The Planning Inspectorate

Costs Decision

Hearing held and site visit made on 7 October 2014

by Alan Woolnough BA(Hons) DMS MRTPI

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

Decision date: 17 November 2014

Costs application in relation to Appeal Ref: APP/Q1445/C/13/2208935
21 Rowan Avenue, Hove, East Sussex BN3 7JF

- 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 Mrs Jessica Yates for a full award of costs against Brighton and Hove City Council.
- The Hearing was in connection with an appeal against an enforcement notice alleging: 'Without planning permission to *[sic]* change of use from residential to a mixed use for residential and dog breeding'.

Formal Decision

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

The Submissions for Mrs Yates

2. A full award of costs is sought by Mrs Yates against the perceived unreasonable behaviour of the Council in issuing the subject enforcement notice and defending it on appeal. The Applicant makes no reference to the costs guidance contained in the DCLG's Planning Practice Guidance (PPG) or the costs circular[1] it has replaced. Nonetheless, I have had regard to the PPG in determining the application.

3. The costs application was made primarily in writing prior to the Hearing (in the Applicant's 'grounds of appeal' letter dated 14 November 2013 and, subsequently, in section 4 of her Hearing statement). That being so, I need summarise only the supplementary and final comments made orally at the Hearing itself, as follows.

4. There are so many inconsistencies in the Council's case and its approach to the enforcement notice that confusion has arisen over various matters. This also applies, to an extent, to the Council's representations at the Hearing. Indeed, local residents have expressed concern that the Council is not acting in their best interests.

5. The Council implies that its planners have pursued this case on behalf of environmental health. However, the environmental health officer's notes suggest that there was no basis for environmental health to take action. The corporate approach seems to be that 'any which way' of preventing the breeding of dogs at the appeal property is acceptable. An award of costs

[1] Circular 03/2009: The award of costs in planning and other proceedings, cancelled on 6 March 2014.

relating to unreasonable behaviour in pursuing enforcement action and the content of notice itself is therefore justified.

The Response by the Council

6. The nature of the breach of planning control is complex, to the extent that it has warranted a full day of discussion at the Hearing. The case was referred to the Council's planning officers by environmental health colleagues, for whom it had been a longstanding issue. The Council's general approach to taking planning enforcement action has thus been founded on, amongst other things, the research of environmental health and the Applicant's response to the Council's Planning Contravention Notice.

7. Much reference has been made to the specifics of the enforcement notice and its particular requirements. However, the notice was based in part on an appeal decision relating to a case elsewhere, where an enforcement notice framed in similar terms was upheld by the Inspector[2]. The Council has not therefore behaved unreasonably in pursuing enforcement action and unnecessary or wasted expense has not been incurred.

Reasoning

8. The PPG advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party applying for costs to incur unnecessary or wasted expense in the appeal process.

9. As part of the costs application the Applicant has challenged the expediency of issuing the enforcement notice. However, expediency is dependent on whether the alleged breach of planning control is harmful in planning terms to interests of acknowledged importance, yet no argument to that effect has been made on the Applicant's behalf by means of an appeal against the notice on ground (a). In the absence of a ground (a) case, I have not been able to assess the planning merits of the subject use and examine matters such as whether the consequences of dog breeding *per se*, as distinct from the keeping of several large dogs at the property, justified enforcement action. Such arguments cannot therefore form the basis for an award of costs in this case.

10. Contrary to the Applicant's assertion, there is no sound reason why an appeal on ground (a) could not have been pursued, irrespective of her concerns regarding the validity or fairness of the enforcement notice. Such an appeal would only have fallen to be determined in circumstances where arguments on validity and the appeal on ground (c) had failed (in tandem with the failure of the case on ground (d)). Consequently, the question of whether there had been a material change to a mixed use, as distinct from the continuation activity incidental to a primary use as a dwellinghouse, would already have been explored.

11. Moreover, the apparent assumption that a grant of planning permission on ground (a) would inevitably be subject to a condition restricting the number of dogs at the appeal property to three is ill-founded. In granting permission the Inspector is not bound by the requirements of the enforcement notice. The scope of the deemed planning application associated with an appeal on ground (a) is defined by the wording of the alleged breach of planning control set out

[2] Appeal decisions ref nos APP/P4605/C/13/2197328 & 2197329.

in the notice, not its requirements. Accordingly, there would have been no disadvantage to the Applicant in seeking a planning permission, other than the payment of a fee. In any event, the Applicant would have enjoyed a further right of appeal against any condition that might be imposed.

12. I give no credence to the suggestion that a perceived problem of the kind targeted by the notice should have been pursued by environmental health under the provisions of the Environmental Protection Act 1990. A breach of planning control has clearly occurred, as reflected in my finding on ground (c). In such circumstances it is a matter of logic that it must be possible to remedy that breach by means within the parameters of planning enforcement legislation, irrespective of whether there might be other ways of pursuing the matter.

13. Turning to the specific wording of the alleged breach of planning control, there is no reason why this should necessarily distinguish between dog breeding undertaken on a commercial basis and that which might be pursued as a domestic hobby. I have explained in the context of determining the appeal on ground (c) that the keeping of a large number of dogs at a residential property can be subject to planning control, irrespective of whether there is a functional relationship between that activity and residential use, and need not repeat my reasoning here.

14. In this case, the notice targets all types of dog breeding carried on at the property, without qualification, and falls to be considered and challenged on that basis. It is not unreasonable to word the allegation in this way, as the *Mansi* doctrine[3] essentially ensures that a notice cannot take effect against a lawful incidental use. Had my determination of the appeal progressed as far as the case on ground (f), it would have been open to me to consider varying the requirements of the notice so as to accord with *Mansi*, in the event that I found shortcomings in that regard.

15. The Applicant expresses the view that requirement 1 of the notice is excessive in specifying a reduction in the number of dogs kept at the property to three without drawing distinction between adults and puppies, dogs kept for breeding and as domestic pets and different sizes of dog. Having allowed the appeal on ground (d) there has been no need for me to address this question in determining the appeal, where it would have fallen to be addressed under ground (f). Nonetheless, I am still able to consider, in the context of this costs decision, the principles that would have applied to a ground (f) determination.

16. There are no relevant permitted development rights that apply in this case to levels of use. Nor is there any threshold defined by statute, case law or guidance that draws a firm distinction between the keeping of dogs on a scale that requires planning permission and that which could be held to be incidental to the enjoyment of the dwellinghouse as such. An assessment of where the line should be drawn is therefore a matter of fact and degree and requires judgment to be exercised by the decision-maker.

17. In this case, the Council initially determined that three dogs, irrespective of age, size or purpose, was the relevant limit, but conceded at the Hearing that puppies need not be included in the count. Even had I determined the appeal on ground (f) and found that a reduction to three dogs plus puppies, without

[3] A long-established principle arising from the judgment in *Mansi v Elstree RDC* [1964] 16 P&CR 215.

further qualification, exceeded what was necessary to remedy the breach of planning control, the fact that the Council had concluded otherwise is not in itself unreasonable in circumstances where setting a dividing line is essentially a subjective exercise. Moreover, in issuing a notice of this kind it would have been impractical to build in distinctions between dogs kept for breeding and as household pets, given that some animals could be held to fulfil both roles and any such differences would be difficult to discern for purposes of monitoring and enforcement.

18. Nor would it have been sensible to specify that the numerical limit should apply only to certain sizes or breeds of dog, despite the fact that a group of small dogs would be less likely to trigger a material change of use than the same number of large dogs. The permutations in this regard are almost endless and would be virtually impossible to incorporate into the requirements of a notice. Indeed, it is notable that no such distinctions were drawn in the enforcement notice upheld by the Court in the case of *Wallington v SSW & Montgomeryshire DC* [1991] PL 942. It is also pertinent that numerous appeal decisions made in the wake of *Wallington*, including the example referred to by the Council in its response to this costs application, have not sought to qualify requirements in this way.

19. The question of whether or not a distinction should have been drawn in the notice between puppies and adult dogs is more finely balanced. Although I have not been required to determine the appeal on ground (f), it is nonetheless reasonable to conclude for the purposes of this costs decision that, in this particular case, the keeping of three dogs at the appeal property would be incidental to the enjoyment of the dwellinghouse as such. However, given that the dogs are used for breeding, it is highly likely that such a low threshold would be breached whenever a litter, which on the Applicant's evidence generally comprises five to ten German Shepherd puppies, was born.

20. Following discussion of the matter at the Hearing the Council acknowledged this difficulty and conceded that puppies need not subject to the limitation on numbers imposed by requirement 1 of the notice. Nonetheless, the Appellant had by then devoted text in her statements and time at the Hearing to the absence of a distinction between puppies and adult dogs from the notice as issued. I have therefore considered, for the purposes of this costs decision, whether this omission was so illogical or perverse that it amounted to unreasonable behaviour on the part of the Council.

21. I am mindful that a single litter would be kept in the house rather than the garden and would be unlikely to generate significant noise or other activity discernible from outside the appeal property, even taking into account the viewings of potential purchasers. On the evidence before me there is no good reason why newly-born puppies need be retained at the property for more than a few weeks before being re-homed. I therefore find that, in all likelihood, the short periods of time for which puppies would swell the numbers of dogs beyond three would be *de minimis* for the purposes of planning enforcement such that, overall, dog breeding at the property on that limited scale would remain incidental to the primary residential use.

22. I also note that neither the *Wallington* notice nor the example cited by the Council excluded puppies from the requirements and that the latter specifically concerned dog breeding. Moreover, *Cord v SSE* [1981] JPL 40 makes it clear

that obvious integral or ancillary activity need not be given special protection in the requirements of a notice. This is not to say that, had I determined the appeal on ground (f), I would have agreed with the stringency of the Council's initial approach. Nonetheless, I am content that the strict terms of requirement 1 stemmed legitimately from a subjective judgment rather than a flaw in the notice and did not preclude the continuation of dog breeding on an incidental scale.

Conclusion

23. I therefore conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Alan Woolnough

INSPECTOR