



Costs Decision

Inquiry held on 13 May, 15 & 16 July 2009 and site visit made on 16 July 2009

by **Tim Belcher FCII, LLB (Hons), Solicitor (Non-Practising)**

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

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Decision date:
12 August 2009

Costs application in relation to Appeal Ref: APP/V3310/C/08/2077856 Land at Burnham Garden Centre, Pier Street, Burnham on Sea, Somerset.

- 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 Telefonica O2 UK Limited for a partial or full award of costs against Sedgemoor District Council.
- The inquiry was in connection with an appeal against an Enforcement Notice alleging that Condition A2(3) of Part 24 to Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (As Amended) has not been complied with because the relevant period has expired and the apparatus or structures remain on the land.

Summary of Decision: The application is allowed in the terms set out below in the Formal Decision and Costs Order.

The Submissions for Telefonica O2 UK Limited (O2)

1. The submissions are set out in Inquiry document 26.

The Response by the Council

2. The Council agreed that they should meet the partial costs of O2 for the adjournment on the 13 May 2009 which resulted from the Council's failure to comply with the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiry Procedure) (England) Rules 2002.
3. The Council do not accept that at the beginning of the Inquiry they changed their position from that stated in their Pre-Inquiry Statement¹ (the Pre-Inquiry Statement). The reference to alternative providers of mobile telecommunications was merely to indicate that contact with the emergency services was not exclusive to O2 users. O2 took these comments out of context. There has never been a dispute as to the need for the emergency mast. Accordingly, there was no need for O2 to have carried out additional work.
4. The material contained at Part 9² of Colin Arnold's folder of documents handed in at the beginning of the Inquiry merely indicated the "approximate" position from where the photographs were taken.
5. The Council accept that the Pre-Inquiry Statement was incorrectly labelled. However, that mistake does not warrant a partial award of costs against the Council.

¹ Decision Letter Document 20 - Paragraph 4.01

² Decision Letter - Photographs A-M

6. The Council also refute that a full award of costs is justified in this case. The reasons for issuing the Enforcement Notice were fully explained and defended by Mr Arnold at the Inquiry. The document entitled "*Request for Planning Assessment for Breach of Planning Control*"³ (the delegated report) was made available to O2. Further, Mr Arnold described the full discussions which he had with senior Officers prior to the service of the Enforcement Notice and the procedure accorded with the Scheme of Delegation⁴. Mr Arnold explained the visual harm caused by the unauthorised mast and how this accords with the reasons for issuing the Enforcement Notice⁵. It is submitted that the Council carried out the balancing assessment prior to the service of the Enforcement Notice.
7. Accordingly, for the reasons explained above, the Council do not consider that they should pay O2's costs (other than as agreed above).

O2's Final Say

8. O2 had to carry out further work following the Council's assertion at the opening of the Inquiry that contact with the emergency services could be provided by other operators. The rebuttal proofs dealt with this matter. Further, the Council did not challenge the need for the carrying out of this rebuttal exercise when they cross-examined O2's witnesses. It is too late for the Council to say now that this work was unnecessary.
9. Both Burnham Area Rescue Boat and the RNLi in Burnham rely on O2's services and there is no alternative coverage available (as explained by O2's witnesses at the Inquiry).
10. The location plans purporting to identify the position from where Mr Arnold's photographs were taken were not provided on the basis that these were the "approximate" position from where they were taken. It was only due to Mr Waterson's diligence that this misleading evidence was corrected. What is startling is that Mr Arnold failed to even correctly identify the position of unauthorised mast. It was Mr Waterson's obligation to the Inquiry to correct these errors. Further still, the Council failed to explain to the Inquiry that some of the photographs were taken using a zoom lens.
11. As regard O2's application for a full award of costs the balancing exercise is not set out in the delegated report. Whilst Mr Arnold explained that this was dealt with orally at "meetings" O2 question whether such meetings took place. It is not good enough to say that the balancing exercise was carried out - it is clear from Inspector Roberts' Cost Decision⁶ that it was not appropriate to say after the event that the balancing exercise took place. The balancing exercise needs to be recorded within the Report. This reasoning was followed by Inspector Juniper in his Costs Decision⁷.
12. The reason why this has to be the case is a sound one. Unless this was so anyone could turn up at an Inquiry and say that the balancing exercise had been carried out - this is not a sound approach. The Council have to show

³ Decision Letter Document 16.

⁴ Decision Letter Document 9

⁵ Decision Letter Document 17 - Paragraph 4

⁶ Decision Letter Document 22

⁷ Decision Letter Document 24

how they balanced the harm caused by the unauthorised mast against the evidence regarding alternative sites. This was not done by the Council in either the delegated report, the Pre-Inquiry Statement or in the Proof of Mr Arnold. The only inference that can be drawn from this is that the balancing exercise as required by PPG 8 was never addressed. When this is considered in the light of the Costs Decisions referred to above then a full award of costs should be awarded in this case.

Conclusions

13. I have considered this application for costs in the light of Circular 8/93 "*Awards of Costs Incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings*" (the Circular) and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

The Application for a Full Award of Costs

14. The Circular explains, in respect of Section 78 appeals, that "*In any appeal proceedings, the authority will be expected to produce evidence to substantiate each reason for refusal, by reference to the development plan and all other material considerations. If they cannot do so, costs may be awarded against them.*" Further, "*Decisions to award costs in enforcement appeal proceedings are based on substantially the same principles as for planning appeals.*"
15. The only written evidence as to what matters were taken into account prior to the issue of the Enforcement Notice is the delegated report. The only information included in this is the information set out at paragraph 4 of the Enforcement Notice.
16. Section 172 of the 1990 Act explains that a local planning authority may issue an Enforcement Notice where it appears to them that there has been a breach of planning control and that it is expedient to issue the Notice, having regard to the provisions of the development plan and to any other material considerations. In this case the Enforcement Notice does not make any reference to any provisions of the development plan and neither does it refer to material considerations other than the visual harm caused to the area by the unauthorised mast.
17. I have explained in my Decision Letter what the relevant development plan policies are. The Council relied on Local Plan Policy PCS4⁸ at the Inquiry. Whilst this Policy was not referred to in the delegated report I find it inconceivable that the Officer who made the decision to issue the Enforcement Notice would have been unaware of this Policy. The Policy acknowledges the Government's encouragement for the growth of telecommunications which broadly reflects the advice in PPG 8.
18. The Enforcement Notice was issued after an application to retain the unauthorised mast for a period of 12 months had been lodged⁹ with the

⁸ Decision Letter Document 3.

⁹ Decision Letter Document 19

Council but prior to its determination. Mr Arnold was the case officer dealing with that application. His concern about the visual impact of the mast on its surroundings broadly reflects the reasons for issuing the Enforcement Notice. As part of the application process the Council wrote to O2's planning application agent asking for information as to what progress had been made towards finding a permanent site for the mast. I consider that this was a legitimate matter for the Council to seek information about. The planning application was refused more than four weeks after that information was sought. No reply was sent to the Council in the interim.

19. However, the Enforcement Notice was issued eight days prior to the aforementioned letter from the Council being sent to O2's planning agent. The Council were aware that the unauthorised mast had been installed due to an emergency as defined by the Telecommunications Act 1984¹⁰. O2's Solicitors confirmed in March 2008 that the apparatus remained on the site due to that emergency¹¹. The Council did not dispute the need for the mast either at the stage the Enforcement Notice was issued or at the Inquiry. Further, prior to the installation of the unauthorised mast there had been local concern that the poor mobile phone reception for O2 users could cost lives¹².
20. The Council did not make any enquiries as to the availability of alternative sites for the temporary mast prior to the issue of the Enforcement Notice. Prior to the issue of the Enforcement Notice O2 had applied for consent for a permanent mast at the Ritz Cinema in Burnham-on-Sea. Permission for such a mast would have allowed O2 to remove the unauthorised mast.
21. It seems to me that in these circumstances the Council should have weighed against the visual harm caused by the unauthorised mast the undisputed need for a mast to provide coverage for users of the O2 system in the seafront area of Burnham-on-Sea, the safety implications that flowed from requiring the unauthorised mast to be removed prior to a permanent solution being found and the lack of known alternative sites for the temporary mast. In my view these matters should have been explored fully by the Council prior to the issue of the Enforcement Notice. Had such an exercise been carried out I am of the view that the decision to issue the Enforcement Notice at that time would not have been taken and that a meaningful dialogue with O2 could have been entered in to resolve the problem.
22. I know the Council say that the balancing exercise was carried out. However, as explained above, this is not set out in writing in the delegated report or elsewhere. Further, there was no evidence from the Council Officer who made the decision to issue the Enforcement Notice that the balancing exercise had been carried out. I also consider that the lack of evidence about the dates of meetings and what was discussed at those meetings especially regarding the balancing exercise that was required to be taken is indicative that the exercise was not carried out. I consider that in these circumstances the Council behaved unreasonably by issuing the Enforcement Notice at that time.

¹⁰ Decision Letter Document 13

¹¹ Decision Letter Document 15 – Paragraph (c).

¹² Decision Letter Document 11

23. The appeal work carried out on behalf of O2 flows directly from the Council's unreasonable behaviour explained above. Accordingly, it is proper that O2 are entitled to all of their costs. As I have found in favour of O2's application for a full award of costs it follows that I need not rule on the applications for partial awards.
24. For the reasons explained above, I find that unreasonable behaviour resulting in unnecessary expense, as described in the Circular, has been demonstrated. I therefore conclude that an award of costs is justified.

Formal Decision and Costs Order

25. In exercise of my powers under Section 250(5) of the Local Government Act 1972 and Schedule 6 to the Town and Country Planning Act 1990 as amended, and all other powers enabling me in that behalf, I HEREBY ORDER that Sedgemoor District Council shall pay to Telefonica O2 UK Limited the costs of the appeal proceedings, such costs to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned an appeal under Section 174 of the Town and Country Planning Act 1990 as amended against an Enforcement Notice issued by Sedgemoor District Council alleging that Condition A2(3) of Part 24 to Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (As Amended) had not been complied with because the relevant period had expired and the apparatus or structures remain on the land at Burnham Garden Centre, Pier Street, Burnham-on-Sea, Somerset.
26. The applicant is now invited to submit to Sedgemoor District 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. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Supreme Court Costs Office is enclosed.

Tim Belcher

Inspector