



Costs Decision

Site visit made on 22 November 2021

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 07 December 2021

Costs application in relation to Appeal Ref: APP/X2600/C/21/3279099 Land at Garage Lane, Setchey, Norfolk

- 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 Norfolk County Council for a full award of costs against Mr Benjamin Lemmon (Skippy Industries Ltd).
 - The appeal was against an enforcement notice alleging without planning permission, the use of the Land for the import, export, deposit, storage, handling, processing and transfer of waste and the use of the Land for operations ancillary to the waste facility the subject of planning permissions ref C/2/2013/2017 and C/2/2019/2009.
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Decision

1. The application for an award of costs is allowed in part.

Reasons

2. The 'Appeals' section of the Planning Practice Guidance ('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.
3. The Council's costs application is for both a procedural award relating to the process and a substantive award arising from the merits of the appeal.
4. The Council asserts that the appellant's statement seems to be based on misconceptions of planning law. As such, it is the Council's view that the appellant has failed to provide any material evidence to support the grounds of appeal. Those misconceptions could, in the Council's view, have been resolved and the entire appeal avoided had the appellant entered dialogue not only with them but also with his landlord and other interested parties.
5. In particular, the Council submits that the arguments under ground (f) have no sound footing within planning law and no reasonable prospect of success. In response, the appellant claims that a lack of reasonable diligence by the Council in initially identifying the precise nature and extent of the land subject to the alleged breaches led to the need to submit the appeal in the first place. The Council, it is claimed, failed to conduct a robust enough assessment of the subdivision of the land ownership and alleged uses within the land in question.
6. In consequence, the appellant considers he has been wrongly associated with other alleged activities over which his company has no control and relate to uses undertaken by the landowner.

7. The appellant was professionally represented throughout. However, the appeal on ground (f) did not divulge a case which could succeed under this ground. The main thrust of the argument concerned the issue of a single enforcement notice including land which the appellant does not rent. The appellant contended that at least two notices should have been served 'on the correct individuals'. What emerged from this line of argument was that the appellant acknowledged that (with one exception) the alleged uses were taking place across various parts of the appeal site. The issue being taken was one of responsibility for the land and use in question.
8. I observed that the areas occupied by the appellant are not clearly distinguishable on the ground from those which are the sole responsibility of the owner. Despite protestations from the appellant that he only has control of two areas, there were clear signs of activities associated with his lawful waste facility having strayed outside its parameters. This included parts of the yard/car parking area. It was also apparent that more of the appeal site was in use as a means of unauthorised access to the waste facility than the appellant acknowledged.
9. There was nothing wrong in the Council issuing a notice against both the owner and occupier which was in accordance with section 172 of the 1990 Act. It was not for the Council to attempt artificially to divide up the appeal site and attribute responsibility for the unauthorised uses. That was particularly so in circumstances where there was evidence of unauthorised waste related activities spread across the appeal site. The Council was also entitled to anticipate waste being moved within the appeal site.
10. In terms of ground (g), the Council wrote to the appellant and his agent on 26 July 2021 offering to extend the compliance period beyond the period requested within the appeal. The appellant failed to respond within the 14 day period requested and despite a follow-up telephone call to discuss the offer.
11. The appellant now suggests that it would have been prudent to engage in discussions with the Council only if the notice had been served on the appellant correctly pertaining solely to land over which the appellant has control. As the appellant did not accept that the remedial measures required to rectify the breach were adequate or just, the ground (g) appeal was pursued in tandem with ground (f).
12. That explanation does not account for the failure to respond to the Council's offer of resolution which was made after the appeal was lodged.
13. At the same time as offering to extend the compliance period, the Council's email of 26 July 2021 gave the assurance that it *'will only hold you and your company responsible for the areas and waste for which you are responsible. The County Council will hold the landowner responsible for the matters for which he is responsible. I have met the landowner and he confirms that he accepts this.'* The Council proceeded to list items that the appellant would need to remove. The assurance could not have been much clearer.
14. It is extraordinary that having argued for a 3 month extension to comply with one requirement, the appellant failed to respond when the Council proposed a further month on top of that requested to allow 120 days for compliance. When the appeal statement was made in September 2021, there was no mention of the Council's offer made 2 months previously. Instead, the appellant sought a

compliance period until 30 March 2022 for not one, but two of the requirements. It was not until the appeal progressed and the submission of final comments that the appellant acknowledged and agreed to 120 days. Of course, by then further time had elapsed.

15. The lack of co-operation by the appellant in the Council's attempt to reach agreement and respond to a proposal which more than addressed the ground (g) appeal, as originally pleaded, was unreasonable behaviour.
16. Had the appellant engaged with the Council in response to its email of 26 July 2021 then the compliance period could have been extended to overcome the ground (g) objection. The appellant had also received the written assurance over the measures he would need to take which were raised under ground (f). If he did not consider these to suffice then the appellant could, and should, have said so and entered into dialogue on what was missing.
17. Clearly, the appellant was entitled to bring an appeal. However, there was an ongoing duty on both parties to co-operate in the appeal. More costs have been incurred whilst the appeal has progressed to its conclusion. Those further costs were avoidable had the appellant not displayed such reluctance to discuss resolution of the appeal when offered in July 2021.
18. As it was, the appellant proceeded with arguments over what was happening on different parts of the appeal site even though it was acknowledged, with one exception, that an unauthorised use was taking place as alleged. The appellant secured deletion of the word 'processing' from the notice on the basis that the processing of waste had not occurred after I identified it as a late hidden ground (b) appeal. Success on this one point does not mitigate the conduct of the appellant. Had it been raised earlier then there could have been scope for the Council to agree a relaxation of this term which was but one of several components within the same allegation.
19. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated. A partial award of costs is justified from expiry of 14 days from the date of the Council's offer of resolution on 26 July 2021 which also contained the written assurance.

Costs Order

20. 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 Mr Benjamin Lemmon (Skippy Industries Ltd) shall pay to Norfolk County Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred from 10 August 2021; such costs to be assessed in the Senior Courts Costs Office if not agreed.
21. The applicant is now invited to submit to Mr Benjamin Lemmon (Skippy Industries Ltd), to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

KR Saward

INSPECTOR