

Costs Decision

Hearing held on 22 May 2018

Site visit made on 22 May 2018

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 03 July 2018

Costs application in relation to Appeal Ref: APP/W3005/X/17/3181325 Land at Yew Tree Farm, Main Road, Jacksdale NG16 5HW

- The application is made under the Town and Country Planning Act 1990, sections 174, 195, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mr D Collins for a full award of costs against Ashfield District Council.
 - The appeal was against refusal of an application for a certificate of lawful use or development (LDC) for the siting of a mobile home for residential use.
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Decision

1. The application for an award of costs against the Council is allowed in the terms set out below.

Preliminary matters

2. The application is for a full award of costs. It was made in writing before the hearing and orally in front of me.
3. The Council was given the opportunity to respond to the written application but by email dated 30 November 2017 declined to do so, stating that the issues raised will be dealt with via its written appeal statement. However there was no reference in its statement to the costs application. No response was made to the application until the hearing, at which submissions were made orally.

Submissions of the Appellant

4. The LDC application was made in December 2016, accompanied by a statutory declaration from the previous site owner, correspondence from the Council's revenue services department, an aerial photograph dated 2001, invoices for the supply of heating oil, receipt for community charge payments and images of the mobile home as existing. The Council had no evidence to demonstrate that the use of the mobile home was unlawful, or to show that the appellant's version of events was ambiguous or less than probable.
 5. The Council failed to foster a positive and pro-active approach to the application contrary to Paragraph 187 of the National Planning Policy Framework (Framework). The appellant made several unsuccessful attempts to discuss the evidence with the Council before a decision was made on the application, for example by letter on 28 February 2017.
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6. The decision notice had several errors. Contrary to advice in Planning Practice Guidance (PPG), it wrongly referred to the criminal burden of proof, "beyond reasonable doubt". Also the time limit for immunity was incorrectly stated.
7. Following the decision the appellant repeatedly sought to discuss with the Council what more evidence was required and to clarify the reasons for refusal. In a call to the Council in July 2017 a meeting was agreed but no response was made to the appellant's numerous attempts by email to follow this up and fix a date. The appellant wished to avoid an appeal but ultimately assumed, in his view reasonably, that the Council did not wish to meet to discuss these matters. An appeal was therefore made as it was "close to the time limits".
8. The Council failed properly to consider the application which, had it done so, would have avoided an appeal. Therefore the Council behaved unreasonably causing the applicant unnecessary delays and expense in pursuing the appeal.

Submissions of the Council

9. The errors in the decision notice were a minor oversight. The Council had accepted in its appeal statement that errors were made. The application was confusing as the applicant had ticked not only the box that stated the use began more than 10 years before the application date, but also the box which stated use as a single dwelling began more than 4 years before the application.
10. The officer dealing with the case at the time would have asked himself whether there was new information to be considered and it could not therefore be concluded that it was appropriate to hold a meeting. No further information was received and in the circumstances the Council had not acted unreasonably.

Reasons

11. PPG advises that costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour directly caused another party to incur unnecessary or wasted expense in the appeal process. Unreasonable behaviour can be procedural or substantive, relating to the issues arising from the merits of the appeal. Although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviours and actions at the time of the application can be taken into account.
12. Paragraph 187 of the Framework is not relevant as it concerns decisions taken on planning applications. However PPG states that the applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land.¹
13. The Inspectorate has issued procedural guidance for LDC appeals, stating that all parties should follow its general principles and read them alongside PPG. It highlights the importance of continued discussion about an LDC application:

While the LPA should always co-operate with an LDC applicant asking for information about the planning status of the land by making records readily available they need not go to great lengths to show that the subject of the application is or is not lawful. Having said that, it is however best practice for the local planning authority to have constructive discussions with

¹ Paragraph: 006 Reference ID: 17c-006-20140306

applicants for an LDC and, if it has any concerns, give the applicant the opportunity to amend the application before it is decided. This should help to avoid the need to appeal, especially appeals where the local planning authority has failed to make a decision...

...clear reasons for refusal of the LDC application will help continued discussions and may mean that a new application with an amended proposal or with additional evidence would be the best way forward.²

14. The reasons for refusal were far from clear as I found in the Appeal Decision. The errors originated in the officer's report because, after rehearsing correctly the burden of proof and relevant time limit for immunity, albeit referring to a cancelled circular rather than the current PPG, it inexplicably summarised that the criminal burden applied and there was no compelling evidence that the mobile home had been used for residential purposes for the last 4 years.
15. It was however common ground that the unit was not a building and therefore the 10 year period, not the 4 year period would have applied. Considering the way the form is worded, it is understandable that an applicant might wish to tick more than one box³, and in any event if the Council had genuinely misunderstood the application it should have sought clarification rather than compound within its decision any initial ambiguity on the part of the applicant.
16. Understandably therefore the appellant would have wished to clarify the reasons for refusal and establish how the errors may have operated on the minds of officers in assessing the evidence submitted. It is fallacious to argue, as the Council did, that the applicant would not have been prejudiced in that he only needed to demonstrate a shorter period of 4 years' continuous use. Had the matter come to appeal on that basis the Council, having recognised its error, would not have been remotely disposed to accept that period as establishing immunity, nor could any estoppel arise in favour of the applicant.
17. The Procedural Guide sets out that other than in listed building cases, there is no time limit within which an appeal against refusal of an LDC application has to be received. However it is expected that normally an appeal would be received within 6 months. If the Council had changed its mind about the need for a meeting it should have communicated this clearly to the appellant, but it failed to do so. It was therefore reasonable for the applicant to consider that if an appeal had to be made it should be made in good time.
18. Turning to the substantive evidence the Council's appeal statement contained no recognition of the statutory declaration made by the previous owner but instead referred to it as a signed statement. In the officer report it is referred to ambiguously as a statutory declaration letter. A statutory declaration should be given appropriate weight as a solemn declaration made under the Statutory Declarations Act 1835 with all that that implies. Unsworn letters or written statements do not have the same status and authority. A signed statement to which no sanctions apply might be afforded slightly but not much more weight than a letter. The Council did not properly explain the status of, or the relative weight attached to, the document in question.

² Procedural Guide: Certificate of Lawful Use or Development appeals – England, Paragraphs 1.41. and 1.4.2

³ The relevant part of the form reads "the use as a single dwelling house...", an unsatisfactory abbreviation of "the change of use of any building to use as a single dwellinghouse", found in s171B(2) of the 1990 Act (my emphasis).

19. The declaration came from someone who had direct experience as a resident of the mobile home for over 20 years. The Council said that it did not show a continuous period of occupation, but the statement that she had "lived there for over 20 years until my said late husband purchased the said properties" calls into question the dates involved rather than the continuity of occupation. Considering that the declaration also clearly implied that a mobile home had been there "at least" since 1981, to my mind the Council should have at least consulted its own planning history surrounding the temporary planning permissions in 1985 and 1987. This would not have been going to great lengths to show that the subject of the application is or is not lawful, even if, as is commonly done in such cases, they are reprinted from microfilmed sources. In my experience it is more often than not sensible for the Council to examine its own original copy planning records in LDC cases, whatever other documents are potentially available from other departments or third parties.
20. The synopsis of planning history in the officer report mentions only the 1985 and 1989 permissions and not for example the application in 1975 for the agricultural worker's bungalow. The Council may only have printed out or perused online a summary of the planning history. But the 1975 application should still have been apparent. If so this would have caused a reasonably critical eye to link it to the fact that, as the officer report also noted, the mobile home was called The Bungalow and there was no evidence of any other dwelling across the site apart from the main farm house. This reinforces my view that the planning history should have been more fully considered.
21. Also of concern is the Council's appeal statement that claimed the Council tax records only went as far back as 1998. This transpired not to be the case since a manual check could in fact be made back to when the tax was introduced in 1993. The Council may have considered it disproportionate to have to do this work but the impression conveyed to the appellant in the statement was misleading, leaving open the question whether the appellant was excluded from accessing them or whether for example on payment of a fee, he might have been able to see and make use of them.
22. A key part of the Council's case was that a site visit by the former case officer showed the mobile home not to be in a state to be occupied as a dwelling and any use had been supplanted by an agricultural use in the form of a farm worker's mess room or similar. However there was no note of a site visit or any photographs taken at the time the visit was alleged to have taken place. Indeed the date of the visit is unknown as there was only a general reference in the officer report. The only images supplied were taken by the appellant in February 2017, from which it was clear that the home was equipped with all the necessary accoutrements of daily living, despite - and these were the only points taken by the Council, the lack of ornaments and toilet requisites, the lack of carpets in the living area (there were rugs) and a dirty kitchen floor. Insofar as this element of the Council's case formed part of its reasons for refusal, the evidence was wholly inadequate to substantiate its position.
23. I recognise of course that the appellant's case was based on events after the expiry of the last temporary planning permission in 1989. However if the Council provided itself and in turn, the appellant with the relevant history that included the statements from the applicant in the temporary permissions, Mr Graham Fry, the appellant would have been able to amend or resubmit his

application on grounds comparable with those on which the Appeal Decision is based. In that event, in all likelihood an appeal would have been avoided.

24. That the applicant himself did not appear to press for details of the planning history is a consideration. However when considered overall the level of cooperation and communication by the Council fell markedly short of what an applicant for an LDC could reasonably expect by way of clear and accurate statements, constructive discussion and provision of documentation originating in the Council's own planning department that may show whether or not the subject of the application is lawful. In addition where the Council sought to make a positive case against the use applied for, it failed to substantiate that case with realistic evidence. The shortcomings amount to unreasonable behaviour by the Council that led to unnecessary expense in the appeal process. Therefore an award of costs is justified.

Costs Order

25. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Ashfield District Council shall pay to Mr D Collins, the costs of the appeal proceedings described in the heading of this decision.
26. The appellant is now invited to submit to the Council to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

Grahame Kean

INSPECTOR