



Costs Decisions

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 November 2021

Costs application 1 is made pursuant to Appeals A and B: APP/X2220/C/18/3204618 and APP/X2220/W/18/3204475

- Costs application 1 is made by Mr Jamie Wilson under sections 78, 174 and 322 and Schedule 6 of the Town and Country Planning Act 1990, and section 250(5) of the Local Government Act 1972 for a full award of costs against Dover District Council.
 - Appeal A was made against an enforcement notice which alleged that there had been, without planning permission, the material change of use of the land to a caravan site, for the siting of one caravan for residential occupation and for facilitating operational development involving the construction of additional hardsurfacing and alterations to the vehicular access and installation of septic tank at land on the south west side of Marshborough Road, Marshborough (Title Number: K621349).
 - Appeal B was made against the Council's decision to refuse planning permission for the change of use of land to a mixed use for the keeping of horses and as a residential caravan site, the construction of a driveway and hardstanding and installation of septic tank at Hollyoak, Marshborough Road, Marshborough, Ash, Kent, CT13 0PF.
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Costs application 2 is made pursuant to Appeal A: APP/X2220/C/18/3204618

- Costs application 2 is made by the Marshborough Action Group (MAG) under sections 174 and 322 and Schedule 6 of the Town and Country Planning Act 1990, and section 250(5) of the Local Government Act 1972 for a partial award of costs against Dover District Council.
 - Appeal A was made against an enforcement notice which alleged that there had been, without planning permission, the material change of use of the land to a caravan site, for the siting of one caravan for residential occupation and for facilitating operational development involving the construction of additional hardsurfacing and alterations to the vehicular access and installation of septic tank at land on the south west side of Marshborough Road, Marshborough (Title Number: K621349).
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DECISIONS

1. Costs application 1 is allowed in the terms set out in the first Order below.
2. Costs application 2 is allowed in the terms set out in the second Order below.

PRELIMINARY MATTERS

Appeals A and B

3. The '2017 (planning) application' (ref: DOV/17/01208) was made on 22 September 2017 and refused on 23 February 2018, before the enforcement notice (ref: ENF/WOO/17/00196) was issued on 23 May 2018. Appeals B and A were made on 7 and 10 June 2018 respectively. I shall sometimes refer to Appeal A as the 'enforcement appeal' and to Appeal B as the 'planning appeal'.
4. Appeals A and B were to be 'linked', meaning determined by the same Inspector in the same decision letter (DL) because they were made by the same appellant in

respect of the same land. Initially, the '2019 Inspector' was appointed to determine both appeals following a hearing on 17 December 2019.

5. The 2019 Inspector wrote to the parties on 6 December 2019 to advise them in advance of the hearing of her concerns about the enforcement notice. In short, the notice alleged that there had been a material change of use of land without planning permission, but it appeared to the 2019 Inspector that permission had in fact been granted for what was alleged by the '2012 Inspector' on appeal¹.
6. Counsel on behalf of the Marshborough Action Group (MAG) responded to that email on 10 December 2019. On 16 December 2019, the Planning Inspectorate wrote to the parties again, on behalf of the 2019 Inspector, to advise that the procedure for Appeals A and B would be changed from a hearing to inquiry. The timetable would also change and both appeals were then transferred to me.
7. On 30 June 2020, the Council submitted an amended statement of case in which they accepted the 2019 'Inspector's approach'. They proposed that I exercise my powers under s176(1)(a) of the Town and Country Planning Act 1990 (TCPA90) to correct the notice so that it would instead allege that there had been a failure to comply with condition 8 imposed on the 2012 permission.
8. After further correspondence and with the parties' agreement, the procedure was changed to written representations, and I determined Appeal A separately. I quashed the enforcement notice as invalid by DL dated 10 May 2021 and gave the parties time to consider that outcome. I did not then decide either costs application in order to avoid causing prejudice to Appeal B but that was later withdrawn by the appellant via email dated 6 September 2021.
9. It is worth recapping that I quashed the enforcement notice because there had not been a material change of use without planning permission as alleged and the notice could not be corrected to allege that there had been a breach of condition(s) without causing injustice to the appellant and indeed other parties.

The Costs Applications

10. The costs applications were submitted in writing and are a matter of record.
11. Costs application 1, made by the appellant, was initially made in respect of Appeal B only, as noted in my DL dated 10 May 2021: *'MAG and [the] appellant have both applied for an award of costs against the Council, but MAG's case relates to this enforcement appeal, while the appellant's concerns the planning appeal...The two costs applications raise similar issues and considering either at this stage could prejudice the planning appeal. I shall decide both costs applications in due course.'*
12. When the appellant withdrew Appeal B, he stated that his 'claim for costs against the Council in respect of the enforcement notice appeal still stands'. I sought clarification and he emailed on 15 September to say 'in that the two appeals were originally running together, my claim for costs relates to both appeals'.
13. The Council did not respond to the appellant's costs application, although they were given additional time to do so following emails from the Planning Inspectorate dated 23 July and 16 September 2021. Thus, the Council had a fair opportunity to comment after I had said that MAG's and the appellant's cost applications 'raise similar issues' and after the appellant clarified that he seeks costs in respect of both appeals. I can proceed on the basis that the appellant seeks a full award of costs for Appeals A and B without causing any loss of natural justice to the Council.

¹ That appeal, ref: APP/X2220/A/11/2166301, was determined on 20 June 2012.

14. The Council did respond to costs application 2, and MAG submitted final comments. Although MAG applied expressly for a partial award, they seek reimbursement of 'wasted costs incurred in preparing...to fight the Enforcement Notice appeal'. The Council seems to have read the application in the same way I do, that MAG seeks an award of all costs incurred in respect of Appeal A, and used the word 'partial' because costs are not sought in relation to Appeal B.

REASONS

15. The Government's Planning Practice Guidance (PPG) provides that where a party to a planning proceeding has behaved unreasonably and, in so doing, directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs². Unreasonable behaviour in this context may relate to procedural or substantial matters.

Costs Application 1 made by Mr Jamie Wilson

16. The appellant's case for an award of costs is, in summary, that it was unreasonable for the Council to refuse the 2017 planning application when the 2012 permission was either extant or recently-expired, the 2012 Inspector had found that the use subject to conditions caused no unacceptable planning harm, and Council officers had recommended that the application be approved.
17. The appellant did not spell out how, in his view, the Council caused him to incur wasted expense. However, his implied case has to be that the planning appeal, the enforcement notice and the enforcement appeal were all unnecessarily caused by the unreasonable refusal of the 2017 planning application.

Appeal B and the Council's Decision to Refuse Planning Permission

18. I shall park for the time being the appellant's point regarding the status of the 2012 permission; the 2017 application was validly made and I can understand why the Council determined it on its merits. The 2012 permission was an 'important material consideration' whether extant or not, and that was recognised in paragraph 2.9 of the 'planning report' on the 2017 application which was considered by the Council's Planning Committee on 25 January 2018³.
19. The planning report advised that, although there had been policy changes since 2012, the use and development subject to the 2017 application remained acceptable in principle. The report also advised that there were no changes in circumstance or policy to alter the 2012 Inspector's findings in respect of character and appearance, highway safety and 'residential amenity'. Any harm caused by the use or development could be mitigated by imposing planning conditions.
20. In relation particularly to highway safety, it was noted in the planning report that the County Highways Officer did not object to the 2017 application, so long as the use would be permitted subject to the same conditions imposed by the 2012 Inspector. That recommendation is significant because it had been the appellant's failure to carry out works required by the 2012 condition 2, to improve visibility at the site junction, which ultimately led to both appeal proceedings.
21. The minutes of the Committee meeting⁴ show that the planning report was fully discussed. It is recorded that *'the Planning Solicitor reiterated that the [local planning authority (LPA)] was bound to take into account, and give considerable weight to, the previous appeal decision. The Committee was required to consider*

² PPG paragraph ref ID: 16-028-20140306

³ Appendix PBA3 to the appellant's statement of case

⁴ Appendix PBA4 to the appellant's statement of case

whether this application was the same as or distinguishable from, the previous application. There was a risk of costs being awarded against the LPA if it was thought to have acted unreasonably'.

22. Yet the Council refused the 2017 application for reasons related to highway safety, character and appearance and living conditions. I have made no determination on those matters because Appeal B was withdrawn but I can say, for the purposes of this costs application, that the minutes and later representations do not properly explain why the Council rejected clear advice that those issues were previously rehearsed and any harm was conditionable. The minutes refer to 'local knowledge and the Council's policies' but the reasons for refusal do not cite any of the latter.
23. The PPG advises that LPAs are at risk of an award of costs if, for example, they refuse permission on a planning ground capable of being dealt with by conditions and persist in objections to a scheme which an Inspector has previously indicated to be acceptable⁵. I find that, in refusing the 2017 application, the Council behaved unreasonably as expressly described by the PPG. The appellant incurred wasted expense in making a planning appeal he should not have had to make.

Appeal A and the Council's Decision to Take Enforcement Action

24. I could find that it was unreasonable for the Council to issue the enforcement notice simply in consequence of their unreasonable refusal of the 2017 application. However, I will return to the submission that the 2012 permission was extant. The appellant made that point in his original costs application and he also stated in his email of 15 September 2021 that it was unreasonable for the Council to serve an enforcement notice against development that already had planning permission.
25. The 2017 application was accompanied by a planning statement. In the second (or first substantive) paragraph of that statement, the appellant described the 2012 permission and said that 'this [2017] application is made without prejudice to our belief that the existing planning permission remains extant'. In other words, what the 2019 Inspector suggested and I found to be the central error in the notice was brought to the Council's attention some eight months before the notice was issued.
26. The planning report did not record the appellant's view of the status of the 2012 permission, but it does show that the Council was cognisant of the issue. It stated that 'as the conditions were not adhered to within the timeframe set...the appeal permission ceased'. Unfortunately, the report included little reasoning and no legal authority to back that assessment, and the Committee minutes suggest that the Planning Solicitor did not address the matter.
27. But whether or not the Council should have said more in the planning report, their refusal of the 2017 application did not have to lead to enforcement action against the use and development. The Council's decision to issue an enforcement notice was made separately, and it raised the stakes significantly because the notice could have been (and was) appealed on legal grounds, and it could have led to the appellant losing his home and/or gaining a criminal record.
28. The PPG is clear that, 'for enforcement action, local planning authorities must carry out adequate prior investigation. They are at risk of an award of costs if...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'⁶. It was for the Council, if not before then certainly after they refused the

⁵ PPG paragraph ref ID: 16-049-20140306

⁶ PPG paragraph: ref ID: 16-048-20140306

2017 application, to carefully consider what breach of planning control had apparently occurred and whether to issue an enforcement notice.

29. The Council's report to authorise enforcement action is undated but must have been written between 25 January and 23 May 2018. The 'enforcement report' stated that 'some' of the 2012 conditions imposed time limits for the submission, approval and implementation of schemes but *'some works relating to visibility sightlines/access had not been carried out in full...following a site visit in 2016...as a result of non-compliance with the...conditions, the [2012] permission had lapsed and no planning permission...existed for the use...nor the operational development'*.
30. The enforcement report did not mention the appellant's submission that the 2012 permission was extant. It did not properly analyse or even specify the condition(s) that the appellant was (considered to be) in breach of. Condition 2 imposed on the 2012 permission provided that, in the event of failure to submit or implement on time a scheme to improve visibility, the approved use should cease – but not that operational development should be removed. The report did not explain how the Council made the leap from 'the use...shall cease' to 'the permission has lapsed' or even say whether the breach of condition identified in 2016 was ongoing in 2018.
31. I appreciate that the Council was dealing with a situation that was both complex and controversial in planning and legal terms, as shown by MAG's defence of the notice in their email of 10 December 2019. However, that is exactly why 'adequate prior investigation' is essential in cases such as this. On the evidence before me, the Council did not carry out due diligence as to what breach of planning control had actually occurred in this case.

Conclusion on Costs Application 1

32. The 2019 Inspector, in her email of 6 December 2019, said that *'the Council might wish to consider prior to the hearing whether the enforcement notice correctly addresses the breach of planning control which has occurred and whether, in determining the planning application and resolving to take enforcement action, proper and due consideration was given to the planning permission that had already been granted and implemented'*.
33. I conclude that the Council failed to give 'proper and due consideration' to the 2012 permission and thereby behaved unreasonably both in refusing the 2017 application and issuing the notice. That unreasonable behaviour caused the appellant to incur wasted expense, as described in the PPG, in making unnecessary enforcement and planning appeals. His application for a full award of costs in respect of Appeals A and B is allowed.

Costs Application 2 made by the Marshborough Action Group (MAG)

34. MAG's case for an award of costs essentially reflects my findings in respect of Appeal A above. They argue that the Council behaved unreasonably in failing to properly analyse the planning history of the site and drafting an inappropriate enforcement notice which had to be quashed. They state that this unreasonable behaviour caused them to incur wasted expense in contesting Appeal A. The Council has made several points to rebut MAG's application, and I shall start with whether the PPG describes the behaviour said to be unreasonable in this case.
35. MAG referred to advice in the PPG that introducing fresh and substantial evidence at a late stage of an appeal, necessitating an adjournment or extra expense for preparatory work, is an example of unreasonable behaviour which may lead to an award of costs against an LPA. That guidance is of limited relevance as shown

- below, but the PPG is explicit that its lists of examples of unreasonable behaviour are 'not exhaustive'⁷. I have found other examples given in the PPG to be apt.
36. The PPG does not 'envisage' but also does not prevent an awards of costs being made to interested parties in cases dealt with by written representations⁸. In this case, the agreed appeals procedure was firstly a hearing and then a local inquiry. The Council suggests that an inquiry was required because MAG submitted extra highway evidence at a late stage, but the Planning Inspectorate's email of 16 December 2019 only stated that 'the hearing would have had to have been adjourned' because of the additional documents.
37. The 16 December email indicated that the 'decision...to change the procedure to that of a public inquiry' was related to the 2019 'Inspector's preliminary concerns in particular with the framing of the allegation in the enforcement notice' and issues raised, not least by MAG's defence of the notice, which were 'far from straightforward and would benefit from formal presentation through an advocate with evidence tested by cross-examination...'
38. Thus, the need for an inquiry arose from the wording of the notice, not MAG's late highway evidence. The procedure was changed to written representations after the Council conceded in June 2020 that the notice should not be directed at an unauthorised material change of use, and then proposed the written procedure by email dated 14 August 2020. By that time, MAG had already carried out preparatory work for a hearing or inquiry.
39. The Council has defended as reasonable its decision to not withdraw the notice during appeal proceedings. I understand that the Council proposed doing just that in a letter sent to the other parties on 4 May 2020, and MAG responded with a Legal Opinion that any such withdrawal would be 'vulnerable to judicial review proceedings'. Plainly that response would have given the Council pause to think but it does not follow that they should have continued with enforcement action. MAG has admitted that they sought to 'keep the notice alive' for their own reasons. The 2019 Inspector and I both disagreed with some legal submissions by MAG⁹.
40. I reject the Council's submission that the notice could not have been withdrawn before the appellant remedied the breach of condition(s). I quashed the notice not because the allegation was wrong but because correcting the allegation would have caused injustice whether there was any actual breach of condition or not. I made no determination in my DL as to whether there was any ongoing breach¹⁰.
41. Moreover, the Council accepted that the 2012 condition 2 had been complied with in their amended statement of case dated 30 June 2020. They then proposed that the notice should allege a breach of condition 8 but that did not concern 'works relating to visibility sightlines/access' and had not been discussed in the enforcement report which had authorised the issue of the notice.
42. The Council suggests that its decision to not withdraw the notice was 'favourable to MAG because it kept the appeal process and their opportunity to be heard alive'. That is not good enough reason, in my view, for the Council to persist with enforcement action so as not only to increase costs for all parties but also keep the appellant under threat of more serious consequences. In any event, this issue is

⁷ PPG paragraphs ref ID: 16-047-20140306 and 16-049-20140306

⁸ PPG paragraph ref ID: 16-056-20140306

⁹ Relating, for example, to the relevance or otherwise of *Pye v SSE & North Cornwall DC* [1998] 3 PLR 72 and *Kensington and Chelsea RBC v SSE & Mia Carla Ltd* [1981] JPL 5071.

¹⁰ Paragraph 8 of my decision letter relating to Appeal A.

irrelevant because I have found that it was unreasonable for the Council to issue the notice in the first place.

43. MAG's warning in May 2020 that they might apply for judicial review of any withdrawal of the notice cannot be read as meaning that 'MAG would have brought a judicial review application' had the notice alleged a breach of condition at the outset. Such speculation is of no assistance except perhaps to reinforce the need for diligent investigation prior to the issue of a notice. Why the Council did not withdraw the notice is not an answer as to why they issued the notice without having properly analysed the planning history and the appellant's claim that the 2012 'permission remains extant'.
44. I conclude that the Council's unreasonable behaviour in issuing the notice caused MAG to incur wasted expense, as described in the PPG, when they participated in the enforcement appeal, as they were wholly entitled to do as an interested party. MAG's application for an award of costs in respect of Appeal A is allowed.

Costs Order for Application 1

45. 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 Dover District Council shall pay to Mr Jamie Wilson the costs of the proceedings pertaining to Appeals A and B (refs: APP/X2220/C/18/3204618 and APP/X2220/W/18/3204475) described in the 'Costs Application 1' heading to this decision letter, such costs to be assessed in the Senior Courts Costs Office if not agreed.
46. Mr Jamie Wilson is now invited to submit to Dover District Council, to whom a copy of this decision letter has been sent, details of those costs with a view to reaching agreement as to the amount.

Costs Order for Application 2

47. 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 Dover District Council shall pay to the Marshborough Action Group the costs of the proceedings pertaining to Appeal A (ref: APP/X2220/C/18/3204618) described in the 'Costs Application 2' heading to this decision letter, such costs to be assessed in the Senior Courts Costs Office if not agreed.
48. The Marshborough Action Group is now invited to submit to Dover District Council, to whom a copy of this decision letter has been sent, details of those costs with a view to reaching agreement as to the amount.

Jean Russell

INSPECTOR