

Costs Decision

Hearing held on 14 February 2017

Site visit made on the same date

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 07 March 2017

Costs application in relation to Appeal Ref: APP/L1765/X/16/3152524 Butlers, Arlebury Park House, Arlesford, SO24 9ER

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mrs Jane Flowerdew for a full award of costs against Winchester City Council.
 - The hearing was in connection with an appeal against the refusal of the Council to issue a certificate of lawful use or development for use of land as a domestic garden.
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Decision

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

Procedural Matter

2. Mrs Flowerdew (the Appellant) provided a costs application in writing to the Inspectorate on the Friday before hearing. The Inspectorate's records indicate that the application was sent to the Council by email on the same day but the Council did not receive it. The costs application therefore came as a surprise to the Council at the hearing. The Council was offered the opportunity to respond in writing but decided to respond orally after a short adjournment to consider its response.

The submissions for Mrs Flowerdew – Main points

3. The Appellant submitted that the Council had acted unreasonably in, among other things, acting inconsistently with regard to this decision given another decision it had made on an application for a LDC; not clarifying its case and the reasons for refusal not being clear; not following its own published procedures; not sharing evidence at the application stage; late submission of appendices; asking the appellant to prepare a statement of common ground; reference to an enforcement notice in the Questionnaire when none has been served; and insisting on a Hearing rather than written representations.

The response by Winchester City Council – Main points

4. The Council submitted that from after the date of the refusal and the making of the appeal all the evidence, including Mr Clemmow's, had been sent to the Appellant. The Council did not withhold any evidence. The grounds of refusal were not unreasonable; the Council had a different interpretation of the case law and the red line land from the Appellant; and the reasons addressed both the ten year period and the lawful use of the land.
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5. The other LDC application cited by the Appellant involved a completely different set of circumstances relating to implementation and keeping a planning permission alive, it did not involve the lawful use of the site. The difference between the Council and the Appellant in this appeal is what the 1996 permission meant.
6. The Council considered that a Hearing was necessary because of the complicated history of a complex site. Local residents were interested and wanted to speak and be involved. Their evidence was needed for explanation and to air the various arguments in the process.
7. The Council acknowledged that the decision was issued after the eight week period but the Appellant could have exercised her right to make an appeal on that basis but she did not.

Reasons

8. 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 process¹.
9. I found in my decision that the other LDC application referred to by the Appellant was so different on its facts and matters to be considered that it had no bearing on this appeal and therefore the Council did not act inconsistently in determining this application. The onus on the Appellant in this appeal was to prove on the balance of probabilities that the domestic garden use was in operation on the material date; that it was a lawful use; and that it had continued throughout the ten year period before that date. The reasons for refusal and the case put by the Council reflect those matters.
10. Costs in appeals are awarded in respect of costs incurred in the appeal process. A failure, if any, by the Council to comply with its own procedures is not a matter within the scope of the Guidance and other remedies outside the appeal process are available to the Appellant.
11. The file records that the Council's statement was received by the Inspectorate on 13 September 2016 and was sent to the Appellant on 29 September 2016 with the third party representations. The statement refers in paragraph 5.3 to Appendix 3 as comprising the plans relating to the 1996 planning permission. These plans were not included with the statement and were not requested by the Inspectorate until 5 October 2016 as well as the case referred to by the Council². I do not know how the omission came to the attention of the Inspectorate³ but the documents were forwarded to the Appellant on 5 October 2016. But as is apparent from the Appellant's grounds of appeal she was fully aware of the plans and the terms of the 1996 permission. The late submission of the plans was therefore not unreasonable in the terms of the Guidance and whilst there was delay in providing the case, given the period of time between its submission and the date of the Hearing, the Appellant did not suffer any prejudice.
12. The Council's final comments with regard to the third party representation could have been more clearly expressed but as the Appellant had been supplied

¹ Paragraph 030

² *The Queen on the application of Mr Jimmy Searle v SSE and East Hampshire DC* [2006] EWHC 1908 (Admin)

³ Possibly a phone call from the Appellant

the detailed representations in September 2016 I do not consider that the Council acted unreasonably.

13. Although a statement of common ground is often helpful there is no requirement in the Rules for one in to be provided in Hearings. If the Appellant thought one would be of assistance in this appeal it was a matter for her to prepare it, the Council did not act unreasonably in requesting her to do so. The Hearing procedure was requested by the Council and given the discussion of the history of the appeal site and surrounding land and the issues in this appeal, which included evidence from local residents as well as the Appellant and the Council, was appropriate in the circumstances of this appeal. Matters were raised and discussed that would not have become apparent or easily dealt with in the written representations procedure and as such I do not consider the Council acted unreasonably in this regard.
14. The Questionnaire is clearly headed s.195 and s.26K Lawful Development Certificate Appeal and the reference to a copy of an enforcement notice as a document uploaded with the form is an unfortunate clerical error. It does not amount to unreasonable behaviour.

Conclusions

15. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

Gloria McFarlane

Inspector

DOCUMENTS

Document 1 – Costs application by the Appellant (in two parts)