
Costs Decision

Inquiry held on 10, 11 and 12 August 2016

Site visit made on 10 August 2016.

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 09 January 2017

Costs application in relation to Appeal Ref: APP/H0928/C/15/3141454 Land at Blencathra View, Gamblesby, Penrith CA10 1 HR

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Philip Dixon for a [partial] [full] award of costs against Eden District Council.
 - The inquiry was in connection with an appeal against an enforcement notice alleging
 - i. The erection of a fence in excess of 2 metres in height.
 - ii. The erection of a stable block.
 - iii. The change of use of the land to the mixed use of agriculture, and use for the schooling and exercising of horses and ponies.
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Costs application in relation to Appeal Ref: APP/H0928/X/16/3141604 Land at Blencathra View, Gamblesby, Penrith CA10 1 HR

- The application is made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Philip Dixon for a full award of costs against Eden District Council.
 - The inquiry was in connection with an appeal against the refusal of a certificate of lawful use or development for a mixed use of the land for agricultural, and the schooling and exercising of horses and ponies.
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Decision

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

The submissions for the appellant

2. The Council have behaved unreasonably by incorporating an incorrect decision on the LDC application into an enforcement notice against the same uses, and thereby imposed time limits on the LDC appeal that would not otherwise have existed. Issue of the enforcement notice had been deliberately timed to prejudice the appellant's ability to appeal against either the enforcement notice or the LDC decision.
 3. The situation giving rise to the LDC application and to the instigation of enforcement action was created by the neighbour, Mr Jackson. The Council have taken action they were not obliged to take, have not investigated matters properly before taking action, and have thus favoured Mr Jackson, who would be the only beneficiary of the refusal of the certificate. The Council have made no real inquiries into the alleged change of use and have relied instead on evidence and claims made by Mr Jackson. There would be no real gain or
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benefit in terms of wider planning policy if the LDC had been granted. Overall, the Council have created a situation where an appeal became unavoidable, although unnecessary.

4. The Council took an inordinately long time to reach its decision on the LDC application. This had occurred in order to give Mr Jackson time to assemble and submit evidence. This had a knock-on effect on the timing of issue of the enforcement notice, and the appellant's agent was put in the position of preparing the case over the Christmas holiday, thereby increasing expense. In the event the certificate issued by the Council did not meet the standards required by the 1990 Act.
5. Furthermore, it is clear that the Council are not properly acquainted with matters of keeping, training and riding of horses in the planning context. The Council's witness confirmed that he had no knowledge of horses. He had clearly made the delegated decision and maintained his position at the Inquiry without proper regard to the use of land for equestrian purposes, or its seasonal nature – matters that were set out in evidence. Unnecessary expense had been incurred in addressing this deficiency.
6. The Council's witness misdirected himself in that he did not consider materiality, or apply the proper test of 'on the balance of probabilities', he had proceeded on the basis that a particular 10 year period had to be identified, and when asked about evidence indicated that he was not sufficiently familiar with it to give a view. The Council had accepted the evidence of others without applying any critical analysis, and the result favoured Mr Jackson.
7. The Council have failed to produce evidence to substantiate their reason for refusal. Their Statement of Case was silent on the new case and its merits, and it was only at proof of evidence stage that their position became clear. The Council appeared content to allow others to guess the nature of their case, and no reference was made to there being an amenity issue with respect to the alleged change of use. It was only in oral evidence that the Council's concerns about amenity issue arising from the alleged change of use became apparent.
8. The Council have behaved unreasonably, the appeal was unnecessary, and this caused significant wasted expense for the appellant. A full award of costs should be made against the Council.

The response by the Council

9. It has always been quite clear that the Council would be considering the additional information provided subsequent to the original LDC application as part and parcel of the appeal. The Council were not responsible for additional material put in after their decision was issued.
10. It is entirely baseless to suggest that the Council should be liable for costs arising from the time taken to determine the LDC application. Nor is it clear what steps the appellant considers the Council should have taken but did not take. The Council have made a careful examination of all the information supplied by the appellant and by Mr Jackson. This was voluminous and increased during the application period, with additions from both the appellant and Mr Jackson. This evidence was carefully and impartially analysed by Mr Addis, and he applied the correct test using the relevant legal principles. There

is nothing to suggest that the Council unfairly favoured Mr Jackson's version of events in any way.

11. There was no obligation on the Council to delay service of the enforcement notice until the LDC decision was issued. The appellant had in any case been made aware of the Council's view that he was in breach of planning control and that enforcement action was likely. There is no merit in the argument that the Council behaved unreasonably, or tried to deprive the appellant of the right to appeal – such allegations are unfortunate and unsupported by evidence. The appellant has anyway been unhindered in bringing the cases to appeal.
12. It was apparent at the Inquiry that the appellant's case in the enforcement appeal on grounds (d) and (c), and in the LDC appeal were essentially the same. It is difficult to understand how providing this evidence in respect of both appeals can have resulted in any significant additional costs.
13. As to the argument that Mr Addis had no knowledge of equestrian matters – he had the information provided by the appellant, and was quite aware of this. Regarding the question of materiality, this had been little touched upon at the Inquiry, and Mr Addis had quite reasonably explained that whether there could be circumstances where the use might not be regarded as material depended upon the facts of the case.
14. The contention that the Council were 'bound to lose' both appeals is without merit. Mr Addis' professional opinion was based on the information available to him at the time of the LDC application and the issue of the enforcement notice, and the burden of proof in such cases rests with the appellant and not the Council. The suggestion that Mr Addis did not properly consider the material presented flies in the face of evidence he provided to the Inquiry. In cases such as this different opinions can quite reasonably be formed on the basis of the same evidence. There has been a careful analysis as to whether a breach of planning control has occurred. This was an entirely reasonable approach.
15. The Council have not behaved unreasonably, nor has unnecessary or wasted expense been incurred by the appellant. No award should be given.

Reasons

16. The government's Planning Practice Guidance (PPG) 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. That is the basis upon which I have determined this application.
17. It appears to me that the considerable period between the application date and the issue of the Council's final determination in November 2015 resulted from the error made in the original decision notice of 20 April 2015. This was acknowledged by the Council, and the situation was reviewed. Subsequent to withdrawal of the original decision further evidence was put in both by the appellant and Mr Jackson. While the error in the decision was unfortunate, and possibly delayed bringing the LDC case to appeal, it did not in itself lead to any unnecessary costs for the appellant. Indeed, to some extent there was a benefit to the appellant, since he was able to submit further material.

18. Regarding the claim that the appellant was prejudiced in his right to appeal as a result of receiving the LDC decision later than the enforcement notice, I find this difficult to understand. The LDC application was made in February 2015, well before the issue of the enforcement notice. It was apparently a valid application, and at the time the application there was no enforcement notice then in force – since none had been issued at that time. Even though the period for determining the LDC application became drawn out, the Council would still have to consider the situation at the date of application, when the claimed use would not have automatically have been considered unlawful by reason of s.191(2)(b) of the Act – that the uses did not constitute a contravention of any enforcement notice then in force.
19. Much is made of the possibility that the Council took a biased approach to the case in favour of Mr Jackson. While much of the Council's material derived from information provided by Mr Jackson, there is no obligation on the Council to collect evidence for themselves. In fact PPG advice at paragraph 006 of the section entitled 'Lawful development certificates' is that a local planning authority is entitled to canvass evidence if it so wishes before determining an application. Furthermore, in the same paragraph it is apparent that in the case of applications for existing use, a local planning authority may have its own evidence or that of others (my emphasis).
20. In my opinion the Council weighed the evidence of both sides and came to their conclusion. Although this was not the decision the appellant wanted, I can see no significant evidence of the Council being unreasonable in their considerations. Although the Council's case may not have become entirely clear until the proof of evidence stage, the appellant had the full opportunity of responding to this, and I do not consider they were prejudiced in this regard, or that they incurred unnecessary expense. Furthermore, the determination of a LDC application does not rest upon the planning merits of the case, and considerations of whether a development would further wider policy aims are irrelevant, as is the question of possible harm to amenity.
21. As to the appellant's arguments about materiality, it is apparent that the Council came to the view that that prior to about 2013/2014 there may have been some element of exercising and schooling occurring at some periods, but that this was no more than a *de minimis* use against which it would not have been possible to enforce. They also came to the view that after 2013/2014 there was a significant change to the character of the use, which could no longer be regarded as *de minimis*. It is implicit in this that the change must have been material. Furthermore, it is apparent that the Council applied the correct 'balance of probabilities' test in coming to their stance, and had been considering continuity of use for a rolling period of 10 years.
22. In coming to a view on planning matters it is frequently the case that assessments must be made of details of activities or operations that fall outside the general knowledge or experience of the decision maker. In such circumstances it might be expected that such information is sought out, or is provided by – in this case – the applicant. In the appellant's LDC application a full and detailed description was provided of the types of equestrian activities that might occur, extending beyond those that took place on the appeal site. It appeared to me that Mr Addis was acquainted with this information to the extent that he had been able to make an informed analysis of the activities claimed to have taken place on the appeal site. I do not consider there was

unreasonable behaviour in this regard. Furthermore, the description of equestrian activities was provided as part of the application, and any expense associated did not form part of the appeal proceedings.

23. Overall, I do not consider the Council came to their decisions to refuse the LDC and to take enforcement action in an unreasonable manner, or that the need for the appeal could have been avoided.
24. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated. The application therefore fails.

Stephen Brown

INSPECTOR