
Costs Decisions

Site visit made on 26 September 2016

by D E Morden MRTPI

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

Decision date: 08 November 2016

Costs application in relation to Appeal Refs: APP/C1760/C/16/3142742, APP/C1760/C/3142743 and APP/C1760/C/3142744

Oakcutts, Kentsboro, Middle Wallop, Stockbridge, SO20 8DZ

- 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 Test Valley Borough Council for a full award of costs against Messrs M and A Burford and Mrs M Burford.
- The appeal was against an enforcement notice alleging the erection of a building in the approximate position marked with an 'x' on the plan attached to the Notice.

Decision: The application is refused and no award of costs is made.

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- 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 Messrs M and A Burford and Mrs M Burford for a full award of costs against Test Valley Borough Council.
- The appeal was against an enforcement notice alleging the erection of a building in the approximate position marked with an 'x' on the plan attached to the Notice.

Decision: The application is refused and no award of costs is made.

The submissions for Test Valley Borough Council

1. The application is for a full award of costs. The appellant's approach to the appeals on all three grounds has been unreasonable. On ground (a) there is clearly no case for a development that is not in accordance with the development plan and no material considerations were put forward to justify permission being granted.
2. The ground (c) was pursued on the basis that the certificate of Lawfulness (LDC) granted is for the building but it is not. No meaningful evidence was submitted to show that the building was in the curtilage of Oakcutts or that its size was required for purposes incidental to the enjoyment of the dwelling. They have not demonstrated therefore that Class E of the Town and Country Planning (General Permitted Development) Order 2015 is applicable. Even if it is within the curtilage it exceeds the restrictions applicable for Class E.
3. Nothing was put forward to substantiate the appeal on ground (f); nothing to demonstrate that the requirements were excessive and no lesser requirements were suggested. The ground (a) and (f) appeals were added at a later date

and two days after the adoption in January 2016 of the most recent Development Plan. The appeals had no prospect of succeeding on any of the grounds submitted and the addition of further grounds of appeal added to the work necessary by the Council to respond.

4. As recently as November 2014 an appeal had been dismissed for a similar sized building in approximately the same position and there have been no fundamental changes to the policies applicable to new development in this location.

The response by the appellants and the Counterclaim

5. In response the appellants submitted that pursuing grounds (a) and (f) did not prolong the appeal. The development is in accordance with the development plan and it was legitimate to pursue ground (a). Even if that point was not accepted there were material considerations that meant permission should have been granted. The development is not very similar to that previously refused at appeal in November 2014. It was not correct to say that the ground (a) appeal had no reasonable chance of success.
6. It was irrational of the Council to grant the LDC and then decide that a building for incidental purposes could not be erected on the land when there were already others that did precisely that. The Council's measurement was wrong and the eaves height does not exceed the height limit in Class E of the GPDO.
7. It was not correct to assert that ground (f) was not justified. There are clearly lesser steps such as removing the shed adjacent to the appeal building, the container and the mobile home once the appeal building is being used for incidental purposes. It was not unreasonable to exercise the right to appeal against an enforcement notice particularly as the grounds for doing so were reasonable.
8. It was not correct for the Council to compare the building with the dwelling refused at appeal in 2014. They are different in law and have different impacts and the visual parallels are unjustified given it is a different development. Such matters are in any event a matter of judgement for the decision maker and do not go to the reasonableness or otherwise of pursuing the case.
9. The Council has failed to grasp that having granted an LDC for the use of the land for purposes incidental to the enjoyment of the dwelling it granted the same for the building as it existed at the time. If it wished to exclude this development it could have drawn the red line in a different place but it did not do so. Further one can walk from the building with no physical barrier in the way to the house so it must be within the curtilage.
10. It is not accepted that the eaves is too high but if it is found to be so it could be altered. The Council has not grappled with the appellants' desire to reorganise what is on site so that the family does not need to occupy a mobile home or caravans. There were proportionate lesser steps that would have met the Council's objections.

The response by Test Valley Borough Council to the Counterclaim

11. The Council responded that it had carried out diligent investigation prior to the issue of the notice having served planning contravention notices to gain information from the appellants and it also carried out many site visits to

ascertain what was taking place on site and to investigate what it considered the curtilage of the property to be. The impacts of the building are similar to what was considered in the 2014 appeal; the use makes no difference to the physical appearance of the structure and its intrusiveness.

12. The fact that an LDC was granted for incidental residential use does not mean the land forms part of the curtilage; similarly the fact that one can walk from the dwelling to the appeal building with no physical barrier to interrupt someone from doing so does not mean it is within the curtilage. There is no 'fall back' position as claimed by the appellants in this appeal.

Reasoning

13. The Planning Practice 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 process.
14. There was a considerable amount of detail included in the parties' costs claims and also a number of rebuttals were also sent including and in some instances repeating details that had been set out in the representations. The essence of the arguments, however, is quite straightforward in my view.
15. On ground (c) the question of what constitutes the curtilage will be different for every dwelling and each side was entitled to put forward its case. Whilst the appellants, in my view, were wrong to base their argument, in part, on what the LDC may have meant, they did put forward other reasons as to why the area should be considered curtilage. As is clear from my decision I did not agree with them but that does not mean it was unreasonable to put forward their case. Much of the dispute concerned a matter of law and as I set out in my decision that is ultimately a matter for the Court to determine.
16. On ground (a) the issue was the effect on the area (whether the structure would be materially harmful to the character and appearance of the countryside). Whilst there had been an appeal dismissed in November 2014 for a similar building in a similar location, it was not unreasonable for the appellants to claim that that this particular building was acceptable. I did not agree with them and again, whilst some of the argument was based on the fact that the land was part of the curtilage and another building could be erected if this one was removed, the argument was straightforward and simply dealt with by the Council.
17. On ground (f) the appellants in the representations referred to landscaping and conditions but they are ground (a) matters, not ground (f). Nothing was put forward in terms of lesser steps but that is not very often possible when a building has been erected and the requirement is to demolish it. However, very little therefore needed to be said by the Council in response to that.

Conclusions

18. In my view, the question of whether or not the land formed part of the curtilage was a matter on which both sides were entitled to make representations whether or not the basis of what lay behind their view may have been faulty. Both on the principle of what is the curtilage and the reasons behind the representations are matters of law and each side was entitled to its opinion. Similarly, the question of the intrusiveness or otherwise of the building and the effect it might have on trees on the site are matters of

judgement for the decision maker and each side was entitled to make representations on those issues. Clearly I did not agree with the appellants' views on these matters but they were thoroughly set out and explained.

19. I do not consider that it was unrealistic for both parties to expect success on any of the arguments they put forward and it was not unreasonable to have pursued them in the way that they did. Regarding ground (f) whilst it is clear that the appellant did not suggest any lesser steps; the points raised were all ground (a) matters and dealt with as such, it was, therefore, a very simple matter to deal with that would not have caused the Council unnecessary expense.
20. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated by either side and I will refuse both applications.

D E Morden

INSPECTOR