh inquiry and with a different Inspector. In the particular circumstances the Secretary of State concludes, in agreement with the Inspector, that it has not been clearly shown that unreasonable behaviour by the appellants has caused the Council to incur unnecessary or wasted expense. No award of costs is therefore being made in respect of this part of the costs application.

Part (ii) of the costs application

6. While the Council are seeking a full award of costs the view is taken that it is difficult to clearly conclude, in the absence of evidence being heard and a formal determination of the appeals, that they had no prospect of success. However, having exercised the right of appeal it is to be expected that, barring any material change in circumstances, the appeals would be pursued to a determination.

¹ The Inspector explained to the parties at the inquiry that he was going to retire shortly.

7. The decisive issue is considered to be whether or not the appellants acted unreasonably by withdrawing the appeals. Paragraph 054 of the PPG makes it clear that if an appeal is withdrawn without any material change in the planning authority's case, or any other material change in circumstances relevant to the planning issues arising on the appeal, an award of costs may be made against the appellant in the event of wasted expense having been incurred by the claiming party.

8. In this case it was the Planning Inspector's decision to abort the inquiry in favour of a fresh inquiry. The Inspectorate's subsequent procedural correspondence of 19 June 2015 provided the principal parties with confirmation that the new inquiry had been set for 1 December 2015. It is considered that expense in preparing for that inquiry would have begun to have been incurred soon after receiving confirmation of the inquiry date. Further correspondence dated 4 November 2015 from the Inspectorate enclosed a formal site notice and made clear that proof of evidence were to be submitted four weeks before the inquiry date. And it is noted that the letter to the appellants' agents warned of the risk of an award of costs in the event of the appeals being withdrawn without good reason. The appellants nevertheless decided to withdraw the appeals, without any apparent prior warning, less than a week before the inquiry was due to open.

9. The view is taken that having made the appeals, and having been informed of the arrangements for the inquiry, the appellants would wish to proceed with their preparation of case for the inquiry. However, it appears that they decided to withdraw in favour of awaiting the determination of the further LDC application(s). While that was their choice it was a decision that should have been weighed against the risk of an award of costs, in the event of the appeals being withdrawn without good reason, as explained in the Inspectorate's procedural correspondence.

10. Having considered the available evidence the Secretary of State concludes that it has not been demonstrated that the appeals were withdrawn as a result in a material change in the Council's position or any other material change in circumstances relevant to the planning issues arising on the appeals. The practical consequence of the decision to withdraw the appeals is that the Council incurred wasted expense in the appeal process. In the particular circumstances the conclusion drawn is that the appellants acted unreasonably by withdrawing the appeals. An award of costs will therefore be made.

11. As to the extent of the award the Secretary of State considers that it should be from 29 June 2015 (inclusive). This allows a nominal period of 10 days for the appellants to consider their position following the Inspectorate's confirmation of the inquiry arrangements and to decide whether they still wished to pursue the appeals at an inquiry. If the appeals had been withdrawn at this time it would have helped minimise the extent of the Council's abortive expense.

12. For the avoidance of doubt the Secretary of State does not decide the amount of costs payable. This is for the parties' agreement or, failing that, via an application for detailed assessment in the Senior Courts Costs Office.

FORMAL DECISION

13. For these reasons, the Secretary of State has decided that a partial award of costs, on grounds of "unreasonable" behaviour resulting in unnecessary or wasted expense, is justified in the particular circumstances.

COSTS ORDER

14. Accordingly, the Secretary of State for Communities and Local Government, in exercise of his powers under section 250(5) of the Local Government Act 1972, and sections 195 and 322 of the Town and Country Planning Act 1990 (as amended), and all other powers enabling him in that behalf, **HEREBY ORDERS** that Donald Ward Limited shall pay to Derbyshire

County Council their costs of the appeal proceedings before the Secretary of State limited to those costs incurred from 29 June 2015 (inclusive); such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned the appeals more particularly described in paragraph 1 of this letter.

15. The Council are now invited to submit to the appellants' agents details of those costs to with a view to reaching an agreement on the amount. A copy of this letter has been sent to them.

16. There is no statutory provision for a challenge to a decision on an application for an award of costs. The procedure is to make an application for judicial review within 6 weeks of the decision.

Yours faithfully

John Gardner

JOHN GARDNER
Authorised by the Secretary of State
to sign in that behalf



The Planning Inspectorate

Costs Report to the Secretary of State for Communities and Local Government

by B S Barnett BA MCD MRTPI

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

Date 13 May 2015

Appeals by Donald Ward Ltd

Applications for Lawful Development Certificates

Inquiry held on 12 May 2015

Land at Griffon Road, Quarry Hill Industrial Estate, Ilkeston, DE7 4RF

File Ref(s): APP/U1050/X/14/2225276 & 2225279

File Ref: APP/U1050/X/14/2225276 & 2225279

Land at Griffon Road, Quarry Hill Industrial Estate, Ilkeston, DE7 4RF

- The application is made under the Town and Country Planning Act 1990, sections 195 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by Derbyshire County Council for a partial award of costs against Donald Ward Ltd.
- The inquiry was in connection with appeals against the refusal, and part refusal respectively of two applications for certificates of lawful use or development for the storage and processing of waste materials.

Summary of Recommendation: The application for a partial award of costs be refused.

Preliminary Matters

1. The inquiry was scheduled for one day. It was aborted after lunch as it was clear that it would not be possible to complete proceeding in a single day and it proved impossible to find a mutually agreeable date on which I would be able to resume it. It will be restarted with a different inspector.

The Submissions for the Council

2. When making the appeals the appellants indicated that they could be dealt with at an inquiry in a single day. When PINS made arrangements accordingly no attempt was made to change the duration to two days.
3. The appellants submitted a large number of documents but no proofs of evidence. The absence of proofs was partly responsible for them taking such a long time in presenting evidence verbally at the inquiry. Their evidence was incoherent making it necessary for the inspector to seek frequent clarification.
4. The inefficient and unhelpful manner in which the verbal evidence was presented prevented the inquiry being completed in the time arranged. It led to the Council incurring the additional costs involved in preparing for and attending the resumed inquiry.

The Response by Donald Ward Ltd

5. My jurisdiction to determine the Costs Application was questioned and concern was expressed that any decision I might make in respect of it could prejudice the appellants by influencing the decisions on the appeals when the inquiry is restarted.
6. PINS was responsible for arranging the duration of the inquiry and the fact that it took longer than expected was, in itself, irrelevant to the costs application. It did not indicate unreasonable behaviour.
7. Although the need to restart the inquiry with a new inspector increased the costs of the appeals for all involved, this was not due to unreasonable behaviour by the appellants but due to PINS inspector availability.
8. There is no requirement for appellants to prepare proofs of evidence and all appropriate documents for the appeal were submitted in good time. If it had been possible to complete their evidence at the inquiry it would have been seen that the appellants had at the very least an arguable case.

Conclusions

9. Advice on the determination of costs applications is contained in the on-line Planning Practice Guidance.
10. This report is being made to the Secretary of State who has jurisdiction to determine the costs application. If a decision on that application is made after the planning appeals are determined, or independently of that determination, it is most unlikely that the appellants would be prejudiced in any way.
11. The appellants took an unusually long time to present their case. Evidence in chief of their first witness took over two hours. This was partly due to me having to intervene frequently to clarify what was being said. If their case had been better prepared and presented this would not have been necessary and evidence in chief would have been dealt with more quickly.
12. As the inquiry was aborted, I am unable to reach any conclusion on the overall strength of the appellants' case. I have, therefore, no reason to conclude that they were unreasonable in pursuing the appeals or that they would not have presented at least an arguable case if they had been able to complete it.
13. The appellants were professionally represented both in submitting their appeals and at the inquiry. The manner in which they presented evidence at the inquiry was, in my opinion, unreasonable. With better preparation, evidence in chief of their first witness could have been completed more quickly, probably saving at least 30 minutes of inquiry time. I can express no opinion on whether or not this would have resulted in a reduction in the overall duration of the inquiry had it been completed as it would be wrong to speculate on how matters might have proceeded. For this reason I am unable to conclude that the manner in which evidence was presented at the inquiry caused the Council to incur additional or wasted costs.
14. The appellants' failure to ask for the inquiry to be scheduled for two days was unfortunate, but did not in itself prolong the proceedings or cause the Council to incur additional or wasted expense.
15. The additional costs which will be incurred by the Council due to the need to restart the inquiry have arisen due to circumstances outside the appellants' control.
16. I consider that unreasonable behaviour resulting in unnecessary expense has not been demonstrated.

Recommendation

17. I recommend that the application for a partial award of costs be refused.

B Barnett

INSPECTOR