The Planning Inspectorate

Costs Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 April 2022

Costs application in relation to Appeal Reference: APP/R4408/C/21/3283505
Premises/Land between 4 and 6 Albert Street, Cudworth, Barnsley S72 8AP

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
- The application is made by Mr Stephen Cox against Barnsley Metropolitan Borough Council. The appeal was in relation to: The material change of use of the land to one of a mixed usage of repair of motor vehicles (B2 General Industrial) and a Sui Generis use for the undertaking of horsebox conversions and the related fabrication of motor vehicles.

Decision

1. The application for an award of costs is refused

2. Planning Practice Guidance (PPG) states that, irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process. The costs application has been made in a timely manner.

The application for costs

3. In summary, the appellant contends that the LPA has behaved unreasonably on the basis that the underlying rationale for the service of the enforcement notice was wrong in law, and secondly, that there was also no material planning justification for serving the notice. It is the appellant's contention that the LPA pursued a misconceived and hopeless case and that this appeal, and its associated costs, were entirely unnecessary.

4. Unreasonable behaviour prior to the appeal is referred to because it is contended that the LPA have had numerous opportunities to reconsider their position which was not legally correct. Nor should it have been expedient, in the public interest, to issue an enforcement notice in this case. Consequently there should have been no requirement for this appeal and its associated costs.

5. On behalf of the appellant it is stressed that there had been numerous opportunities since June 2020 for the Council to carry out adequate investigations and due diligence, prior to taking formal enforcement action in the form of the earlier Stop Notice (SN), and the subsequent Enforcement Notice (EN). It is contended that the Council has failed to acknowledge the mistakes made and have instead made assertions which have been shown to be manifestly inaccurate and untrue.

6. It is indicated that the Council should have co-operated with and properly engage with the appellant following requests for meetings and detailed submissions regarding legislation and case law surrounding relevant use classifications. It is

contended that the Council acted incompetently and recklessly by failing to adequately and robustly make their case for enforcement action, contrary to practice guidance, legislation and case law. The Council also appears to have acted inconsistently with regard to the use classification of another major horsebox conversion business in the Borough.

7. Furthermore, it is contended that the Council failed to produce any evidence whatsoever to substantiate their allegations of either a breach of planning control relating to use classification, or their allegations regarding noise and highway safety. Instead, it is considered that vague and unsubstantiated assertions have been made about both the use classification and the alleged impacts from the activities, which are directly contradicted by the occupants of seven independent neighbouring properties.

8. It is the appellant's view that the Council had no reasonable grounds for concluding a breach of planning control had occurred. Reference is made to Counsel's opinion that '*the Council's interpretation of the position is wholly misplaced and service by it of an Enforcement Notice comprises unreasonable behaviour.'*

9. It is indicated that the Council was put on notice at a very early stage that the appellant considered the Council's position was mistaken and that full costs for unreasonable behaviour would be applied for in the event an EN being served. This was reiterated following the service of the EN.

10. On behalf of the appellant it is argued that the Council should have reviewed the strength of their case at numerous stages, but instead appears to have ploughed on regardless of the consequences. This has put the appellant to considerable wasted and unnecessary expense, much of which is unlikely to be recoverable of course, because it pre-dates the appeal.

11. Finally the appellant contends that the enforcement notice should not have been served for the reasons set out and consequently the costs resulting from the appellant being obliged to appeal the Notice are consequently applied for in full.

The Council's response to the application

12. The Council indicates that it had been in receipt of complaints that activity was being undertaken at the site which would require planning permission. After analysing the evidence provided, the LPA states that it was deemed expedient and proportionate to serve a Temporary Stop Notice (TSN) which was served on 24 June 2020. Further complaints were received stating that the unauthorised activity cited in the TSN was continuing during the period specified in the notice. Furthermore, the Council indicates that it is in receipt of information that shows the appellant continued working throughout the period of when the TSN was in effect.

13. It is stressed that a dialogue was opened with the Council via a third party which claimed that the activity on site was lawful and fell under a Lawful Development Certificate (LDC). Subsequently, specific details were requested via a Planning Contravention Notice (PCN) which was served on 25 November 2020 via Royal Mail upon all interested parties of the appeal site.

14. The Council indicates that it then received correspondence from an agent acting on behalf of the appellants who claimed that not all parts of the PCN had been received. Although the appellant's agent requested a site visit, the dates suggested were not suitable due to the high level of workload for the sole Enforcement Officer

at that time. The agent was informed of this and was asked for suitable alternatives. The authority did not receive any alternative dates.

15. It was the view of the Council that the agent, landowner, and tenants were being obstructive and that a further PCN was served on the interested parties on 7 July 2021 via Royal Mail and through email. The agent put in a formal complaint to Barnsley Council upon receiving the second PCN but the complaint was dismissed, as all procedures had been followed. It is the view of the Council that this was another stalling tactic from the appellant and the agent.

16 It is the view of the LPA that the appellant and agent have been obstructive with regards to organising site visits for the Council to investigate the breach of planning control. Furthermore, it is the view of the Council that the appellants have contempt for Barnsley Council by completely ignoring the TSN.

17. Moreover, the appellant and agent failed to respond to the first PCN and then complained formally to Barnsley Council upon receiving the second notice. This is considered to be a blatant attempt to withhold information, of which they were legally bound to provide. The Council completely and wholeheartedly refutes the claims for costs as the authority and contends that it has been more than reasonable in its dealings with the appellant and the representatives.

Appellants reply to Council's response to the application

18. The LPA appear to have relied upon third party information to determine that a breach of planning control had (allegedly) occurred, which resulted in a TSN alleging a change of use from a *'builder's merchants to a vehicular workshop'.* Given the established facts of the case including the LDC and the current uses, it is clear that the LPA failed to properly investigate or verify either the established lawful use, or the uses being undertaken at the time the TSN was served.

19. This is confirmed by the facts that the LPA do not dispute in their appeal evidence that (a) the premises was *not* a builder's merchants previously; and (b) the current use comprises something different – i.e. as specified in the subsequent EN. It was, therefore, neither expedient nor proportionate (or indeed legally correct) for the Council to issue the TSN.

20. With regard to the requested site visit and the LPA not receiving any suitable alternative dates, this is factually untrue. Following the initial offer of a meeting in December 2020 (Council reply April 2021) an e-mail was sent back to the Council offering further dates (again, not responded to for a further two months). Moreover, if workload was indeed an issue, this does not reasonably excuse the absence of any sort of reply from the LPA for over four months to the initial meeting requested in December 2020 – for example a courtesy e-mail to explain that a meeting could not be held for a period time due to resource issues.

21. For the Council to then claim (based on this incorrect statement) that *'the agent, landowner, and tenants were being conceitedly obstructive'* is both highly disappointing and unacceptable, particularly when the facts of the actual correspondence relating to these matters are analysed: i.e. the appellant was pro-active in trying to arrange a meeting, but this was not reciprocated by the Council.

22. With regard to the second PCN; the complaint by the agent and the claim that this was a stalling tactic on behalf of the appellant again, the opposite is the case. As detailed in Appendices A and K of this costs application, two offers of a meeting were

sent to the LPA by the appellant's agent, which were not responded to by the Council for four and two month periods respectfully.

23. Although the Council had been at fault in not responding to these requests in a timely manner, the Council then served the PCN out of the blue. In other words, rather than admitting its own tardy behaviour, it chose to damage relations between the parties by issuing a PCN without further reference to the appellant (and no further responses regarding arranging a meeting have been received since).

24. It is a matter of fact that the Council did not lawfully serve a PCN notice and as such, the appellant was not legally obliged to respond. To then accuse the appellant of a *'blatant attempt to withhold information'* is incorrect and highly objectionable. Indeed, if the Council was confident it had in fact lawfully issued a PCN, it was open to them to prosecute the appellant under Section 171D of the T & CP Act. However the Council did not do this. Moreover, once a correct PCN notice had been served (8 months later), the appellant duly responded within the requisite 21 days.

25. In conclusion, the appellant is deeply saddened that the Council is now resorting to factually incorrect and derogatory assertions about the appellant's conduct. The appellant can only speculate as to whether or not this is a somewhat desperate attempt to distract from their own calamitous (and entirely avoidable) failings in this case, however we strongly maintain the view that the costs application as set out should be upheld in full.

My assessment

26. Clearly the early communications between the Council and the appellant's agent were difficult and strained, but it is evident that, initially, the Council acted due to a complaint (seemingly bases on the level of noise) being made about the use being carried out at the appeal site. It is difficult, however, to understand why the Council's enforcement team seemed to consider that a change of use had taken place from what was alleged by the complainant (a builder's yard) to what was being carried out at the premises. This is all the more puzzling since the Council must have had somewhere on its records that a LDC had been granted for a Class B2 (General Industrial) use of the premises.

27. I agree with the view put forward on behalf of the appellant that the issuing of the TSN was unreasonable. If the records had been checked properly, before its issue, then the Council might not have considered it expedient to issue a TSN and could have decided simply to issue the enforcement action at that time in the form of the notice eventually issued. That is, against the alleged change of use of the land to one of a mixed usage of repair of motor vehicles (B2 General Industrial) and a Sui Generis use for the undertaking of horsebox conversions and the related fabrication of motor vehicles.

28. Although references have been made to the Planning Contravention Notices (PCNs) I have not seen any details of the first notice (which is alleged not to have been complete) and nor have I seen the detailed reply from the appellant in response to the second PCN. It seems to me, therefore, that the exact details in the early stages of the negotiations relating to the use of the premises have not been made clear. It is evident that the Council issued a TSN unreasonably on the basis of a use which was not being carried but it is not clear to me why the first PCN was incomplete and, as indicated above I have not had sight of the response to the second PCN.

29. There is no appeal against a TSN and the appeal before me (made on grounds (c) and (g)) resulted from the eventual issuing of the EN when the Council considered it was expedient to do so. Despite the earlier unreasonable behaviour in issuing the TSN, the EN was clearly issued on the basis that the use as being carried out (conversion of vans to horseboxes) was materially different to that which was allowed under the terms of the 1999 LDC. In my appeal decision I have disagreed that this was the case. However, the Council was entitled to make a planning judgement and to take this decision. On the basis of that judgement it was then entitled to reach a conclusion that it was expedient to take enforcement action. The appellant was then equally entitled to appeal.

30. I acknowledge the Appellant's concerns about the strength of the Council's evidence in responding to the ground (c) appeal. However, it is evident from the Council's appeal statement that their case was made on the basis that the operations being carried out at the premises did not fall under the Class B2 authorised use.

31. The Council argued that the operations are not typical of a traditional motor vehicle repairs/MOT testing centre and, therefore, that the activities fall under Use Class 'Sui-Generis' and that the breach of planning control cited in the EN has occurred as a matter of fact and degree. In particular the Council referred to an increase in noise as not being typical of a traditional motor vehicle repairs/MOT testing centre. Again this was a matter of planning judgement and a conclusion which the Council was entitled to reach based on complaint(s) they had received. I do not, therefore accept the appellant's contention, therefore, that the Council should not have reached a conclusion that it was not expedient, in the public interest' to issue the EN.

32. Whilst fully understanding the appellant's frustration and dismay about the issuing of the TSN, in my view, the overall situation must be considered in two distinct phases. The first comprising the initial complaint, the issuing of the TSN and the PCNs and the second the Council's decision to consider it expedient to serve the EN, followed by the appellant's appeal which I have dealt with in the appeal decision.

33. On behalf of the appellant these two phases have been conflated, whereby it is contended that the underlying rationale for the service of the EN was wrong in law, and secondly, that there was also no material planning justification for serving the EN It is also contended that the LPA pursued a misconceived and hopeless case and that this appeal, and its associated costs, were entirely unnecessary.

34. Having considered the overall situation I do not agree that the appeal was unnecessary. The arguments relating to the LPA's handling of the TSN and the contention that they had had numerous opportunities to reconsider their opinion and their position (prior to issue of the EN) are not, in my view, directly related to loss of unnecessary expense in the appeal process before me.

35. I have agreed that the LPA acted unreasonably in issuing the TSN but, despite the arguments put forward by the appellant, I do not consider that any expense in relation to this can be appropriately recovered through this costs application. In my view the application for costs can only relate directly to any unreasonable behaviour and loss of unnecessary expense in the appeal process. I consider that this commenced once the EN was issued against the alleged change of use. Once the EN had been served and the appeal had been submitted it was inevitable that the appeal would proceed.

36. I sympathise with the appellant's position regarding the situation with the TSN and the LPA's delays in dealing with the case. However, if it is considered that the Council's actions (whether unlawful or not) resulted in loss of earnings and any related planning and legal advice, then this would be a separate matter between the appellant and the Council. The same is also the case if it is considered that the Council acted unreasonably in terms of its administrative processes and/or the alleged non co-operation with the Appellant or his agents prior to the issuing of the EN.

Conclusion

37. For the above reasons and in conclusion on this application for costs, I do not consider that the Council's actions have led to unnecessary loss and expense in this appeal process for the appellant.

Formal Decision

38. The application for an award of costs is refused.

Anthony J Wharton

Inspector