



Costs Decision

Hearing Held on 26 February 2019

Site visit made on 26 February 2019

by Chris Preston BA (Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 April 2019

Costs application in relation to Appeal Ref: APP/B3030/C/18/3196972 Land to the north-west side of Winthorpe Road, Newark, Nottinghamshire

- The application is 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 application is made by Ms C Smith for a partial award of costs against Newark & Sherwood District Council.
- The hearing was in connection with an appeal against an enforcement notice alleging the material change of use of land to residential occupation including the stationing of caravans and the erection of a structure.

Decision

1. The application for an award of costs is refused.

The submissions for Ms C Smith

2. The application is for a partial award of costs relating to costs incurred with regard to the issue of noise.
3. As noted in the letter from PINS dated 25/01/19 regulation (4) of The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 (the Regulations) requires that a notice shall specify all the reasons why a local planning authority consider it expedient to serve the notice, along with reference to all relevant policies.
4. At the time of serving the notice, the LPA's position was protected by an interim injunction. It also had available the option of serving a stop notice temporary or otherwise. As such, any suggestion that there was no time to properly consult on the contents of the notice does not stand up to scrutiny.
5. Furthermore, the reason could have been included in the second notice, as the open breaks policy was. Finally, given the appeal was submitted on 28/02/18, the LPA has had a period of almost a year to notify the appellant that they wished to raise this as an issue. Instead, at very short notice the appellant has had to go to extraordinary lengths to ensure that technical data was provided (caused by road closures during the limited survey period).
6. As such, the LPA has prolonged the proceedings by introducing a new reason for refusal and has introduced fresh and substantial evidence at a late stage, necessitating extra preparatory work. The appellant's position is that this constitutes unreasonable behaviour that justifies an award of costs.

7. The costs incurred include the commissioning of expert noise evidence, the appearance of an expert at the hearing, additional administrative work and the submission of this application.

The response by Newark and Sherwood District Council

8. Having regard to the Regulations the reasons considered expedient to issue the notice have been set out along with all relevant policies. Core Policy 5 is listed due to its fundamental importance and that policy includes a variety of planning issues, including noise, that are relevant to the consideration of the appeal.
9. The site came to the attention of the LPA in January 2018 when it was being prepared for occupation without the benefit of planning permission. The Authority had to provide evidence in its witness statement expeditiously and was granted an injunction on 16 February for the following reason:

The apprehended use of the Land as a G&T site would constitute inappropriate development on land designated as an "open break" within the Council's Allocations and Development Management Development Plan Document (the ADMDPD).....Further, the anticipated use would be harmful to the character and appearance of the area, being mostly open agricultural land, would injure the amenity of local residents and would impose risk on the lives of occupants with the Land being within Flood Zone 2 (medium probability of flooding).

10. That injunction had to be served in haste. The appellant has subsequently appealed against the enforcement notice and as a result of proper due process, the LPA have now had the opportunity to consider the land use issues, taking into account all relevant material planning considerations. The LPA contends that no unreasonable behaviour has occurred and that considerations have come to light with regards to noise during the course of dealing with the matter through appeal procedures.
11. The appellant has not been put to any unnecessary extra expense in relation to the Noise Report because that report was necessary for the Inspector to be able to assess the impact of noise on the occupiers of the site which is a relevant material consideration. It has not led to an adjournment or delay in proceedings.
12. The first enforcement notice was served on 15 February 2018 when no injunction was in place. The draft injunction order was put in place on 16 February 2018 and the Council considered that the service of an enforcement notice was fundamental to the application for an injunction, hence the need to serve at short notice. The LPA was not in a position to serve a Stop Notice because a Stop Notice may only be issued along with an enforcement notice. It is for the LPA to determine which enforcement tool it wishes to use and in this case it chose to follow the injunction route.

Reasons

13. The Planning Practice Guidance (the PPG) sets out the basis upon which an award of costs can be made. At a broad level costs may be awarded where a party has behaved unreasonably and that behaviour has led another party to incur unnecessary or wasted expense in the appeal process. Unreasonable behaviour can relate to procedural or substantive matters.

14. Paragraph 047 of the PPG identifies that a Local Planning Authority is at risk of an award of costs on procedural grounds where it introduces fresh and substantial evidence at a late stage which necessitates an adjournment or additional preparatory work that would not otherwise have arisen. Paragraph 048 states that local planning authorities should carry out adequate prior investigation before issuing an enforcement notice and are at risk of an award of costs if it is concluded that an appeal could have been avoided if a more diligent investigation had taken place.
15. In a similar way to which planning authorities are required to fully set out reasons for refusal in relation to planning applications, the Regulations require that an enforcement notice should specify all reasons and relevant policies that were relevant to the decision to take enforcement action. In this case, two notices were served but the issue of noise was only relevant to the material change of use in terms of the effect on the living conditions of occupants of the site. The reasons for issuing that notice concentrated solely on the matter of flood risk. I accept that reference was made to Core Policy 5, which includes a range of criteria including noise, but the way in which the notice was worded firmly gave the impression that the objection rested on the matter of flood risk.
16. When the second notice was issued in relation to operational development the Council referred to the effect on the "Open Break" between Newark and Winthorpe but the text made no reference to noise or living conditions. In my view, any reasonable person reading the two notices would not have been aware that the Council had an objection relating to noise.
17. I can fully understand the need for expediency in the enforcement of the planning system but the Council's response to the costs application indicates that, in the rush to seek an injunction, it may not have fully considered all relevant planning matters. In my view that approach led to a failure to set out all relevant reasons and policies and could not be said to have been a diligent investigation, as required by paragraph 048 of the PPG.
18. It is not for me to comment on the merits of seeking an injunction but the fact that the Council chose to pursue that route should not be seen as justification for the failure to comply with the Regulations in setting out all relevant considerations within the notice. The fact that the Council was raising the issue of noise only came to light months later when its statement of case was submitted. Having regard to the requirements of the Regulations and the PPG I find that was unreasonable.
19. The appellant was then faced with the cost of preparing a noise assessment at short notice in the lead up to the Hearing. She did not request an adjournment and the event proceeded on time but I have no doubt that the late introduction of the matter caused work to be prepared outside the normal timescale for the appeal.
20. However, in order for a costs award to succeed unreasonable behaviour must lead another party to incur "unnecessary or wasted expense". I find it difficult to conclude that the production of evidence relating to noise was unnecessary or that the expense was wasted. Interested parties had referred to the issue of noise and the owner of the adjacent boarding kennels was at the Hearing and the impact of dogs barking was a matter that would need to have been considered in my decision, regardless of the stage at which the Council introduced its objection.

21. Moreover, having visited the site myself, the traffic noise from the A1 was so noticeable that I would have felt compelled to raise it as an issue in any event. The proximity of the site to such a major source of traffic noise was clearly a relevant material consideration, particularly having regard to the nature of the use.
22. Thus, whilst I find that the Council was unreasonable in not referring to the matter as part of the reasons for issuing the enforcement notice that unreasonable behaviour did not lead to any unnecessary or wasted expense. It follows that there are no grounds for an award of costs and I shall refuse the application.

Chris Preston

INSPECTOR