



Costs Decision

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 December 2020

Costs application in relation to Appeal Refs: APP/W1145/C/19/3241008 & 3241009

The building known as Chilla House Cabin aka the Barn ("*the Building*"), on "*the land*" Chilla, Beaworthy, Devon EX21 5XE

- 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 Mr Samuel Page and Ms Amy Page for a full award of costs against Torridge District Council.
 - The appeal was against an enforcement notice alleging, without planning permission, the material change of use of the land involving the erection of a building for residential use entailing human habitation.
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Decision: The application is granted in the terms set out below

Procedural matters

1. This appeal was initially scheduled to be determined by way of an Inquiry, to be held at a date to be arranged. This application for costs was made on 22 October 2020, prior to the determination of the appeal. In the event, I found the enforcement notice to be invalid and incapable of being corrected without causing injustice. Accordingly, I quashed the notice in a Decision dated 19 November 2020.
2. The Council was initially proceeding on the assumption that it would be able to respond fully to the application for costs at the conclusion of this matter and had made an interim holding response dated 28 October 2020 (the interim response). The Council therefore reserved making its detailed comments on the application for costs until that time.
3. The matter reached its conclusion with the issuing of my Decision. In the circumstances and in the interests of fairness, the Council was afforded a further opportunity to make its full comments on the costs application. The Council did so by letter dated 26 November 2020, which I shall refer to as the 'full response'. The applicants had already commented on the Council's interim response in a letter dated 3 November 2020 but, again in the interests of fairness, were then afforded a further opportunity to make final comments on the Council's full response. The applicants did so in an email dated 30 November 2020. I have had regard to the points made in all of these representations. This is therefore an extraordinary situation whereby both parties have had sight of my Decision on the appeal prior to making their final submissions on the costs application. Nevertheless, because of the procedure followed above, I am satisfied that neither party has been prejudiced.

Reasons

4. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may only 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. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against a local planning authority. These examples include acting contrary to, or not following, well-established case law; failure to produce evidence to substantiate each reason for refusal on appeal; not reviewing their case promptly following the lodging of an appeal and refusing to enter into pre-application discussions, when a more helpful approach would probably have resulted in the appeal being avoided altogether.
5. The essence of the applicant's claim is that the local planning authority has issued an invalid enforcement notice, which is fundamentally flawed on a technical level. In doing so, it is the applicant's view that the Council has misunderstood generally accepted principles of planning law and guidance. This, the applicants say, includes requirements in the notice to cease activities which have not themselves been the subject of enforcement action and the requirement to remove operational development which the Council itself accepts is lawful and immune from enforcement. The applicants also consider that the Council has set out reasons for issuing the notice which do not relate to or justify the breach of planning control alleged, and has failed to address the actual matters enforced against within the evidence at Statement of Case stage.
6. In procedural terms, the applicants consider that the Council failed to review its position when notice of appeal was received and have refused to enter into constructive discussions where these would have either narrowed or avoided the appeal altogether. Accordingly, the applicants consider that the Council has acted unreasonably and has caused the applicants to incur unnecessary and wasted expense in bringing the appeal.
7. The starting point for my consideration of the applicant's claim for costs is the enforcement notice itself and in particular the breach of planning control that is alleged in that notice. It is helpful to set that out in full here:

without planning permission, the material change of use of the land involving the erection of a building for residential use entailing human habitation.
8. For the reasons set out in my Decision, this conflates the two limbs of Section 55(1) of the Town and Country Planning Act 1990 (the 1990 Act) by alleging that operational development (the erection of the building for residential use) constitutes a material change of use of the land. That is not only a misunderstanding of that section of the 1990 Act, it is also wholly contrary to Section 336(1) of the 1990 Act which states in terms that "use", in relation to land, does not include the use of land for the carrying out of any building or other operations on it. It follows that the Council has not followed, and indeed has acted contrary to, primary legislation.

9. The Council then compounds that error by requiring a use to cease that does not form part of the breach of planning control alleged in the notice. The requirements of an enforcement notice should flow from the breach of planning control alleged, and the notice was therefore also defective in that respect.
10. The applicants additionally complain that the notice requires the removal of operational development which the Council itself accepts is lawful and immune from enforcement. Given my findings in relation to the validity of the notice, I have not myself reached any conclusions about the lawfulness or otherwise of the operational development on the land.
11. Nevertheless, the Courts have held that a notice properly directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement, so that land is restored to its condition before the change of use took place. I make no finding in relation to it, but it is entirely possible that this principle could apply to the operational development on the appeal site. For that reason, the Council cannot be said to have acted unreasonably in stipulating that requirement in the notice.
12. I do, however, take the applicant's point that the reasons for issuing the notice are almost exclusively aimed at a material change of use of the land. The reasons for issuing the notice therefore do not relate to the breach of planning control alleged which, for the reasons set out in my Decision, in practice relates solely to operational development.
13. The Council explains in its full response that the breach of planning control alleged in the notice was based on the findings of fact made by the Inspector in dismissing an earlier appeal against the refusal of the Council to grant a certificate of lawful use or development for the use of Chilla House Cabin as a single dwellinghouse (APP/W11145/X/18/3204080). That is an entirely reasonable approach and I make no criticism of the Council for that.
14. The problem arose when the Council sought to translate those findings of fact into an allegation of a breach of planning control in the enforcement notice. The breach of planning control as originally alleged was not valid. Neither was it capable of being corrected without causing injustice. That in itself does not necessarily constitute unreasonable behaviour on the part of a local planning authority: situations do arise where a notice is found to be invalid for reasons that are entirely understandable and/or based on facts of which a local planning authority was genuinely not aware at the time of issuing the notice. But in this case the salient point is that the allegation arrived at did not accord with a well-established concept in primary legislation and one which a local planning authority ought to have followed.
15. An enforcement notice can have potentially serious consequences for the recipient. A local planning authority therefore has a responsibility to ensure that any enforcement notice issued is carefully drafted in accordance with relevant planning legislation. The failure to properly apply that primary legislation constitutes unreasonable behaviour on the part of the Council in the terms set out in the Planning Practice Guidance.
16. The Council then compounded that error by producing a revised allegation which not only failed to clearly allege a breach of planning control, but also

bordered on the nonsensical. I recognise that the Council was seeking to be helpful in producing that revised allegation, and for that reason I do not find that the Council acted unreasonably in this respect. Nevertheless, the Council missed its opportunity to make amends for the earlier unreasonable behaviour resulting from the drafting of the original breach of planning control alleged.

17. In procedural terms, the applicant contends that the errors in the enforcement notice were highlighted to the Council but the Council failed to review their position. The applicant further contends that repeated attempts were made to engage the Council in a constructive dialogue about the enforcement notice but that these attempts met with no success.
18. However, these contentions have not been supported with documentary evidence. I am also mindful that the Council did concede in a letter dated 26 October 2020 that the enforcement notice could have been drafted with greater precision and sought to address that with a revised allegation. Whilst that revised allegation was itself flawed, this demonstrates a willingness of the part of the Council to review its position in response to errors in the original notice being drawn to its attention. For these reasons, I am not persuaded that the Council has acted unreasonably in procedural terms.
19. Nevertheless, I consider that the Council has acted unreasonably in substantive terms. This not only caused the applicants to incur unnecessary and wasted expense in bringing the appeal against an enforcement notice that was fundamentally flawed, it additionally caused the applicants to incur unnecessary and wasted expense responding to a significant quantum of evidence produced by the Council in seeking to defend that appeal.
20. The Planning Practice Guidance advises that costs may only be awarded where a party has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. Both of these conditions have been met in this case, such that a full award of costs in favour of the applicants is justified.

Costs Order

21. In exercise of the powers under sections 195, 320 and Schedule 6 of the Town and Country Planning Act 1990, and section 250(5) of the Local Government Act 1972, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Torridge District Council shall pay to Mr Samuel Page and Ms Amy Page, the full costs of the appeal proceedings described in the heading of this decision.
22. The applicants are now invited to submit to Torridge 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 Senior Courts Costs Office is enclosed.

Paul Freer

INSPECTOR