



Costs Decision

Hearing Held on 20 April and 5, 7 and 12 May 2021

Site visit made on 21 April and 13 May 2021

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 November 2021

Costs application in relation to Appeal Ref: APP/P1615/C/20/3252116 Land at Lake Farm, Wyndbrook Lane, Redmarley, Gloucester GL19 3LF

- 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 William John Larkins for a full award of costs against Forest of Dean District Council.
 - The hearing was in connection with an appeal against an enforcement notice alleging the construction of a means of access, gates, hardstandings, fences, access tracks, a garage with hay store, and a dwelling with decking and associated paraphernalia.
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Decision

1. The application for a partial award of costs is allowed in the terms set out below.

Procedural Matter

2. The application for an award of costs was made in writing following the close of the hearing. The Council were given the opportunity to respond to the submission in writing, with final comments provided by the cost applicant. All written submissions have been considered in reaching my decision.

The submissions for Mr William John Larkins

3. The application for a full award of costs is summarised as follows:
 - The Council failed to undertake a proper investigation and properly consider expediency prior to the issue of the enforcement notice, including the issue of a planning contravention notice (PCN).
 - The Council has not had regard to the permitted development rights for certain of the operations alleged in the notice.
 - The notice is the second issued, following the withdrawal of the first. The first notice contained a number of defects that were brought to the Council's attention. Many of these were carried through to the notice that is the subject of the appeal.
 - The Council failed to negotiate with the appellant or to agree defects, inaccuracies or deficiencies in the notice in advance of its issue or in advance of the hearing.
 - The Council refused to accept and validate applications for matters that required planning permission, but were in common with the notice.

The response by Forest of Dean District Council

4. The Council's response to the applicant's written submission is summarised as follows:
- The site was visited prior to the issue of the second notice. The Council were obliged to take action where harm was being caused and in doing so it is not always necessary to issue a PCN.
 - The breaches of planning control alleged in both notices were the same, with the exception of one. Therefore, the analysis in the expediency report still applied.
 - The Council has put forward a strong and reasonable case that the operations listed in the notice are not permitted development.
 - The planning applications referred to by the appellant are not relevant to this appeal and were for development that, in any event, had already been considered by the Council to be unacceptable.
 - The withdrawal of the first notice was fundamentally a technical matter, relating to a perceived failure to serve all interested parties. It does not appear to go to any of the matters raised in the costs application.
 - Whilst the notice contains some difficulties, these were discussed on the second day of the hearing. The wording was, in the majority of instances, readily understandable. The complexity of the enforcement notice and the issues discussed arose directly from the number of breaches at the site.
 - The appellant accepted that there were elements of the notice that could be corrected without prejudice. Certain elements of the notice are separate and severable. The notice is not, therefore, invalid or a nullity in its entirety.
 - The first day of the hearing was unproductive as a result of the Inspectorate's failure to circulate the appellant's case.
 - The appellant's costs should not include any peripheral costs, including those associated with the structural survey of the historic barns, the draft heritage report and the ecological survey, all of which have been carried out in relation to the possible development of the listed building.

Reasons

5. Paragraph 030 of the Planning Practice Guidance on Appeals (the PPG) advises that costs may 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 PPG sets out circumstances where the behaviour of a local planning authority may give rise to a procedural (paragraph 047) or substantive (paragraph 049) award against them, although these are not exhaustive lists.
6. In addition, paragraph 048 of the PPG states that:
- 'For enforcement action, local planning authorities must carry out adequate prior investigation. They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would

have either avoided the need to serve the notice in the first place, or ensured that it was accurate.'

7. The costs application relates in part to the circumstances prior to the issue of the notice and to its various defects. In this regard the applicant has compared the first and second notice issued by the Council, the second being that subject of the appeal. Having compared the two, I can see that the matters alleged in both are broadly similar, save for the omission in the second notice of the allegation of the mixed use for residential and machinery plant sales storage. Accordingly, I do not consider the lack of a second expediency report prior to the issue of the second notice as unreasonable in this case. Neither is the lack of a PCN, particularly as I can see that there had been contact between the parties (not least the submission of planning applications) prior to the issue of the notice. It is, therefore, more likely than not that the Council would have already obtained information that it considered to be relevant to its investigation.
8. With regard to the planning applications made prior to the issue of the notice, it is suggested that these seek permission for matters alleged in the notice. I have not, however, been provided with sufficient information regarding these in order to make the link with allegations in the notice. Furthermore, I do not have sufficient detail of the circumstances relevant to the Council's decisions on these applications. I am, therefore, unable to conclude that the Council acted in an unreasonable manner with regard to these applications.
9. That I have concluded that some matters are permitted development¹ or that others should be granted permission does not mean that the Council has been unreasonable in issuing a notice in relation to them. The Council's case with regard to the various legal grounds of appeal is comprehensive, as is most aspects of its case with regard to the ground (a) appeal. An exception to this is its case regarding the means of access and its objection to it on the ground of harm to highway safety.
10. The reasons for issuing the notice refer to Gloucestershire County Council's standing highway advice on visibility requirements. However, at the hearing it was confirmed that the standing advice had been withdrawn by the County Council prior to the issue of the notice. It was also confirmed that there was no advice from the County Council to replace this, and no policies were being relied on. Nevertheless, the Council maintained its view that necessary visibility splays from the access in either direction were not achieved. Only at the hearing was it suggested that, due to the likely traffic speeds on Wyndbrook Lane, a splay of 2.4 by 45 metres in either direction would be adequate, but that achieving this to the north of the access was not so necessary. However, at the second accompanied site visit some measurements were set out and, as a result, the Council acknowledged that visibility from the access onto Wyndbrook Lane was adequate. It also accepted that it was not necessary to consider visibility along Cook's Lane, despite an earlier suggestion at the hearing of the need to do so, notwithstanding that visibility along Crook's Lane did not form part of the Council's case.
11. Having regard to the above, I find it more likely than not that the Council had not properly considered the expediency of taking enforcement action with

¹ Having the benefit of permission granted by The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended.

regard to the matter of harm to highway safety, and that the Council's evidence on this matter was vague and unsupported by any objective analysis. Accordingly, I conclude that the Council has acted unreasonably with regard to this matter. The applicant submitted evidence in the appeal in response to this matter and hearing time was also spent on this. The expense incurred in this regard would have been wasted.

12. Turning to the inaccuracies of the notice, the applicant has provided a number of documents in which he sets out his views with regard to the flawed nature of the first and second enforcement notice, stating that many of the problems he identified in the first notice were carried through into the second. An agenda was sent in advance of the start of the hearing, in which I list a number of my concerns with regard to the notice that would be discussed, including whether the recipient of the notice would be reasonably certain of what the breach of planning control is and what must be done to remedy it. Prior to the discussion on the grounds of appeal, a considerable portion of the hearing was taken up with a discussion on every allegation and almost every requirement of the notice. During this discussion, the Council were invited more than once to consider its position, having regard to the concerns I had raised. Accordingly, it would have been fairly obvious that my concerns about the notice were fundamental and that the best course of action for all parties would have been for the notice to be withdrawn, giving the Council the option to issue a more precisely worded notice.
13. As can be seen from my decision on the appeal, I found a significant number of defects and errors in the notice, all of which rendered the notice invalid, but were not so serious as to make it a nullity. For example, the notice required the cessation of a residential use, without an allegation of such a use. The suggestion that the allegation of a residential use was 'implied' by the notice clearly does not accord with the settled caselaw² that had been brought to the parties' attention in the hearing agenda. Furthermore, the means of identifying most of the operations alleged in the notice, including reference to 'the curtilage listed farm outbuildings', 'curtilage listed barns' and the 'listed residential dwelling', meant that identifying the nature and extent of the alleged operations was almost impossible. This is particularly so as it was confirmed at the hearing that more than one building on the site is statutorily listed.
14. The duplication of requirements in the notice, together with vague instructions to 'regrade' or 'level' the land, and replant a new hedgerow to a depth and height of an existing mature hedgerow added to the imprecise nature of most of the notice's requirements. As did a failure to properly identify the sections of fence that are the target of the notice, bearing in mind the extent and variety of fences that are on site. These examples are, of course, not all of the problems with the notice that I identify in my decision.
15. Whilst I had regard to the Council's response to many of the concerns I raised, I was unable to conclude that the allegations and most of the requirements did not provide the recipient with the necessary degree of certainty as to what he has done and what he must do to put it right. More than this, I cannot conclude that a reasonable degree of care and precision was taken when drafting the notice, particularly in view of the nature of some of the defects I

² Oates v SSCLG v Canterbury CC [2018] EWCA Civ 2229

found. I acknowledge that the notice covers a number of allegations and for this reason it is complex. Nevertheless, I am not satisfied that this provides a sufficient explanation for the problems I have identified.

16. Furthermore, the applicant has provided evidence of correspondence between the parties in which he attempts to gain the necessary degree of certainty with regard to the allegations and requirements of the notice. The evidence demonstrates that he did not obtain an adequate response to his requests.
17. I acknowledge that, notwithstanding the above, I have been able to correct or vary some of the notice's defects without causing injustice. This does not, however, alter my finding that the notice had not been drafted with sufficient care and precision. Large parts of the applicant's evidence and a significant proportion of the hearing time was spent on matters that I have ultimately had to remove from the notice. For this reason it is plain that my decision will mean that certain matters on site remain unresolved between the parties. The appeal evidence and hearing time spent on these matters was, therefore, abortive. As was the hearing time spent on the matters that I was able to correct. This would not be the case had the Council drafted the notice to ensure that it was accurate, or had sufficient regard to the defects that had been drawn to its attention earlier on in the process, such that the notice could have been withdrawn and redrafted.
18. With regard to the defects of the notice that I have been able to correct or vary, the applicant's evidence on some of these matters was clearly drafted without the necessary certainty as to the nature and extent of the operation that was the intended target of the notice. Furthermore, the discussion on the grounds of appeal relating to these matters was made particularly difficult in view of this uncertainty. In my judgement, it is more likely than not that the applicant's evidence and the discussion at the hearing on these matters would have been far more focused, had the notice been drafted with sufficient precision and care.
19. All of the above leads me to conclude that the Council has acted unreasonably in issuing the enforcement notice subject of the appeal. The applicant has, therefore, been put to the unnecessary expense in making the appeal against the notice; preparing statements and evidence that specifically support his appeal and respond to the reasons for issuing the notice; attending the hearing; and making the costs application. Accordingly, an award of costs is justified.
20. Notwithstanding my conclusion above, I have had regard to the Council's suggestion that the first day of the hearing was unproductive as a result of the Inspectorate's failure to circulate the applicant's case. Whilst any error on the part of the Inspectorate is unfortunate, this does not alter my conclusion with regard to unreasonable behaviour having been demonstrated in this case on the whole. Nevertheless, the loss of the vast majority of the first day is not the fault of the Council. I acknowledge that I used part of the first day to alert the parties of the extent of my concerns with regard to the notice. However, it was necessary in any event to discuss those matters in full on the subsequent days of the hearing. It would, therefore, be unreasonable to require the Council to cover the costs incurred by the applicant in attending the first day of the hearing. For this reason, the award of costs is a partial award.

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21. On a final point, the costs to be paid by the Council should not include the expense of preparing documents that had primarily been prepared for some other purpose and had not been specifically prepared for the purposes of the appeal, or which addressed matters that were not the subject of the appeal.

Costs Order

22. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the Forest of Dean District Council shall pay to Mr William John Larkins, the costs of the appeal proceedings described in the heading of this decision save for the cost incurred in attending the first day of the hearing; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The applicant is now invited to submit to the Forest of Dean 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.

J Moss

INSPECTOR