
Costs Decision

by Thomas Shields MA DipURP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 28 August 2018

Costs application in relation to Appeal Refs:

Appeal A: APP/E0535/C/17/3190818, 3190819

Appeal B: APP/E0535/C/18/3203601, 3203602, 3203603

Withdrawn Appeal: APP/E0535/C/17/3190824, 3190825

Land at East Anglian Resources Ltd, Unit 1, Benwick Road Industrial Estate, 35 Benwick Road, Whittlesey, Cambridgeshire PE7 2HD

- The application is made under the Town and Country Planning Act 1990, sections 78, 322A and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Bobby Tribe and Mr James Tribe (East Anglian Resources Limited) and Mr Andrew Millar for a full award of costs against Cambridgeshire County Council
 - The application is in connection with appeals against enforcement notices issued by the Council in respect of non-compliance with condition No. 6 of planning permission Ref: F/2008/16/CW and condition No. 5 of planning permission Ref: F/2009/16/CW.
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Decision

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

The application

2. The application for costs and the positions of both parties are set out in their written submissions and need not be repeated here.

Reasons

3. Irrespective of the outcome of an appeal the National Planning Practice Guidance (2014) (PPG)¹ advises that costs may only be awarded where a party has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
4. Unreasonable behaviour may be in respect of procedural matters, in relation to the process, or substantive matters relating to the issues arising from the merits of the appeal.
5. The applicants seek a full award of costs in respect of both procedural and substantive matters.

¹ Paragraph 030 ref 16-030-20140306

Substantive matters

6. Two enforcement notices (EN1 and EN2) were issued in November 2017. The Council's identical reason for issuing each of the notices is set out within them at Section 4. One of those notices (EN2) was later withdrawn during the appeal process following the issue of a third notice (EN3) issued in May 2018.
7. As far as substantive matters are concerned the Council's reason for issuing each of the notices was the same. It related to harm to the residential amenity of occupiers of nearby residential properties resulting from HGV movements outside of permitted hours, as described in the alleged breach of planning control at Section 3 of each notice.
8. As set out in the related appeal Decision, it has been determined that no further action is taken regarding the applicants' appeals. Hence, the detailed merits of the evidence submitted by the Council and the appellants in respect of each ground of appeal have not been considered. However, as part of the appeal process the Council in making its case is required to produce evidence to substantiate its reasons for issuing the notices. Such evidence should not be based on vague, generalised or inaccurate assertions unsupported by any objective analysis.
9. With regard to the applicants' immunity assertion that 'Yard 2' was not covered by the planning permissions and had been operating as a HGV yard for in excess of 10 years, I am mindful of the fact that for all of the legal grounds² of appeal the burden of proof, tested on the balance of probability, lies with the appellants and not the Council. In terms of the Council's own evidence, they submitted a comprehensive Statement of Case, a Proof of Evidence and numerous appendices in the form of documents and photographs. It includes evidence obtained from third parties as well as evidence gathered from investigation by the Council's officers.
10. Notwithstanding that the applicants dispute the veracity and quality of the Council's evidence, I consider that taken as a whole it substantiates the reasons for issuing the enforcement notices, and is very far from being vague or generalised, or that it is based on inaccurate assertions unsupported by any objective analysis.
11. For these reasons I find that unreasonable behaviour has not been demonstrated with regard to substantive matters.

Procedural matters

12. The applicants refer to a number of matters which I summarise as follows:-
 - (i) Failure to engage with the applicants
 - (ii) Inadequate investigation and expediency
 - (iii) Issue of enforcement notice EN3 and withdrawal of notice EN2
 - (iv) Lawfulness of the enforcement notices subject of the appeals/failure to withdraw them
13. These matters are addressed in the same order in the following paragraphs.

² Grounds (b) (c) (d) and (e)

(i) *Failure to engage with the applicants*

14. The applicants allege³ that the Council's officer failed to engage with them and their representatives, and failed to provide information to them on various occasions. Also that no opportunity was offered to resolve the issues in dispute other than by way of proceeding to appeal.
15. However, there is no convincing evidence before me which demonstrates that the Council failed to engage properly with the applicants. There is also no evidence of the particular information referred to that the applicants say they sought from the Council, and which was not provided, such that it would demonstrate unreasonable behaviour resulting in unnecessary or wasted expense in the appeal process.
16. Additionally, it is not clear to me what alternative opportunities may have resolved the issues in dispute between the parties, particularly given the Council's position that there was a breach of planning control and they sought a prompt remedy to the alleged harm to amenity. In such circumstances I can find no procedural error or unreasonable behaviour by the Council in issuing the enforcement notices. The correct procedure for challenging the notices was by way of appeal as has been the case.

(ii) *Inadequate investigation and expediency*

17. As I have described previously, the Council's evidence included a fully detailed Statement of Case, a Proof of Evidence and numerous appendices in the form of documents and photographs. It incorporates evidence obtained from third parties as well as evidence gathered from investigation carried out by the Council's officers. That includes the issue of a Planning Contravention Notice and records of emails and telephone conversations with EARL.
18. Given the accumulation of evidence from the Council it seems to me that they carried out a reasonable investigation in response to complaints they had received. While I acknowledge that the applicants dispute the findings and outcome of the Council's investigations, I am unable to reach a conclusion that it was inadequate, or that further investigation would have led to the appeals being avoided.
19. Given the nature of the alleged breaches of planning control and resulting harm to amenity, together with the investigation of the matter that the Council has evidenced, it appears to me that the issue of the enforcement notices was a logical and expedient course of action for the Council to take. However, that notwithstanding, case law⁴ has established that there is no jurisdiction for an Inspector to determine whether or not a local planning authority has complied with its obligation in terms of exercising expediency when issuing an enforcement notice. That is a matter which can only be challenged through the Courts by way of a Judicial Review.

(iii) *Issue of enforcement notice EN3 and withdrawal of notice EN2*

20. The applicants hold the view that notice EN2 was issued without proper authorisation, and refer to the time spent in their consideration of this matter and their related correspondence. The Council, although they withdrew notice

³ Paragraph 6.3.2 of Appellants Statement of Case

⁴ *Britannia Assets v SSCLG & Medway Council* [2011] EWHC 1908 (Admin)

EN2, maintained their position that it did have such proper authority for its issue.

21. The question of whether the Council had such proper authority may or may not have led to the quashing of notice EN2, but given that it was withdrawn it ceased to be a matter to be determined with regard to the appeals.
22. That aside, for the purposes of this application for costs, and taking the applicants' best case scenario, the following factors are relevant. Enforcement notice EN3 duplicated notice EN2 in all respects other than being issued at a later date. Hence it raised no new grounds of appeal or arguments beyond those already advanced in respect of EN2. Therefore, even if it had been determined that EN2 was issued without proper authority, I consider that the amount of time spent on this matter by the applicants' representatives is negligible in the context of the appeals taken as a whole. If anything, the withdrawal of EN2 following the issue of EN3 reduced the overall amount of time that would have been expended by the applicants at the scheduled Inquiry.

(iv) Lawfulness of the enforcement notices subject of the appeals/failure to withdraw them

23. The Inspectorate communicated to both parties that the appeal Inquiry was scheduled to take place after the relevant planning permissions expired, and hence the conditions alleged to be in breach would no longer be capable of compliance or enforcement. Thus, from 30 June 2018, the notices no longer had any effect. Given these circumstances the parties were invited to either withdraw the appeals, or to withdraw the notices. In the event neither party did so.
24. Although an enforcement notice may no longer have any effect, there is no legal requirement for it to be withdrawn by the local planning authority. Not doing so does not therefore amount to unreasonable behaviour.
25. That no further action was taken on the appeals does not prevent the applicants from applying, should they wish to do so, for a Certificate of Lawful Development to establish that either before or at the date the notices were issued the use of the land referred to as 'Yard 2' was lawful as a HGV Yard due to the passage of time (10 years). Such an application should be made to the Council in the first instance.

Conclusion

26. For these reasons I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Thomas Shields

INSPECTOR