

Costs Decision

Date of Hearing 26 July 2021 (Virtual) and 19 August 2021

Site visit made on 19 August 2021

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 27 January 2022

Costs application in relation to:

Appeal Ref: APP/N1350/C/21/3266271

Little Beck, Burma Road, Darlington, Co Durham DL2 1QH

- 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 Smith for a full and a partial award of costs against Darlington Council (the Council).
 - The Appeal was against an enforcement notice alleging a failure to comply with a condition restricting the number of caravans on a residential caravan site.
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Decision

1. The application for an award of costs against the Council is allowed in the terms set out below.

The application

2. The application was for a full, or alternatively partial, award of costs, made in writing and orally before me. I allowed the Council further time to prepare its response in writing by 26 August 2021 with an opportunity for the Applicant to reply in writing by 31 August 2021.

Submissions on behalf of the Applicant

3. The Council's notice was invalid and the appeal could have been avoided. There was no proper investigation before formal enforcement action was taken and no evidence emerged to contradict the evidence that had been submitted that the use had been established through the passage of time.
 4. No evidence was offered by the Council concerning its allegations regarding commercial uses involving kennels and the storage and dismantling of cars.
 5. The circumstances of the appellant were effectively ignored by the Council in its determination to issue an enforcement notice and in continuing to defend the appeal.
 6. The Council belatedly conceded that there was insufficient evidence to sustain its objection to the development on the grounds of biodiversity.
 7. The issue of living conditions was attempted to be pursued during the appeal but had not been raised in the reasons for issuing the enforcement notice or in the Council's statement of case.
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8. The Council belatedly responded to requests for information on need and supply matters concerning Gypsy and Traveller accommodation.
9. Overall, the Council failed properly to consider whether enforcement action should be taken, which, had it done so, would have avoided an appeal. It had behaved unreasonably causing the Applicant unnecessary delays and expense in pursuing the appeal.

Submissions of the Council

10. It was not open to the Applicant to ask for a full costs award in relation to procedural matters as well as a partial award in relation to some substantive matters.
11. The Council warned the Applicant in writing that if the alleged breach of planning control were not remedied formal enforcement action would be taken. It subsequently met with "relevant parties" and spoke to the "Appellants" as to its concerns over the dog kennels, the open access from Neasham Road and storage of cars in partial states of dismantling. The occupant of the caravan the subject of the enforcement action was "their" son but no mention was made of his needs or circumstances.
12. The condition of the site was now markedly improved in appearance compared with what it had been when the notice was issued. The Council considered that it had now been agreed [although it is unclear to me with whom] that if its condition as found by the Inspector at his site inspection had been in existence beforehand *"it would not have been necessary to serve a Notice in the first place"*. The enforcement notice *"directly influenced the Appellant's agent to encourage the Appellant to clear up the site"*.
13. The Applicant could have applied for a lawful development certificate (LDC) at any time but if the sworn or personal evidence was known to him at the time of discussions with the Council in November 2020, it should have been made available to the Council at that time. No fuller investigation was carried out in any event because an argument based on ten years' use was unlikely to be substantiated based on photographic evidence demonstrating *"the location of the caravan not being in existence in 2013 [sic]"*.
14. It was aware of its responsibilities as set out in *R. v Kerrier DC Ex p. Uzell (1996) 71 P. & C.R. 566 at 571* but the individual circumstances of the Applicant were unnecessary to take into account in deciding whether it was expedient to issue the enforcement notice. It did consider that the caravan was occupied by the *"Appellant's son [sic]"*, and alternative sites were available. The Applicant appeared unwilling to engage with the Council on this latter point. The Council did not know that the Applicant was a vulnerable person or a person with special needs. The requirements for assessment were met as set out in paragraphs 41-43 of its statement of case.
15. No more diligent investigation was needed because the Applicant was in effect requiring *"a delay in enforcement indefinitely"*, and the Applicant was not assisting the Council as to the residential occupation of the site. It was the Applicant's, not the Council's delay that led to the documents on housing need requested by the Inspector not being available in a timely manner.

16. Its position on biodiversity was clear, reasonable, and in accordance with relevant policy.
17. As to the complaint about lack of evidence concerning the dog kennels that led to the Council agreeing to the deletion of that part of the notice, the kennels "*were and are*" considered to be too large to be an incident of domestic use and the Applicant "*brought forward no reasonable explanation at the appeal as to how the kennels...are to be used if not for non-domestic purposes.*"
18. On the similar point concerning vehicle storage/dismantling, it was denied the vehicles on site at when the notice was served were "*Classic vehicles as indicated at the hearing [sic]*", but vehicles at various stages of dismantling. The evidence for this was in photographs sent with the boundary identification plan requested by the Inspector.
19. Any inconvenience experienced by the Applicant would have been reduced had he genuinely engaged with the nature of existing residential occupation, if there had been an early "*tidying up of the land*", and if he had engaged with procedural issues such as "*investigations, supply of documents and/or information*".
20. Therefore there was no unreasonable behaviour in issuing the notice or in conducting the appeal.

Applicant's reply

21. The wording of allegation 1 of breach of planning control had to be re-written by the Inspector and allegations 2 and 3 had to be deleted from the notice as it was agreed they had not occurred, all evidence of unreasonable behaviour.
22. The warning letter of 18 October 2020 requested removal of all unauthorised caravans and vehicles within 7 days of receipt or by 27 November with unauthorised fencing and commercial dog kennels removed, by 18 December 2020. The notice, issued on 7 December 2020, was 11 days before one of the requirements had to be completed, evidence of acting prematurely.
23. The Council ignored information from the agent and served the notice instead of working with the Applicant to agree a satisfactory solution before enforcement action had to be considered.
24. The 2013 photograph showed part only of the site and a touring caravan was shown on hardstanding where one would expect the caravan to be. The image would not have invalidated an LDC application which was offered to be applied for by emails on 26 November and 4 December 2020. These were not replied to yet the Council emailed on 8 December saying they had served the notice.
25. The Council was informed that the Applicant was in recovery from a serious medical condition, it was essential he had his family support and seeking to remove him or his parents from the site could have grave health implications for him. The agent told the Council that the site could easily accommodate three households in the same family and a third pitch has existed on a family gypsy site with planning permission for two pitches, in excess of 10 years. Two days later the Council replied briefly, apologising for the delayed response, noted the points in the emails but said "*please be advised, the Council have issued an Enforcement Notice*".

Reasons

26. Paragraph 30 of the Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may be awarded where a party has behaved unreasonably and that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. There is no reason why the Applicant may not apply for a full costs award and in the alternative a partial award in relation some matters, whether the alleged unreasonable behaviour relates to substantial or procedural matters.
27. Unreasonable behaviour can be procedural or substantive, relating to the issues arising from the merits of the appeal. Although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviours and actions at the time of a planning application or as the case may be when enforcement action was taken, can be taken into account.
28. The Council appears confused over who the appellant was in the appeal. The only appellant was the son of Mr Tom Smith snr, whom the Council seemed to have confused with the latter person, the head of this Gypsy family.
29. In the Appeal Decision I allowed the appeal, quashing the notice on ground (d). Through his agent, the Applicant supplied several statements, statutory declarations and other documents. He gave oral testimony along with other members of his extended family who had direct knowledge of his situation. The evidence was credible enough to lead me to conclude on the balance of probability (the applicable test and well known to the Council), that the breach of condition in question had subsisted in accordance with the statements for over ten years. That the evidence overall was sufficiently credible for me to allow the appeal was one thing, but that the Council was unable or unwilling to challenge the evidence when invited so to do, makes it all the more credible.
30. As to whether the notice was invalid, I found against the Applicant, but found the notice had defects which needed to be remedied by correction. The Council offered no evidence at all to substantiate two of its three allegations of breach control. These pertained to the erection of "commercial" sized timber dog kennels and the storage and dismantling of scrap vehicles. The Council had had plenty of opportunity to advise the Applicant and indeed the Inspector of its intention to offer no evidence at the hearing but failed to do so. Inexplicably the Council now seeks to defend this application by resiling from its position and offering evidence and argument after the event, which is not acceptable.
31. Clearly the Applicant's agent had made conscious efforts to engage with the Council to encourage it to delay formal enforcement action pending a proper investigation of his client's circumstances and the claimed immunity period. With the issue of the notice an LDC application would be otiose as it would be dealt with by ground (d). The Council deflects criticism of it by claiming the Applicant had not engaged with it and that he or his family should have tidied up the land which would have avoided an appeal. It is of some concern that the Council appears to consider it a legitimate course of action to take enforcement action with a primary aim to have the Applicant (or perhaps his family in general) tidy up the land. Powers exist under s215 of the 1990 Act where it appears to local planning authorities that the amenity of an area is affected by the condition of land in its district. None of the allegations in the notice refer to this purpose.

32. Whilst examining ground (a) issues I invited the Council on several occasions to re-assess its approach to the personal circumstance of the Applicant which it had not thus far considered in its decision to take or continue enforcement action. The Head of Planning declined to do so on each occasion, despite my pointing out established case law (*R. v Kerrier DC Ex p. Uzell* (1996) 71 P. & C.R. 566 at 571). He made it clear that he was unwilling to assist in the task of evaluating from the Council's point of view, the weight that should be given to those personal circumstances in the overall balance. I am not convinced that the Council is yet properly aware of its obligations, as it maintains such matters need not form part of a decision to take formal enforcement action. This view probably explains the reluctance to investigate and assess the merits of the Applicant's case when this was urged on it before enforcement action ensued.
33. In *Kerrier* the key complaint was that the council failed to carry out sufficient inquiries, and therefore arm itself with sufficient information, to enable it to come to a proper conclusion as to the effect that the decision would have in relation to the personal circumstances of the Applicants and others who might be affected by the decision, and to give proper consideration to the consequences of the decision in relation to the Applicant's housing needs.
34. The court held that considerations of common humanity must be equally applicable to enforcement proceedings. That a council might continue with enforcement action in the face of a promised LDC application, is not the point here. It was in "*light of the lengthy history of the enforcement action*" that the council in *Kerrier* could view a late application for permission as not affecting decisions they considered appropriate in relation to the enforcement action. However in the present case, the agent had informed the Council that the Applicant was in recovery from a serious medical condition, and the possible effects on him of seeking to remove him from the site.
35. The guidance cited in *Kerrier* has been superceded but one does not have to look further than the Planning Policy for Traveller Sites 2015 (PPTS) for current government guidance. Paragraph 24 could not be clearer:
- "Local planning authorities should consider the following issues amongst other relevant matters when considering planning applications for traveller sites:... c) other personal circumstances of the applicant".*
36. I accept that local planning authorities have discretion as to whether they find it expedient to issue a notice, but the Council must still consider any relevant personal circumstances of those who might be affected as part of the overall decision and be accountable for its actions.
37. A useful way for the Council to have approached the matter would have been to ask itself, if an application for planning permission were made for the matters it intended to enforce against, would it grant permission? The judge in *Kerrier* was crystal clear when he held that:
- "As considerations of common humanity, they must, it seems to me, be equally applicable to decisions in relation to enforcement actions".*
38. The government's current guidance in PPG also explicitly states at Paragraph: 003 Reference ID: 17b-003-20140306, that the provisions of the European

Convention on Human Rights such as Article 1 of the First Protocol, Article 8 and Article 14 are relevant when considering enforcement action. It states:

"There is a clear public interest in enforcing planning law and planning regulation in a proportionate way. In deciding whether enforcement action is taken, local planning authorities should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by a breach of planning control."

39. It was therefore remiss of the Council to fail to consider such matters before taking what can only be regarded as precipitate action, not to mention what appears to be a misuse of its powers given that the apparent driving force behind the action, as it would now appear from the Council's reply, was to achieve a clearing or tidying up of the site.
40. On the main issue that resulted in the quashing of the notice on ground (d), had proper enquiries been made I have come to the view that it would be reasonable to assume that the Council should have accepted the evidence from the Applicant and his family as to his continued residence on a separate pitch on the appeal site for in excess of ten years. Whether the Council would have been prepared to consider the evidence and engage with the agent rather than just issuing an enforcement notice cannot be certain, but there were several opportunities subsequent to the initiation of the appeal process where the Council could and should have reappraised the position. Had they done so conscientiously I am satisfied that the hearing would not have been necessary.
41. The Government states that effective enforcement action relies on accurate information about alleged breaches of planning control (PPG Paragraph: 014 Reference ID: 17b-014-20140306). Clearly the Council was not in possession of accurate or full information before it took formal action. As PPG Paragraph: 005 Reference ID: 17b-005-20140306 explains, effective enforcement is important, among other things, to maintain the integrity of the decision-making process, and help ensure that public acceptance of the decision-making process is maintained. A failure to do due diligence in this respect, as has happened here, is likely in my view to undermine the integrity of the decision-making process.
42. The Applicant raises issues on the ground (a) appeal, not reached in the Decision but they are relevant here. On biodiversity net gain, time was spent in establishing the Council's position. It objected to including biodiversity as an agreed matter in the statement of common ground, saying that habitat enhancements should have been provided on a landscape plan without which it could not determine if the proposal met NPPF requirements. In fact the Applicant's response to the statement, submitted well before the hearing, proposed a landscaping condition with planting on the space between the fence at the top of the bank and the Beck which would have satisfactorily dealt with the biodiversity related objection. The response also included the landscape plan previously agreed as part of the conditions of the original approval.
43. Councils are advised in PPTS, paragraph 28, to consider how planning objections can be resolved by conditions. The site had little of ecological interest, as planting native hedges and standard trees would meet the biodiversity gain. The Council never explained adequately why or what specific

- landscaping was necessary for the proposed additional pitch. Its original list of conditions included no landscaping/biodiversity condition. The Council's own policy backing for the net gain requirements and the methodology that might be deployed to calculate the 10% gain, was questioned and in the end the Council agreed that a landscaping condition was all that was required.
44. Adverse effects on living conditions of nearby occupiers was not a reason for issuing the notice but raised at the hearing due to the dogs on the site and their "*potential impact*". The Council said that 4/5 dogs would not have an adverse noise impact, yet from what the agent had said earlier there were 4/5 kennels and these were accepted as pets. Whilst noise from any number of dogs could be an issue, the Council was unable to state where was the nearest dwelling. It was agreed that there were no properties in close proximity to the appeal site. The officer leading on this issue had driven past the site a month earlier but had not gone onto the site. The Council brought forward no evidence of actual harm being caused as a result of keeping the dogs.
45. As to the information I requested on need and supply of traveller pitches, the delays were not the responsibility of any one party. I find no unreasonable behaviour in that connection.
46. In summary, the Council appears to have taken a fixed position on the situation soon after their visit to the southern part of the appeal site (which had been sold and was not in the control of the Applicant or his family) to investigate an entirely separate alleged breach of planning control. Officers noticed the tourer vans on the appeal site belonging to the Applicant but this had nothing to do with the breaches alleged to have occurred by the third party, and it did little to investigate the position properly before issuing an enforcement notice, to the detriment of the Applicant.
47. The Council sought to make a case against the use in respect of which evidence was adduced as to its lawfulness through the passage of time, but it failed to substantiate its case with any realistic evidence or argument of its own. The shortcomings on this and the other matters I have described, amount to unreasonable behaviour by the Council that led to unnecessary expense in the appeal process. I conclude that a full award of costs is justified.

Costs Order

48. 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 Darlington Council shall pay to Mr Thomas Smith, the costs of the appeal proceedings described in the heading of this decision.
49. The Applicant is now invited to submit to the 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. In the event that the parties cannot agree on the amount, please find the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office by clicking the following link:
<https://www.gov.uk/assess-approve-court-costs/print>

Grahame Kean

INSPECTOR