The Planning Inspectorate

Costs Decision

Hearing Held on 29 October 2019

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 November 2019

Costs application in relation to Appeal Ref: APP/V2255/C/18/3203175 Land at Brotherhood Wood Yard, Gate Hill, Dunkirk, Faversham, Kent ME13 9LN

- 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 Joe Robb for a full award of costs against Swale Borough Council.
- The hearing was in connection with an appeal against an enforcement notice alleging, without planning permission, the change of use of woodland to an extension of the Brotherhood Woodyard gypsy and traveller site; the raising of ground levels; and the erection of fencing and double gates enclosing the land.

Decision: the application is refused

The submissions for Mr Joe Robb

1. The enforcement notice issued by the Council was found to be defective, both in terms of the identification of the land to which the notice relates and the breach of planning control that was alleged. Those defects resulted in the enforcement notice being withdrawn at the Hearing. The notice was defective from the outset and, despite being invited on several occasions to withdraw the notice by the applicant's professional representatives, the Council nevertheless chose to proceed with the Hearing. Having regard to the criminal sanctions that follow if an enforcement notice is not complied with, it is incumbent upon the Council to draft the notice correctly. The Council failed to do that and, together with the refusal to withdraw the notice prior to the Hearing, this amounts to unreasonable behaviour. That unreasonable caused the applicant to incur unnecessary and wasted expense, such that a full award of costs in justified.

The response by Swale Borough Council

2. The Council issued the enforcement notice against a flagrant breach of planning control. The Council accepts that the wording of the notice could have been clearer, but believed that the notice could have been corrected without causing injustice. The notice was found to be defective on two points: the description of the breach of planning control, and the plan attached to the notice. In terms of the latter, the Council sought to correct the plan and cited the legal precedent to the effect that a plan can be corrected to increase the land subject to the notice provided that no injustice is caused[1]. In relation to the

[1] *Howells v Secretary of State for Communities and Local Government* [2009] EWHC 2757 (Admin)

description of the breach of planning control, this was not a point initially made by the applicant: it was a point raised by the Inspector at the Hearing, which the applicant then seized upon. The Council withdrew the notice promptly once it became apparent that the notice was defective and could not be corrected. The Council therefore acted reasonably in the circumstances. In the alternative, should the Inspector disagree, then a partial award of costs should be made only in relation to the ground (a) appeal.

Reasons

3. The Planning Practice Guidance 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 where an appeal against an enforcement notice could have been avoided by more diligent investigation that would have avoided the need to serve the notice in the first place, or ensured that it was accurate.

4. I concur with the Council that the applicants claim for an award of costs should be considered in two parts: the breach of planning control alleged in the notice, and the plan attached to the notice. It is convenient to consider the latter in the first instance.

5. I have considerable sympathy for the Council in terms of attempting to define the area subject to the notice. As I understand it, the Council initially arrived at the dimensions of the 'red line' depicted on the plan attached to the notice by reference to plans submitted by the applicant with planning application SW/13/0137. The 'red line' for that planning application was based upon a survey drawing completed in 2010 ("the original survey"). In that context, the 'red line' shown on the plan attached to the notice correlates very closely with the original survey.

6. As it subsequently transpired, and as shown on a later survey drawing produced by the Green Planning Studio in 2018 on behalf of the applicant, the area of land occupied by the Brotherhood Wood Yard gypsy and traveller site ("the Permitted Site" referred to in paragraph 3 of the notice) clearly does not correlate with the plans submitted with that planning application. Two points flow from this.

7. Firstly, as the applicant's original agent pointed out, the corollary is that an area of the gypsy and traveller site as existing does not have the benefit of planning permission (or, in the alternative, the planning permission as a whole has not been implemented correctly). I will return to the consequences of that below in relation to the breach of planning control that is alleged.

8. For present purposes, the salient point is that the original survey upon which the Council relied was inaccurate. In my view, the Council cannot be criticised or found to have acted unreasonably for relying upon inaccurate plans previously provided by the applicant himself when drawing up the plan attached to the notice.

9. I pause here because I recognise that, in accordance with the Planning Practice Guidance, the indication by the applicant's agent that an area of the gypsy and traveller site does not have the benefit of planning permission should have prompted a review by the Council of its own case. One course of action that the Council could have considered, and which was advocated by the applicant's representatives, would have been to withdraw the notice at that point. However, the Council was consistent in its view that the plan attached to the enforcement notice could have been corrected, notwithstanding that the area subject to the notice would have increased. In that context, the Council relied on the judgment in *Howells* which, in my view, it was correct to do.

10. Having regard to the judgment in *Howells*, the only matter for me at the Hearing was therefore whether correcting the plan attached to the notice would have caused injustice. I am entirely satisfied that the applicant would not have been caused injustice had I corrected the notice to embrace the larger area shown in the later survey. I would, upon reflection, have had to consider carefully whether the Council itself would have been caused injustice in terms of effectively 'under-enforcing' against the area of the existing gypsy and traveller site that does not have the benefit of planning permission. However, as a matter of principle, the Council was entitled to adopt the position it did in believing that the plan attached to the notice could be corrected and therefore did not act unreasonably.

11. My main difficulty with the plan attached to the notice is in relation to the hatched area(s). It is clear from the Council's evidence, and as expanded upon at the Hearing, that the Council is only seeking to take action against the breach of planning control alleged to have occurred in the area at the south-west corner of the land, shown hatched on the plan attached to the notice. The problem is that this hatched area is not referred to in paragraph 2 of the notice, which purports to identify the land to which the notice relates. That is a clear defect with the notice.

12. The Council sought to address that defect by pointing out that the "Permitted Site" is a clearly defined rectangular shape, such that the land to which the notice relates would have been obvious to the recipient of the notice. There is, I accept, some logic to the Council's position in this respect. The Council also explained it had been in discussion with the applicant prior to the notice being issued, and that the recipient was therefore already well aware of the area to which the notice relates when he 'opened the envelope'.

13. It is a fundamental principle that an enforcement notice must be read as whole, both in terms of the written part of the notice and the plan attached to it. In this case, paragraph 2 of the notice is very clear is stating that the land to which the notice relates is that edged in red on the attached plan. In the absence of any reference to the hatched area, the recipient of the notice was entitled to draw the conclusion that the breach of planning control alleged was intended to relate to the all the land edged in red. That had consequences for the recipient's understanding of the breach of planning control alleged as well as the grounds of appeal upon which he chose to mount his defence.

14. The situation is not helped by the fact that plan attached to the notice shows three different parcels of land edged in red. One of those parcels is the hatched area. To complicate matters even further, there is a second and unexplained hatched area shown in the central part of the part of the land.

15. For all these reasons, the plan attached to the notice is fundamentally flawed and I would not have been able to correct it without causing injustice to the applicant. However, that does not necessarily mean that the Council acted unreasonably. The plan was in error but the Council steadfastly maintained its position that the plan was sufficient to identify the land to which the notice relates and could be corrected without causing injustice. There is, as indicated above, a certain logic to the Council's position and, whilst I ultimately took a different view, that was not an unreasonable stance to take.

16. Turning now to the breach of planning control alleged in paragraph 3 of the notice, I note firstly that this was not a point initially made by the applicant but was a point that I raised myself at the Hearing. The key point, and one which the applicant's representative at the Hearing did clearly make, is that paragraph 3 of the notice must be read in conjunction with the plan attached to the notice. As indicated above, paragraph 2 of the notice is very clear in stating that the land to which the notice relates was that edged in red on the attached plan. The applicant was entitled to take the view that this was the whole of the land edged in red and therefore including the Permitted Site. This in turn influenced the grounds upon which the applicant made his appeal as well as the manner in which those grounds of appeal were framed.

17. At the Hearing, the Council again steadfastly maintained its position that the breach of planning control alleged in the notice is clear. In particular, the Council pointed to the wording at the end of paragraph 3 which indicates that the matters stated relate 'beyond the boundaries of the site as approved under planning ref: SW/13/0137 ("the Permitted Site"). This, the Council suggested, clearly indicated that the breach could only have related to the hatched area shown on the plan attached to the notice, and not all of the land edged in red. The Council again took the view that any defect in the notice could be corrected without causing injustice.

18. I do not concur with the Council in that respect. There is an inherent contradiction in stating that the notice relates to all the land in edged in red in paragraph 2 of the notice and then suggesting that it only relates to a part of that land that was not then specifically identified in that paragraph. Moreover, for the reasons explained at the Hearing, the breach of planning control stated at paragraph 3(1) of the notice does not actually allege any development for the purposes of Section 55(1) of the 1990 Act and cannot stand. It was not possible for the recipient of the notice to understand from that description what the breach of planning control alleged actually was. The notice could not be corrected in either of these respect without causing injustice insofar, as was indicated at the Hearing, the applicant would have made his case differently had he fully understood the breach of planning alleged in the notice and the land to which the notice relates.

19. Nevertheless, that does not necessarily mean that the Council acted unreasonably in the context of the Planning Practice Guidance. The Council had drafted a notice which it considered clearly set out the breach of planning control that it sought to attack. The Council, quite fairly, conceded at the Hearing that the wording of the notice could have been clearer but genuinely considered that any defects within it could be corrected. Although I ultimately took a different view, the Council defended its position with clearly presented and cogent arguments that had a certain logic to them. I find nothing unreasonable in that.

20. Overarching all of the above is the fact that the Council did promptly withdraw the enforcement notice once the defects within it had been explored at the Hearing and it became apparent that the notice could not be corrected. In my view, that was an eminently sensible and reasonable approach to take, and one that is entirely in keeping with good practice as set out in the Planning Practice Guidance.

21. I take the applicant's point that it is incumbent upon the Council to draft the notice correctly and that, on this occasion, the Council failed to do that. However, it is apparent that in this case the situation on the ground is somewhat fluid and complex, and that information previously provided to the Council was ultimately found to be inaccurate. In these circumstances, I am not persuaded that this is a situation where an appeal could have been avoided by more diligent investigation on the part of the Council to ensure that the notice was accurate. Given, then, that an appeal against that notice was necessary, I find overall that the Council did not act unreasonably in defending its position in the appeal proceedings or by not withdrawing the notice when invited to do so by the applicant.

22. In conclusion, I find that the Council has not acted unreasonably. It follows that an award of costs is not justified in this case.

Paul Freer

INSPECTOR