



Costs Decision

Site visit made on 12 October 2022

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 9 May 2023

Costs application in relation to Appeal Ref: APP/P4225/C/22/3297999 Land known as 415 Birch Road, Wardle OL12 9LH

- 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 Edward Smethurst, Prosperity Law, for a full award of costs against Rochdale Metropolitan Borough Council.
 - The appeal was against an enforcement notice alleging that condition 5 of planning permission ref: 19/00536/FUL has not been complied with and the nursery is operating in breach of the condition because the premises are in use as a nursery and the approved car parking as required by planning condition has not been provided.
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Decision

1. The application for a full award of costs is refused.

Reasons

2. The Planning Practice Guidance (the Guidance) 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 process¹.
3. Unreasonable behaviour in the context of an application for an award of costs may be either: procedural – relating to the process; or substantive – relating to the issues arising from the merits of the appeal².
4. The Guidance confirms that although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviour and actions at the time of the planning application can be taken into account in the Inspector's consideration of whether or not costs should be awarded³.
5. The applicant submits that the Council has acted unreasonably throughout. In summary, this includes, issuing the Enforcement Notice (the notice) when the applicant has complied with condition 5 as drafted and had done so prior to the property's use; failing to provide evidence to support the decision to issue the notice; inclusion of requirements in the notice which exceed what is necessary to remedy the breach and go beyond the scope of condition 5; inclusion of language in the notice which is inflammatory with potential to cause prejudice; failing to invite consideration of the complaints and alleged evidence; failing to utilise other powers before resorting to enforcement action; failing to issue a breach of condition notice rather than an enforcement notice; and failing to

¹ Planning Practice Guidance, Paragraph: 030 Reference ID: 16-030-20140306.

² Planning Practice Guidance, Paragraph: 031 Reference ID: 16-031-20140306.

³ Planning Practice Guidance, Paragraph: 033 Reference ID: 16-033-20140306.

respond to an Environmental Information Regulations request (the EIR request). Whilst not in the application for costs, in their statement the applicant also highlights the length of time it took the Council to determine the original application and that the requirement for parking spaces was added very late in the process.

6. The Guidance advises that an enforcement notice should only be issued where the local planning authority is satisfied that it appears to them that there has been a breach of planning control and it is expedient to issue a notice, taking into account the provisions of the development plan and any other material considerations⁴. As part of this process the local planning authority must carry out adequate prior investigation. The local planning authority is at risk of an award of costs if it is concluded that 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 accurate⁵.
7. The parties' evidence includes reference to an 'investigation' by the Council's Enforcement Officers prior to issuing the notice. From the information before me, I have no reason to question its adequacy. Moreover, as set out in my main decision and the appeal on ground (c), I have agreed with the Council and found that the matters stated in the notice do constitute a breach of planning control. On this basis, the Council has not acted unreasonably.
8. Having regard to section 173 of the 1990 Act as amended and the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002, the Council is required, amongst other things, to specify the reasons why they consider it expedient to issue the notice. However, there is no requirement to provide 'evidence' to support the decision to issue the notice as part of the notice itself. As such, I am not persuaded that the Council has demonstrated unreasonable behaviour in this respect.
9. As set out in my main decision and the appeal on ground (f), given the purposes of the notice and bearing in mind that an alternative option is provided, I do not consider that the requirements of Option A to exceed what is necessary. Moreover, this approach is accepted and endorsed by the appeal decision cited by the Council⁶. The Council has, therefore, not behaved unreasonably in this respect.
10. In my main decision and the appeal on ground (f), I have acknowledged that the use of the words 'in strict accordance' as opposed to 'in accordance', is not in line with the requirements of condition 5 as worded in the consented planning permission⁷, and I have varied the notice accordingly. Nonetheless, I do not consider that, of itself, the inclusion of the word 'strict' in Option B(i) constitutes unreasonable behaviour on the Council's part, and there is nothing before me which demonstrates that it has led to any unnecessary or wasted expense at the appeal.
11. Whether the content and tone of the language used by the Council in the notice is inflammatory or prejudicial to the applicant is a subjective judgement, and not one for me to make as part of an assessment of whether the Council has behaved unreasonably on substantive or procedural grounds.

⁴ Planning Practice Guidance, Paragraph: 018 Reference ID: 17b-018-20140306.

⁵ Planning Practice Guidance, Paragraph: 048 Reference ID: 16-048-20140306.

⁶ Council's Appeal Statement, Appendix 4: Appeal Decision Ref: APP/J2373/C/14/2225020.

⁷ Application Ref: 19/00536/FUL.

12. There is no evidence before me which demonstrates that the Council concealed or deliberately withheld any relevant information during the applications for the original permission, the applications to remove or vary condition 5 or the investigation prior to issuing the enforcement notice; and in doing so failed to give the applicant opportunity to comment. Therefore, I am unable to conclude that the Council acted unreasonably in this regard.
13. The Guidance confirms that local planning authorities have responsibility for taking whatever enforcement action may be necessary, in the public interest, in their administrative areas⁸. There is a range of ways of tackling alleged breaches of planning control. Provided that any action is proportionate to the breach of planning control to which it relates and taken when it is expedient to do so, it is at the Council's discretion what form of enforcement action is taken. Consequently, and mindful of the 'investigation' prior to issuing the notice, that the Council did not issue a planning contravention notice or did not issue a breach of condition notice rather than an enforcement notice, does not amount to unreasonable behaviour.
14. The Council failed to respond to the EIR request by the applicant. No reason for this is provided by the Council. Nonetheless, I am mindful that the EIR request is outwith the planning application and appeal process and so not within the remit of my considerations in determining this application for costs.
15. The original application was submitted on 29 July 2019 and determined on 30 October 2019. No details have been provided as to when the comments from Highways and Engineering were submitted. Whilst the decision notice was issued approximately 4 weeks after the 8 week statutory deadline, this is a fairly short delay and, of itself, does not indicate unreasonable behaviour by the Council.
16. Overall, there is nothing before me which robustly demonstrates that the Council has not followed the correct procedures or that it has gone beyond its statutory function in undertaking the enforcement action that it has. As such, I consider that the Council has behaved reasonably and that unnecessary or wasted expense in the appeal process has not been incurred by the applicant.

Conclusion

17. Therefore, unreasonable behaviour resulting in unnecessary or wasted expense has not occurred and an award of costs is not warranted.

F Cullen

INSPECTOR

⁸ Planning Practice Guidance, Paragraph: 002 Reference ID: 17b-002-20140306.