
Costs Decisions

Hearing held on 28 September 2016

Site visit made on 28 September 2016

by Wendy McKay LLB Solicitor (Non-practising)

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

Decision date: 17 November 2016

Costs application in relation to Appeal A Ref: APP/J1860/C/16/3143512 Mountain View, Bastonford, Powick, Worcs, WR2 4QN

- 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 Edward Smith for a partial award of costs against Malvern Hills District Council.
 - The Hearing was in connection with an appeal against an enforcement notice alleging without planning permission (a) the unauthorised operational development of the land by way of the laying of hardstanding; and (b) the unauthorised change of use of the land for the stationing of caravans for residential purposes together with associated amenities and equipment.
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Costs application in relation to Appeal B Ref: APP/J1860/C/16/3143513 Mountain View, Bastonford, Powick, Worcs, WR2 4QN

- 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 E Smith for a partial award of costs against Malvern Hills District Council.
 - The Hearing was in connection with an appeal against the same enforcement notice that is the subject of Appeal A above.
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Costs application in relation to Appeal C Ref: APP/J1860/W/16/3143510 Mountain View, Bastonford, Powick, Worcs, WR2 4QN

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr Edward Smith for a partial award of costs against Malvern Hills District Council.
 - The Hearing was in connection with an appeal against the refusal of the Council to grant planning permission for the continued use of the land as Gypsy/Traveller accommodation for one extended family.
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Decisions

Appeals A, B and C

1. The applications for awards of costs are refused.

The submissions for Mr and Mrs Edward Smith

2. The costs application was submitted in writing prior to the Hearing. The Appellants refer to the Planning Practice Guidance (PPG) paragraph 049 ID: 16-049-20140306 which sets out examples of unreasonable behaviour which may

give rise to a substantive award of costs against a local planning authority. The examples specifically relied upon include:

- preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations;
 - refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs where it is concluded that suitable conditions would enable the proposed development to go ahead;
 - not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.
3. A claim for a partial award of costs is made in respect of the highways reason for refusal and, in particular, for unnecessary expense incurred in meeting the cost of Mr Hurlstone's work in these appeals. The application for costs is made in the context that the Highway Authority did not object to the proposal and the Council's own planning officer recommended that planning permission be granted. In addition, a partial award of costs is sought for the work carried out subsequent to the e-mail of 28 April 2016 sent by Dr Murdoch to Mr Clements of the Council. This explains why the appeals should have been compromised following the issue of the Baughton appeal decision¹ and planning permission subject to reasonable conditions should have been granted for the development of the appeal site.
4. The following additional points were made orally at the Hearing.
5. The costs application is contained in the relevant e-mails appended to the statement of Mr Hurlstone and the speed survey data submitted by the Highway Authority. This confirms that the Design Manual for Roads and Bridges (DMRB) parameters which the Council prefers could be achieved. The Council was given an opportunity to withdraw its objection on this ground at that earlier stage but it chose not to do so. Given that the Highway Authority repeatedly advised the Council that it could, if necessary, secure the required visibility splays within its own land, this shows the unreasonable approach taken by the Council in this case. The e-mails sent by the Appellants' representative makes it clear that they would not seek costs if the Council agreed not to pursue its objection on this ground.

The response by Malvern Hills District Council

6. The response was made in writing and presented orally at the Hearing. In summary, the Council submits that its highways case at the Hearing was reasonable. It called evidence to substantiate its reason for refusal. The previous Inspector found the unauthorised use would give rise to material harm to which he afforded "*considerable weight*". This is potent evidence that there is merit with the Council's highway safety concerns. At the last Hearing, the Inspector heard argument about Manual for Streets (MfS) and DMRB and, on the site visit, he went to the trouble of walking the visibility distance. This was plainly an issue which the Inspector gave his anxious scrutiny. He concluded

¹ See Appendix 6 attached to the Statement of Dr Murdoch

that the arrangement was substandard. The Council's case reflects the previous Inspector's determination.

7. The fact that the Highway Authority no longer opposes the appeal does not render the Council's reason for refusal unreasonable. The Council is not bound by the view of the Highway Authority. It is entitled to reach a different view provided it gives cogent reasons for doing so which it has.
8. The Appellants rely upon MfS. The Council prefers DMRB. The Council finds itself in good company. As Mr Fong for the Bastonford Residents' Association explained, at the last Hearing, the Inspector agreed with two highway engineers who appeared before him that MfS should not apply.

Reasons

9. The PPG advises that parties in planning appeals and other planning proceedings normally meet their own expenses. However, costs may 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.
10. The PPG provides that awards against a local planning authority may either be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal. The PPG sets out examples of situations where an award of costs might be applicable. For enforcement action, local planning authorities must carry out adequate prior investigation. The examples given in the PPG mainly relate to planning appeals and are not exhaustive. The Appellants place particular reliance upon the three examples set out above.
11. On the highway safety issue, the Council draws support from the previous Inspector's decision and his finding that: *"... the deficiencies of the Old Malvern Road junctions with the A449 are material and they should have considerable weight against the proposal..."*. Whilst that decision is a material consideration in this case, the highway safety issues must be considered afresh in the light of the evidence before me in these appeals and any changes in policies and other circumstances which have taken place since the previous decision. At the time of the previous appeal the Worcestershire County Council as Highway Authority (WCC) opposed the development on highway safety grounds. In contrast, WCC did not object to the planning application the subject of this appeal and did not attend the Hearing. Nevertheless, the Council is not bound to accept the views of the WCC's professional officers provided it has sound planning reasons for doing so.
12. The revised position of WCC is that acceptable visibility at the northern and southern access points is achievable within the adopted highway. WCC now relies upon the visibility splay requirements provided by Manual for Streets 2 (MfS2). The officer's report to the Committee Meeting of November 2015 records the WCC advice as being that, although visibility at the northern junction was then below that recorded at the time of the previous appeal, those measurements of 143.5 m to the left and 149m to the right could still be achieved by cutting back the vegetation growing on highway land. Even so, those 'y' dimensions for the visibility splay would still be below the standard required by DMRB for the speed of traffic recorded by the latest speed survey.

13. The Council provided substantial evidence to support its stance that DMRB provides the most appropriate visibility standard for these junctions on this particular road. Indeed, I agree with the Council's approach on that matter. Prior to the Hearing, the Council's position was that the DMRB splays could not be achieved merely through the trimming of vegetation, particularly in the eastern direction at the northern junction because of the existing road geometry. It did not have the benefit of the Appellants' Google Earth Aerial images and Street View image until the Hearing. These had been submitted by the Appellants with their 'Final Comments' to the Planning Inspectorate but were rejected as 'new evidence' and had not been circulated to other parties. These photographs were only introduced and circulated with my agreement on the day of the Hearing.
14. Following consideration of this photographic evidence, and the subsequent site visit, the Council agreed that the DMRB splay of 2.4m x 160m for the recorded 85th percentile speeds could be achieved. Nonetheless, the Council's highways expert pointed out that with increased forward visibility on the major road she would anticipate higher traffic speeds that would, in turn, require a longer 'y' distance. Although I have ultimately agreed with the Appellants' highways expert that it is likely that the DMRB visibility splay could largely be met for the northern junction, I consider that the Council presented cogent evidence on this point which supported its reason for refusal.
15. Whilst I do not agree with the Council that the development would be harmful to highway safety, as is evident from my decisions on the appeals, I do not believe that it has behaved unreasonably in relation to its pursuit of the highways objection to the development. This is not a case where development has been prevented or delayed which should clearly have been permitted having regard to its accordance with the development plan, national policy and any other material considerations. Furthermore, given the fundamental nature and substance of the Council's objection on highway grounds, I do not believe that this was a matter that was capable of being dealt with by planning conditions.
16. The Appellant also complains that the Council did not review its position when presented with the case on highway matters. In particular, there is the e-mail correspondence appended to the statement of the Appellant's highways expert, whereby the Council was invited to withdraw its highways reason for refusal/issuing the notice. This e-mail correspondence indicates that a failure on the part of the Council to follow that course of action would lead to an application for costs being made on the Appellant's behalf.
17. Nevertheless, I believe that the Council was entitled to take the stance that it did in relation to the highways issue and to pursue that matter so that it could be fully evaluated and assessed through the appeal process. The Council's case was obviously more nuanced than simply relying upon the obstruction to visibility caused by a failure to trim vegetation within the highway verge. It provided sound and logical justification for its viewpoint on the highways issue. This was not a matter upon which it was bound to fail and it did not behave unreasonably in rejecting the Appellant's suggestion that the highways reason for refusal should not be pursued.
18. Turning now to the claim for costs incurred after the date of the e-mail correspondence between Dr Murdoch and the Council which made reference to

the Baughton appeal decision. That recent appeal decision concerned another Gypsy and Traveller site in the district and the findings in relation to the need for and supply of Traveller sites are directly relevant to the Bastonford appeals. The Appellants point out that the Inspector's concerns in relation to the noise impact and foul drainage led him to conclude that the site was not suitable for permanent residential occupation. Although such considerations do not arise in the Bastonford appeals, there are other matters such as visual impact which have been identified as being harmful. Therefore, although there are some common aspects and similarities between the two sites, the overall balance of considerations was materially different in each case. Whilst it is incumbent upon parties to review their cases when new evidence emerges, I disagree with the Appellants that it is clear from the Baughton decision that planning permission subject to reasonable conditions should be granted on the Bastonford site. I do not consider that the Council acted unreasonably in rejecting the Appellants' invitation to withdraw the notice and agree to the appeals being allowed.

Conclusion

19. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has not been demonstrated.

Wendy McKay

INSPECTOR