
Costs Decision

Site visit made on 12 April 2022

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 May 2022

Costs application in relation to Appeal Ref: APP/A3655/C/21/3279487 Land at Kemishford Farm, Smarts Heath Lane, Woking

- The application is made under the Town and Country Planning Act 1990 (1990 Act), sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Ms Christy Jackson for a full award of costs against Woking Borough Council.
 - The appeal was against an enforcement notice alleging, without planning permission, the erection of two brick walls, pillars and iron gates, the erection of a closed boarded fence and the construction of hardstanding.
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Decision: the application succeeds in part, and a partial award of costs is made

1. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only 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 Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against a local planning authority. These examples include failure to produce evidence to substantiate each reason for refusal on appeal and not reviewing their case promptly following the lodging of an appeal against refusal of planning permission.
2. The essence of the appellant's case is that the appeal as a whole was pursued unreasonably¹. The appellant indicates that no Planning Contravention Notice (PCN) was served on the appellant to establish the facts relating to the alleged breaches. The appellant also contends that at no time did the Council attempt to establish the timing of events enforced against, or the lawful use of the site. The appellant maintains that no evidence was produced to support the Council's case, and that the Council failed to understand the area where the hardstanding was alleged was agricultural land, subject to permitted rights provided by the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). The appellant considers that the Council failed to take into account the fallback position available to her through the exercise of GPDO rights. The appellant also considers that the Council has been punitive in framing the requirements of the notice.

¹ I have taken that wording directly from the appellant's claim for costs. The Council does not, of course, lodge the appeal and I have therefore taken that wording to mean by the actions of the Council unreasonably forced the appellant into making the appeal.

3. I will address all of these points in turn, taking the Council's response into account as I do.
4. The service of a PCN is discretionary on the part of the Council. In this case, the breach of planning control involved only operational development. No material change of use of the land is alleged in the notice. In those circumstances, whilst the service of a PCN might have been prudent, the Council did not act unreasonably by not serving one.
5. The corollary of not serving a PCN, and the reason why serving a PCN might have been prudent, is that the Council has completely misunderstood the relevant timeline in relation to the erection of the close-boarded fence and the hardstanding. The Council first received a complaint about the walls, pillars and fence on 20 November 2017, at which time the development was still in the process of being erected (and therefore not substantially complete). It seems that the erection of the close-boarded fence and the hardstanding were 'tacked on' to the breach of planning control alleged in the notice without due consideration of the relevant facts.
6. In making her appeal, the appellant has been entirely forthcoming with evidence that the fence was erected in April 2017. I have no reason to believe that the appellant would have been any less forthcoming if she had been approached back in November 2017, either through the service of a PCN or other less formal means of contact. The same applies to the hardstanding, albeit the timeline for that is more difficult to pin down.
7. Moreover, for reasons that the Council does not explain, having received the complaint and visited the site in November 2017, the notice was not issued until 22 June 2021. Had the notice been issued more promptly, even as late as March 2021, the fence would not have become immune from enforcement. There would have been no ground (d) open to the appellant in relation to the fence, and the appeal in that regard would not have succeeded on any ground. In the event, the notice was issued too late and by that time the fence had become immune from enforcement action.
8. The unreasonable behaviour of the Council was, therefore, not in failing to serve a PCN per se: the unreasonable behaviour was in not carrying out due diligence in investigating the complaint received in November 2017 and then issuing the notice in the light of the relevant facts. It therefore seems to me that an appeal in relation to the fence and hardstanding could have been completely 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. Although not specifically identified in the PPG as one of the specific examples of behaviour where a local planning authority might be at risk at an award of costs, the PPG makes it clear the list of examples there is not exhaustive. I take the view the Council did act unreasonably in this respect.
9. For the reasons set out in my Decision, I do not consider that the Council acted unreasonably in taking the view the use of the land was not for agriculture. It follows that the Council cannot be said to have acted unreasonably in adopting the position it did in relation to permitted development rights for agriculture set out in the GPDO. Similarly, I make no criticism of the Council in relation to the fallback position available to the appellant: indeed, in that respect it seems to me that it is the appellant who has misinterpreted the applicability of the fallback position in this situation.

10. I do not accept the appellant's suggestion that the Council was being punitive in framing the requirements of the notice. It is essential to understand the purpose of a notice. In that respect, Section 173(4) of the 1990 Act sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. As set out in my main Decision, in summary these purposes are (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach. With these purposes in mind, the Council was perfectly entitled to require the removal of the brick walls, pillars and iron gates as the only means of restoring the land to its condition before the breach took place, and thereby remedying the breach of planning control that has occurred. It cannot be said to have acted unreasonably in so doing.
11. The Council is also correct in stating at paragraph 7.1 of its Appeal Statement that permitted development rights cannot be applied retrospectively. Consequently, I make no criticism of the Council for not seeking to negotiate a reduction in the height of the brick walls, pillars and iron gates. That of course does not prevent the appellant from exercising her rights under the GPDO once the notice has been fully complied with if she so chooses. But the Council did not act unreasonably in failing to negotiate a reduction in the height of the brick walls, pillars and iron gates.
12. I find that the Council has acted unreasonably in the context of the guidance in the PPG, but only in relation to the appeal made on grounds (c) and (d) in relation to the close-boarded fence and the hardstanding. Those developments should never have formed part the notice and the appellant should not have been obliged to appeal against them. It is evident that the appellant has incurred unnecessary or wasted expense in the appeal process as a direct result of that unreasonable behaviour, in terms of producing written evidence in relation to the appeals on grounds (c) and (d). An award of costs is justified to that limited extent.

Costs Order

13. 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 Woking Borough Council shall pay to Ms Christie Jackson, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in preparation of the appeals made on grounds (c) and (d) specifically in relation to the close-boarded fence and the hardstanding; such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to Woking Borough 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.

Paul Freer
INSPECTOR