
Costs Decision

Inquiry Held on 13 & 14 April 2021

Site visit made on 25 May 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 July 2021

Costs application in relation to Appeal Refs: APP/W4515/C/18/ 3215378; APP/W4515/X/18/3197818; APP/W4515/W/18/3197167; and APP/W4515/W/18/3198298

Land/property at building adjacent to Rudyerd House, Benton Road, West Allotment, North Tyneside NE27 0DN

- The application is made under the Town and Country Planning Act 1990, sections 78, 174, 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by North Tyneside Metropolitan Borough Council for a full award of costs against Mr Phil Harrison-Rowe.
 - The inquiry was in connection with appeals against: (i) an enforcement notice alleging a breach of conditions imposed upon planning permission 15/00352/FUL; (ii) the refusal of the Council to grant a certificate of lawful use or development (LDC); (iii) the refusal of the Council to change of use from Cold Sandwich Shop/Delicatessen [A1] to Hot Food Takeaway with Home Delivery [A5]; and (iv) the refusal of the Council to grant planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
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Decision: the application is granted in the terms set out below

The submissions for North Tyneside Metropolitan Borough Council

1. The application is made on both procedural and substantive terms, as set out in the Planning Practice Guidance.
2. In procedural terms, it was unreasonable for the appellant to withdraw some of the appeals without good reason. The appellant had not even finished calling all his witnesses before three out of the four Appeals had effectively been conceded. The speed at which three quarters of the appeals heard at the Inquiry were conceded (in about ten minutes of cross-examination) was remarkable although the ground was laid by the Proof of Evidence produced by the appellant's planning witness (Dr Lang), which produced no evidence on anything but the LDC appeal. It is entirely unreasonable for the majority of the appeals to be conceded only midway through the inquiry, especially when they didn't need to be – in the sense that it was open to the appellant to run a planning merits case which was not reliant on the LDC appeal (and it had originally been pleaded as such in the appellant's Statement of Case).
3. The Council take these appeals and their statutory responsibility as local planning authority very seriously. This is not a game – an appeal should not be made on whim to wear a local authority down. The grounds of appeal on

the Appeal Form forms cannot just be ticked with the same statements copied and pasted in. There are consequences – the Council is entitled and entirely right to take the Appellant's case seriously and robustly respond to it.

4. The proper operation of a planning appeal is that the appellant sets out their case and the Council respond to it. That has simply not happened here. Even as late as the start of cross-examination of the appellant's planning witness it was unclear what the Appellant's case was on the Enforcement Appeal. It took a considerable amount of time, and the intervention of the Inspector, to seemingly get Dr Lang to understand the case he had brought on behalf of the appellant. It is no excuse to blame the Appeal Form – the statutory grounds of appeal are widely known and should be recitable by an experienced Chartered town planner.
5. The Council's belief is that any point that occurred to the appellant was raised without a second thought, regardless of its validity or even to the logic of it to the wider case. A simple illustration is that the appellant is adamant that the permissions have not been implemented and yet at the same time maintains that the S.73 Appeal must succeed. They are asking the Inspector to find that the permissions have expired and then vary the conditions on these expired permissions to create a fresh permission. In other words, the appellant is asking the Inspector to do something unlawful and eminently challengeable. This illustrates the lack of thought and logic that the appellant has put into their case.
6. An appeal is not the opportunity for any point under the sun to be thrown to see what will metaphorically stick to the wall. It demands (especially where a chartered town planner is instructed) that professional judgment is applied to put forward the 'best' case than can be reasonable made. A failure to do so wastes the time of the Council and so warrant costs. On this procedurally unreasonable point alone the Council has unnecessarily incurred considerable expense in defending appeals quickly conceded by the appellant.
7. In substantive terms, the appellant's case was founded on technical theoretical arguments that were factually and legally flawed. The entirety of the appellant's case (it emerged) was based on one single question – was the 2005 permission implemented? The answer to that is clearly yes. It is inherently unbelievable that a premises opening shortly after being granted permission would not be operating under said permission. It was hoped that after the mistake had been conceded (and it is odd that it was relied upon so heavily in Dr Lang's Proof of Evidence when so clearly wrong) then it would be accepted that the 2005 Permission must have been implemented. Sadly, that was not the case.
8. The point has been run as a 'clever' technical 'Gotcha' point which has no rooting in reality. Overall, such points should be discouraged. It undermines the planning regime if after twelve years of seemingly operating in reliance of planning permission an individual can turn the clock back and now argue that despite appearances they never did. This position was itself based on an unrealistic interpretation of the permission, triggering the need for considerable examination of the facts.
9. The appellant's case not only had no reasonable prospect of succeeding – it had no prospect of succeeding. Ignorance cannot be blamed – the appellant has (it is assumed at considerable expense) instructed an experienced planning

consultant to make his case. It is a case that even the appellant's agent himself in his original supporting statement for the s.73 application recognised did not reflect the facts on the ground nor basic principles of the planning system. The bringing of all four of these appeals was substantively unreasonable.

The response by Mr Phil Harrison-Rowe

10. It is considered that the argument put forward in relation to the LDC appeal had weight, and there was no need to go into the planning merits. Withdrawing the appeals saved time at the Inquiry.
11. In relation to the enforcement appeal, the various grounds of appeal on the Appeal Form were ticked to ensure that all the issues were covered. It is dangerous not to tick all boxes. For example, the relevant box for the 'nullity' argument was not ticked and this resulted in the point not being fully explored.
12. The actions taken by the appellant were an attempt to move things forward, and not a lack of effort on the appellant's part. The appellant's position relating to the implementation of the planning permission was not inherently unbelievable. It is accepted that there was confusion surrounding the dates given in evidence, but no grounds for costs arise from that. It is not unreasonable to submit appeals and to exercise the appellant's statutory rights in that regard.

Reasons

13. 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 an appellant. These examples include providing information that is shown to be manifestly inaccurate or untrue, withdrawal of an appeal without good reason and if the appeal or ground of appeal had no reasonable prospect of succeeding.
14. My starting point is the concessions made by the appellant's agent/planning witness at the Inquiry¹. In summary, Dr Lang conceded that, if the LDC appeal failed, then grounds (b), (c), (d), (a) and (f) of the enforcement appeal must fall away². This left ground (g) as the only remaining ground of appeal. He also conceded that the appeal against the refusal of planning permission should fall away, as should the appeal against the Council's refusal to grant planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted³.
15. These concessions were made by Dr Lang under cross-examination from the Council's advocate and all within a relatively short amount of time. Moreover, the concessions were made even before the appellant's final witness had been

¹ Dr Anton lang MRTPI

² Appeal Ref: APP/W4515/C/18/3215378

³ Appeals Refs: APP/W4515/W/18/3197167 and APP/W4515/W/18/3198298 respectively.

- called. That witness was Mr Tierney, the operator of the appeal premises when it first opened and for much of the relevant period in relation to the LDC appeal. This is significant because Dr Lang had attached significant weight in his Proof of Evidence on a date that could only have been advised to him by Mr Tierney – indeed, much of his case was predicated on that date.
16. To concede that this date was wrong before hearing the evidence of Mr Tierney implies that Dr Lang had not paid sufficient attention to verifying the facts on which his case relied in the first place. Evidence at the Inquiry was given under oath by way of affirmation, and Dr Lang was right to concede that an error had been made. I also recognise that making those concessions resulted in a saving of Inquiry time. Nevertheless, it remains the case that Dr Lang relied on a fact in his Proof of Evidence that he had patently not checked and later admitted as being manifestly inaccurate and untrue after only the briefest of test under cross-examination. That amounts to unreasonable behaviour in the context of the Planning Practice Guidance.
 17. The unreasonableness of the appellant's actions in this respect is compounded by the fact that it was not necessary to withdraw the appeal against the refusal of planning permission or the appeal against the Council's refusal to grant planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted or grounds of appeal. Neither was it necessary to withdraw the appeal on ground (a) of the enforcement appeal. It remained open to the appellant to run a planning merits case which was not reliant on the LDC appeal. Indeed, the appellant's case had originally been pleaded as such in the Statement of Case. However, the arguments made in the Statement of Case subsequently formed no part of Dr Lang's Proof of Evidence or the evidence put to the Inquiry. The withdrawal of these appeals/ground of appeal was therefore without good reason, and as such constitutes unreasonable behaviour in the context of the Planning Practice Guidance.
 18. In relation to enforcement appeals, the facts on which an appellant intends to rely for each ground of appeal are usually set out in the first instance on the Appeal Form and then are subsequently expanded upon in a Proof of Evidence. In this case, the facts relied upon by the appellant were exactly the same for grounds (b), (c), (d), (a) and (f), to the extent that they were repeated word-for-word on all those grounds of appeal. Only in relation for ground (g) were bespoke facts set out, and then only briefly.
 19. The Proof of Evidence provided by Dr Lang (as planning witness for the appellant) did pursue one of the lines of argument set out on the Appeal Form. Although not expressly stated as such in that Proof of Evidence, that argument could be construed as constituting an appeal under ground (b), albeit that was one of the grounds quickly conceded by Dr Lang. Furthermore, Dr Lang's Proof of Evidence made no mention of the appellant's case in relation to the other grounds of appeal, including ground (g) which remained before me.
 20. In my view, Dr Lang was again entirely correct in conceding grounds (b), (c) (d) and (f) as pleaded. If the LDC appeal had succeeded, the appeal on ground (b) must also have succeeded, such that there would have been no need to consider the remaining grounds of appeal. However, in the event that the LDC appeal failed, grounds of appeal (b), (c), (d) and (f) could not possibly have succeeded, either for the reasons stated by the appellant or for any other

reasons. Continuing with those grounds of appeal would have served no purpose. Withdrawing those grounds of appeal undoubtedly save a considerable amount of Inquiry time, but this does not disguise the fact that these grounds of appeal held no reasonable (or indeed actual) prospect of success. The initial reliance on those grounds of appeal therefore constitutes unreasonable behaviour on the part of the appellant.

21. Similarly, the appellant's entire case demonstrated an underlying lack of consistency and logic. The appellant was vehemently pursuing an argument that the relevant planning permissions had not been implemented but, at the same time, seeking a variation of those conditions. The two are mutually exclusive, and pursuing both lines of argument was effectively inviting me to reach a decision that would have been unlawful.
22. I recognise that appellants sometimes advance arguments on a 'without prejudice' basis, but that was not how the case was put here. I also recognise that, in submitting an application to vary those conditions, the appellant was attempting to move things forward. The Planning Practice Guidance indicates that a local planning authority is at risk of an award of costs against if it fails to review its case promptly following the lodging of an appeal. That principle equally applies to appellants. In my view, the appellant ought to have reviewed his case in order to ensure that it had an internal consistency and logic. The case advanced by the appellant at the Inquiry suggests that he failed to do that, which amounts to unreasonable behaviour.
23. This leads me to the principal case advanced by the appellant: specifically, that the 2005 permission had not been implemented. I do not go so far as the Council to say that the appellant's argument was inherently unbelievable: I have previously encountered situations where premises have been operated outside of a planning permission from the very outset. However, on the facts of this particular case and for the reasons set out in my main Decision, the appellant's argument was both factually and legally flawed, and failed to take account of the generally accepted relationship between primary and ancillary uses. As such, the appellant's argument had no prospect of succeeding. Nonetheless, the argument was not conceded and a considerable amount of Inquiry time was spent in cross-examination on the point. Basing an appeal on an argument that had no prospect of success, and subsequently maintaining that position, constitutes unreasonable behaviour in the context of the Planning Practice Guidance.
24. The Planning Practice Guidance indicates that 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 (my emphasis). In this case, the Council called two professional witnesses, both of whom submitted a written Proof of Evidence. Both witnesses were present throughout the two-day duration of the Inquiry, in my view necessarily so in order that they could respond to or provide instructions on any matters or issues that arose during the Inquiry. The Council's planning witness also attended the site visit. In addition, at my request two officers from the Council's Legal Services team were called specifically to address the nullity point that the appellant raised shortly before the opening of the Inquiry. The Council was also represented by Counsel throughout the two-day Inquiry. I am therefore satisfied that the Council did incur unnecessary and wasted expense in the defending these appeals.

Costs Order

25. In exercise of the powers under sections 78, 174, 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 Mr Phil Harrison-Rowe shall pay to North Tyneside Metropolitan Borough Council, the full costs of the appeal proceedings described in the heading of this decision.

26. The applicants are now invited to submit to Mr Phil Harrison-Rowe, 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