The Planning Inspectorate

Costs Decision

Inquiry Held on 13 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 Mr Phil Harrison-Rowe for a full award of costs against North Tyneside Metropolitan Borough Council.
- The inquiry was in connection with an appeal 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.

Decision: the application is refused

The submissions for Mr Phil Harrison-Rowe

1. The essence of the applicant's claim for costs is that, in his view, the appeals should never have progressed as far as a Public Inquiry. On the basis of the materials presented by the Council, the applicant considers it unreasonable for him to have had to defend himself at a Public Inquiry and his costs for the Inquiry are sought in any case, as quite simply he should not have been forced to defend himself through such a mechanism; more so after consideration of the Council's stance which they have presented as their written case through their witness statements.

2. This is evidenced by the lack of explanation or demonstration of proper delegated authority presented to support a lawful service of an Enforcement Notice. This is unreasonable behaviour by the Council.

3. The applicant considers that there is no evidence that the proposed hot and cold food commercial catering operation has not been ongoing continuously in excess of ten years and that every single site visit by a Council officer records some level of hot food. The applicant considers that the local authority should have been well aware of the tests within the National Planning Policy Framework (Framework) and the Planning Practice Guidance that they have to demonstrate actual tangible harm from the operation, and not use subjective

and unsubstantiated reasons, without a full explanation as to any weight given in the 'planning balance'.

4. In that context, the applicant considers that the Council have neither demonstrated, nor proven, that it was "reasonable or expedient" to serve the enforcement notices, or to continue to resist these appeals once more evidence was presented. The applicant also considers that the local authority has not given appropriate weight to the fall-back situation of the previous office use, which would now fall within the Use Class E[1] incorporating café/restaurant uses. This is considered to constitute unreasonable behaviour.

5. The applicant also considers that the Council has had plenty of chances to proactively sort out the "mess" of the January 2005 and May 2015 permissions, but refused to enter into a pragmatic dialogue through the variation of conditions submission. In the applicant's view, had the Council done so, it would have saved all these appeals and this Public Inquiry.

6. The applicant considers that the incorrect and subjective opinion has been utilised by the Council when objective reasoned argument should have been made on a fair balance of all material planning considerations. The Enforcement Notice and the various refusals are considered to be unreasonable and the applicant should not have had to resort to appeals. Thus, full costs should be awarded against the Council to underline that such unnecessary. unreasonable and pedantic sensitivity is unacceptable.

7. The appellant has been put to unnecessary inconvenience and expense by virtue of this unreasonable behaviour of the Council by having to instruct, submit and run these appeals.

The response by North Tyneside Metropolitan Borough Council

8. The costs application was made, rather optimistically, the week before the Inquiry opened before any of the evidence had been tested. Given that at the end of the first day the majority of the applicant's case had been conceded and instead depended on one single narrow question – whether the 2005 Permission was implemented – it cannot be said that the Council have been substantively unreasonable.

9. The majority of the alleged unreasonable behaviour relates to Dr Lang's own misunderstanding of planning, planning law and the actual course of events. These are dealt with in more detail in both the Council's Closing and Costs Applications. In relation to a few of the specific allegations made in the applicant's claim for costs, none of come close to being unreasonable behaviour.

10. The applicant criticises the Council for having been "dragged" into an expensive Inquiry. It is unclear how the Council have done this but appeals involving disputes of fact linked to immunity arguments require evidence on oath and are usually determined through an Inquiry. Indeed, in fact the PINS procedural guidance criteria require that.

11. The applicant criticises the failure of the Council to address whether the Enforcement Notice was issued under the proper delegated authority. The

[1] This is a reference to the new Class E, as inserted into Town and Country (Use Classes) Order 1987 by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020/757 reg.13

Council have now done so, and would have done so much earlier if the point had been formally raised in the appropriate manner via the Inquiry process instead of simply by emailed requests sent in the run up to the Inquiry itself.

12. Finally, the applicant claims boldly that the Council have broken the law in failing to 'disclose' standard basic documents. This submission is perplexing. The Council has disclosed any relevant documents it seeks to rely upon and in fact produced to the Inquiry all the documents it held at the Inspector's request as a 'simple' solution to this complaint. The point goes nowhere but any claim that the Council have broken the law is taken seriously by the Council and is utterly rejected.

13. Overall, the Council has properly defended these appeals in line with their obligations as the local planning authority. Nothing of the Council's behaviour at this Inquiry comes close to being unreasonable, and for that reason this application for costs should be dismissed.

Reasons

14. 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 preventing or delaying development which should clearly be permitted; vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis; refusing to enter into pre-application discussions, or to provide reasonably requested information, when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed; and not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.

15. The first point that I must address is the choice of procedure. The applicant fails to mention in his application for costs is that I held a Pre-Inquiry Meeting on 15 December 2020 specifically to determine the most appropriate procedure through which these appeals should be determined. At that Pre-Inquiry Meeting, the Council explained that it wished to test the evidence presented by the applicant through cross-examination. That is normal practice where, as in these cases, matters of fact are in dispute. Indeed, an Inquiry is the only procedure in which evidence may be given on oath and tested through cross-examination. For that reason, an Inquiry is the procedure advocated in the PINS procedural guidance in that scenario.

16. On the basis of that Pre-Inquiry Meeting, I decided that the only suitable procedure was a full Inquiry. It follows that the Council did not "drag" the appellant into an Inquiry – the choice of procedure was mine and mine alone, and was based upon PINS guidance. The Council therefore cannot be said to have acted unreasonably in that respect.

17. A further point arises in relation to the above that I must also address. The Inquiry was held as a Virtual Event (VE). As part of his application for costs, the applicant claims that the VE prevented regular patrons of the premises from giving evidence in support of his position. I deliberately canvassed the possibility of holding the Inquiry as a VE at the Pre-Inquiry Meeting. Contrary to the position now adopted in his application for costs, the appellant declared that he was content with a VE.

18. Unusually, this application for costs was made a week or so prior to the opening of the Inquiry and therefore before any of the evidence was heard and tested. This is highly material to the applicant's claim for costs because, as events subsequently unfolded at the Inquiry, many of the accusations of unreasonable behaviour levelled by the applicant had either been conceded during cross-examination or overtaken by the submission of new evidence.

19. The question over the authority of the Council to issue the enforcement notice is a case in point. As explained in my main Decision, in the event the Council called two witnesses specifically to address this point. Having heard that evidence, I found that the Council did have the requisite authority to the enforcement notice and I made a ruling to that effect at the Inquiry itself. The matter had not been raised until a few weeks prior to the opening of the Public Inquiry, and then in an email to the Planning Inspectorate outside of the normal exchange of evidence. The matter had previously formed no part of the applicant's case. In those circumstances, the Council cannot be considered to have acted unreasonably in responding to the matter raised as it did. Indeed, to the contrary, I found the Council's response in calling two witnesses to specifically deal with the point (and it should be noted at relatively short notice) to be both helpful and entirely in keeping with good practice as advocated by the Planning Practice Guidance.

20. Similarly, as it happened, the planning merits of the use taking place at the appeal premises were quickly conceded by the applicant's planning witness under cross-examination[2]. By conceding his case on the planning merits (albeit only in a specific scenario), the applicant implicitly accepted that the harm alleged in reasons for issuing the enforcement notice have occurred[i3]. I therefore fail to see how the Council can be considered to have acted unreasonably in issuing the enforcement notice and refusing the two planning applications when the applicant accepts that use of the premises causes planning harms.

21. For the reasons set out in my main Decision, I attach minimal weight to the appellant's fallback position provided by Use Class E, as inserted into the Town and Country (Use Classes) Order 1987. Furthermore, this was an argument that was raised relatively late in the day and even then did not form a major plank of the appellant's case. I do not consider that the Council can be fairly accused of not giving appropriate weight to that fallback position, particularly in view of the concessions made by Dr Lang at the Inquiry. I do not find that the Council has acted unreasonably in this respect either.

[2] In the scenario where the appeal against the Council's refusal to grant the LDC failed (APP/W4515/X/18/3197818)
[3] In that respect, I am mindful that the notice alleges harm to highway safety but that the Council subsequently did not pursue that reason for issuing the notice.

22. The applicant further criticises the Council for not reviewing their case promptly following notification of these appeals as part of sensible on-going case management. I do not know whether or not the Council did purposely review its position in that time. However, events as they unfolded at the Inquiry, and my subsequent Decision, reveal that the Council was perfectly entitled to defend the issuing of the enforcement notice and the refusal of the other applications. The Council cannot be said to have acted unreasonably in that respect.

23. I do, however, consider that the Council can be considered to have acted unreasonably is one respect. That is the failure to provide documents that had been reasonably requested by the applicant. It is apparent that the applicant had, though his agent, requested the provision of various documents relevant to the preparation of his case but that these had not been provided. This matter had again been raised in an email to the Planning Inspectorate, albeit outside of the normal exchange of evidence.

24. Nevertheless, it occurred to me that the documents requested by the applicant might be material to my consideration of these appeals. Accordingly, in a Pre-Inquiry Note issued shortly before the Inquiry opened, I requested that these documents be provided as a "simple solution" to the matter raised by applicant. The documents were promptly provided. The corollary is that these documents must have been readily available all along but that for some reason the Council felt disinclined to provide them to the applicant. In my view, that refusal to provide reasonably requested information constitutes unreasonable behaviour in the context of the Planning Practice Guidance.

25. In the event, those documents did not prove material to the Inquiry. The case to which those documents might have been relevant was quickly conceded by Dr Lang. Furthermore, had they formed a key material consideration, on my reading the evidence within those documents favoured the Council's case far more than the applicant's. The applicant did not withdraw his appeals having had sight of those documents and I have no reason to believe that an earlier receipt of those documents would have prompted the applicant to do so. Consequently, had the Council been more helpful in its approach, that would probably not have resulted in the appeal being avoided altogether or the issues to be considered being narrowed. Accordingly, I do not consider that the applicant incurred any unnecessary or wasted expense as a result of the Council's unreasonable behaviour in this respect.

26. 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). I find that the Council has not acted unreasonably in the context of the Planning Practice Guidance, other than in the one respect identified above. The applicant did not incur any unnecessary or wasted expense as a result of that one aspect of unreasonable behaviour. Accordingly, I find that an award of costs is not justified.

Paul Freer
INSPECTOR