
Appeal Reference:	2022/E0033
Appeal against:	The unauthorised erection of a building and associated underground tank, which is used for keeping of pigs and the laying of a hardcore area.
Location:	Lands approximately 60m NE of 16 Follum Road, Knockmacroony Glebe, Roslea
Claim by:	Mr Patrick Boyle
Claim against:	Fermanagh and Omagh District Council
Decision by:	Commissioner Carrie McDonagh dated 7 th June 2024.

Decision

1. An award of costs is denied.

Reasoning

2. In accordance with the Commission's publication 'Costs Awards Guidance' costs will normally only be awarded where all four of the following conditions are met:
 - the claim relates to a relevant type of appeal;
 - the claim is timely;
 - the party against whom the award is sought has acted unreasonably; and
 - the unnecessary behaviour has caused the party claiming costs to incur unnecessary or wasted expense.

Eligibility

3. The claimant submitted the costs award claim under Section 143 of the Planning Act (Northern Ireland) 2011. It is one of the types of appeal for which a costs claim can be made. The Commission therefore has the power to make an order as to the costs of parties in accordance with Section 205 of the Act.

Timeliness

4. Paragraph 20 of the Commission's aforementioned guidance states that a claim for costs will not be considered unless it is timely and deadlines will be strictly applied, unless the claimant can show compelling reasons for missing a deadline. The appeal proceedings comprised of a hearing, which took place on the 21st September 2023. In appeals where a hearing takes place, the guidance states that any costs claim should be made as soon as reasonably practicable after the behaviour that triggered the claim.
5. Towards the end of the hearing, the claimant team indicated there was a possibility of a costs claim, advising they would be taking instruction on the matter. The claimant was entitled to take the opportunity after the hearing to reflect on his

position. Notwithstanding, the claim was not received by the Commission until 14 working days later (on the 11th October 2023). This does not adhere to the timeframes set out in the Commission's guidance, whereby 10 working days is the maximum period prescribed.

6. Even if I had found in the alternative, I am not persuaded that an unnecessary appeal arises because of unreasonable behaviour in advancing reasons for refusal that were subsequently withdrawn at the hearing for the reasons set out below.
7. The claimant argues that the Council failed to provide any credible evidence in support of their position or failed to recognise earlier in the process that it no longer had a reasonable basis for arguing that the notice should be upheld. This was based broadly on the following:
 - The residential amenity concerns raised by the Council's Environmental Health Department (EHD) could not be sustained,
 - The Natural Heritage concerns raised by Shared Environmental Services (SES) could not be sustained,
 - The refusal to withdraw the enforcement notice, which the Council accepted it had no reasonable basis for defending, instead leaving the matter to the Commission; and
 - The lack of resistance to the ground (g) case.
8. The claimant's updated Odour and Noise Impact Assessment was provided in the SoC in response to a consultation response from EHD on the "duplicate application". It is expected that the EHD take the time to consider the noise and updated cumulative odour information therein. The EHD concerns were not solely based on what the appellant describes as "some undisclosed piece of ongoing work which did not form part of the evidential context of this appeal". At the hearing, complaints were discussed and discussions included the AERMOD dispersion modelling methodology, parameters and findings. The clarification and conclusions thereof prompted the Council to change their position regarding residential amenity.
9. In a similar manner, the claimant argues that had the Northern Ireland Environment Agency (NIEA) and SES reviewed the information within the updated Ammonia Impact Assessment (AIA) prior to the hearing, it would have been apparent that the Process Contributions were at levels at which adverse effects on natural heritage could safely be ruled out. However, the list of issues discussed throughout the hearing included the interpretation of the relevant policies in the Plan Strategy including clarification and debate on the AIA conclusions. Accordingly, I do not find the Council acted unreasonably in withdrawing their natural heritage objections as this was the result of the debate on the effects of ammonia on the designated sites at the hearing.
10. The third aspect of the claim relates to the Council standing over its enforcement notice as outlined above. The Claimant argues that this behaviour is highly prejudicial to them and impinges on the resources of the Planning Appeals Commission. However, the Commission is not a party to an appeal and is not empowered to recover its own expenses. The Council considered it was essential to maintain the enforcement notice until there was a clear indication that planning permission should be granted and argued that its withdrawal would have resulted

in the unauthorised development remaining on site pending permission. The Council are entitled to consider that scenario inconsistent with their enforcement strategy. Accordingly, and in light of the particular matters arising in this appeal, I find that their failure to withdraw the notice did not amount to unreasonable behaviour.

11. The Council accepted the requested extension of time under Ground (g) having considered the claimant's evidence, including the time required to complete the pig cycle and the welfare issues highlighted. If the evidence of an opposing party is convincing, it is reasonable for the counter party, in this case the Council to concede. Had the Council advised prior to the hearing that its resistance to the request for an extension of time had been overcome, it would have brought no advantage as the ground (a) appeal remained to be heard. The Council's approach of advising immediately on the opening of the ground (g) section of the hearing was reasonable in the circumstances.
12. Having considered the claim for costs is out of time an award of costs is denied. Notwithstanding, even had I found in the alternative I do not consider the Council acted unreasonably. Consequently, no award of costs will be made.

COMMISSIONER CARRIE MCDONAGH

Documents

Claimant – “A”	Cost Claim on behalf of Mr Partrick Boyle dated 10 th October 2023
Council – “B”	Response to costs claim by Fermanagh and Omagh District Council