

Costs Decisions

Hearing held on 15-16 February 2017

Site visit made on 16 February 2017

by Roger Catchpole DipHort BSc(hons) PhD MCIEEM

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

Decision date: 21 April 2017

Application A: Costs application in relation to Appeal Ref:

APP/R3705/W/16/3158147

Land at Crown Stables, Nuneaton Road, Mancetter, North Warwickshire CV9 1RF

- 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 Crown Waste Management Ltd for a full award of costs against North Warwickshire Borough Council.
 - The hearing was in connection with an appeal against the refusal of a planning permission for the erection of a 40,001 bird broiler building and associated control room, feed silos, LPG tank, heat exchanger, hard standing and attenuation pond.
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Application B: Costs application in relation to Appeal Ref:

APP/R3705/W/16/3158147

Land at Crown Stables, Nuneaton Road, Mancetter, North Warwickshire CV9 1RF

- 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 North Warwickshire Borough Council for a partial award of costs against Crown Waste Management Ltd.
 - The hearing was in connection with an appeal against the refusal of a planning permission for the erection of a 40,001 bird broiler building and associated control room, feed silos, LPG tank, heat exchanger, hard standing and attenuation pond.
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Decisions

Application A

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

Application B

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

Reasons

3. The Planning Practice Guidance 2014 (as amended) advises that, irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved unreasonably and thereby directly caused another party to incur unnecessary or wasted expense in the appeal process. Unreasonable behaviour can either be procedural, relating to the process of an appeal or substantive, relating to the merits of any issues arising from an appeal.

Application A

4. The first application for costs was made by the appellant with reference to a refusal to grant permission for the erection of a 40,001 bird broiler building and associated control room, feed silos, LPG tank, heat exchanger, hard standing and attenuation pond contrary to the recommendation of the Council's own officer. The appellant believes that the Council acted unreasonably because it failed to produce evidence to substantiate its case on appeal, relied upon generalised assertions, acted contrary to established case law and prevented development that should have otherwise been permitted. Additionally, the appellant has also suggested that substantial evidence was introduced at a late stage which required additional preparatory work. Taken together these perceived failings risk an award of costs on both substantive and procedural grounds.
5. Bearing in mind the grounds of appeal that were submitted by the appellant, I found the Council's approach to be entirely proportionate and directly related to the first reason for refusal, namely the potential impact of odour on a nearby dwelling. The statement of case was explicitly framed in terms of the reasons for refusal and relevant policy context. It was made clear that the additional information contained within the appellant's grounds of appeal overcame the second reason for refusal but not the first. The statement then went on to consider the typical impacts arising from chicken broiler units, the relationship between planning and the environmental permitting regime and the odour impact evidence submitted by the appellant. The fact that the Council chose not to rely on predictive modelling is neither here nor there as it was not obliged to adopt such an approach. I therefore conclude that the Council acted reasonably and did not rely upon vague or generalised assertions or introduce any substantive, new issues.
6. As is clear from the evidence before me, planning decisions and environmental protection have a complex relationship that can overlap. I acknowledge that paragraph 122 of the National Planning Policy Framework 2012 advises that local planning authorities should focus on whether the development itself is an acceptable use of land, and the impact on that use rather than the control of processes or emissions. Whilst planning authorities should generally work on the assumption that the relevant pollution control regime will be properly applied and enforced, case law has nevertheless established that the impact of air emissions from a proposed development is capable of being a material planning consideration¹. Consequently, the Council was entitled to take the pollution control regime into account. Case law² has also established that the elected Members, as decision makers, have a responsibility to consider the permitting regime if they perceived it to be materially flawed. I therefore conclude that the Council acted reasonably and did not act in a way that was contrary to established case law.
7. The fact that the planning committee acted contrary to the advice of its officers does not indicate that the development should have been permitted even though this is the conclusion that I reached in my appeal decision. This is because any officer recommendation does not preclude elected Members from

¹ Gateshead MBC v Secretary of State for the Environment (1995) Env. L.R. 37.

² Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government [2012] EWCA Civ 379; [2012] Env. L.R. 34 and Gateshead MBC v Secretary of State for the Environment and Northumbrian Water Group Plc [1994] Env. L.R. 11 (QB).

arriving at a different decision. They are only guided rather than directed by officer opinion and act on the available evidence or its absence, as happened to be the case in this particular instance. The inadequacy of what can best be described as 'illustrative modelling results' became clearly apparent when subject to scrutiny during the course of the Hearing. Indeed, the appellant's own expert witness acknowledged the limitations of the approach. I find it entirely reasonable that elected Members responded to the lack of robust predictive data, as highlighted by Dr Holdaway in his submissions to the planning committee. Furthermore, the appellant's reliance on the results of a second, site specific predictive model validates the more cautious approach of the elected Members. I therefore conclude that the Council acted reasonably and did not prevent development that should have otherwise been approved.

8. Turning to the submission of the Council's statement of case and associated proof of evidence. I note that the appeal, under a written representations procedure, was not started until the 24 October 2016 and that the statutory deadline for the Council's submission was the 28 November 2016. I accept that the Council failed to meet this deadline and did not submit its statement until 5 December 2016. However, this was agreed and, in any event, the appellant had until 12 December to respond with final comments. I acknowledge the limited time that this left for a response but a further opportunity was subsequently given to the appellant to rebut the Council's case when the procedure was changed to a Hearing on the 6 December 2016. Whilst the Council should have ideally provided its evidence at an earlier stage I am satisfied that the timing of this submission did not lead to any greater need for preparation than would have otherwise been required for a standard Hearing. Although the appellant submitted a substantial rebuttal statement the week before the Hearing, this was the direct result of the appellant's own formal request for an Inquiry rather than a consequence of any Council behaviour.
9. Given the above, I am satisfied that the Council acted reasonably in all respects. As such, the appeal could not have been avoided and no unnecessary or wasted expense was consequently incurred. For this reason and having regard to all other matters raised, an award of costs is therefore not justified.

Application B

10. The second application for costs was made by the Council. It believes that the appellant acted unreasonably because a full statement of case was not submitted with the appeal and that substantial evidence was introduced at a late stage that materially altered the grounds of appeal, thus requiring additional preparatory work. Taken together these perceived failings risk an award of costs on procedural grounds.
11. It was clear from the grounds of appeal that the appellant did not make a full statement of case and largely relied upon the presence of an Environmental Permit (Ref: EPR/TP3035EW) to overcome the Council's first reason for refusal. I accept that the appellant failed to respond to the Council's statement of case before the statutory deadline and that a substantial rebuttal of greater scope was subsequently submitted at a late stage.
12. However, this was in response to an agreed change of procedure, where limited cross-examination was permitted, after substantive evidence from an

interested party was accepted after the statutory deadline. As this comprised results from a predictive modelling exercise, I accept that the material change to the scope of the appellant's evidence was both justified and reasonable. I am also satisfied that no new issues were introduced because it was an elaboration of an existing issue.

13. I also accept that this left the Council limited time to prepare a defence and that this was far from ideal. The deadline for further submissions was not in the hands of the appellant, however, having been set for the 10 February 2017 in order to accommodate a fixed Hearing schedule. Whilst the modelling report may have been available at an earlier date, the required deadline was met and no significant delay consequently occurred at this final stage.
14. Irrespective of the behaviour of the appellant, costs can only be awarded where behaviour has led to unnecessary or wasted expense. In this instance I am satisfied that the Council's defence would have been necessary irrespective of the timing of the rebuttal submission. Consequently, there was no preparatory work that would not have otherwise arisen. I therefore conclude that the appellant acted reasonably and did not delay in submitting information, introduce new issues or late evidence that either necessitated an adjournment or extra expense arising from the need for additional preparatory work.
15. Given the above, I am satisfied that the appellant acted reasonably in all respects. As such, the appeal could not have been avoided and no unnecessary or wasted expense was consequently incurred. For this reason and having regard to all other matters raised, an award of costs is therefore not justified.

Conclusion

16. For the above reasons and having regard to all other matters raised I conclude that the applications should be refused.

Roger Catchpole

INSPECTOR