
Costs Decisions

Inquiry Held on 16 - 17 April 2018 and 9 August 2018

Site visit made on 17 April 2018

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 3 September 2018

Costs application 1 in relation to Appeals Ref: APP/E2001/C/17/3181624 & 3181625

Land adjoining Sunnycliff Cottage and known as Blue Bell Pond Caravan Site, Easington Road, Kilnsea, HU12 0UB

- 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 East Riding of Yorkshire Council for a full award of costs against Mr Richard Joseph Scott and Mr Jonathan Mark Scott.
 - The inquiry was in connection with an appeal against an enforcement notice alleging (in summary): (1) a material change of use of land from agriculture to use of the land for the siting of caravans for human habitation purposes and as a holiday and camping site and for caravan storage and fishing; and (2) operational development including the widening of an internal access road; the creation of a highway access; the formation of hardstandings; the extension/excavation of a pond; the erections of portacabins, shed, fencing, bird hide, fishing platforms, jetties, viewing platforms and access gates; and the installation of taps stands, hook up points, septic tank and foul sewage disposal points .
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Costs application 2 in relation to Appeals Ref: APP/E2001/C/17/3181624 & 3181625

Land adjoining Sunnycliff Cottage and known as Blue Bell Pond Caravan Site, Easington Road, Kilnsea, HU12 0UB

- 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 Mr Richard Joseph Scott and Mr Jonathan Mark Scott for a full award of costs against East Riding of Yorkshire Council.
 - The inquiry was in connection with an appeal against the enforcement notice referred to under application 1 above.
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Decision

1. Application 1 for an award of costs is allowed in part in the terms set out below.
2. Application 2 for an award of costs is refused.

Procedural matter

3. Some aspects of the applications relate only to the appeal made by Richard Joseph Scott under Ref APP/E2001/C/17/3181624. When I refer to "the appellant", that means Richard Joseph Scott, but where I refer to "the appellants", this includes his brother Jonathan Mark Scott.

Application 1

The submissions for East Riding of Yorkshire Council

4. The application was submitted in writing and supplemented orally, but in essence, the Council contends that a full award of costs is justified because:
 - the introduction of fresh and substantial evidence concerning ecology and flood risk at a late stage amounted to unreasonable behaviour and necessitated an adjournment, or extra expense for preparatory work that would not otherwise have arisen;
 - the development is clearly contrary to the development plan and the National Planning Policy Framework (the Framework); and
 - grounds (b), (c), (f) and (g) were bound to fail.
5. Alternatively, a partial award is sought because:
 - the appeal on ground (e) was futile, especially since there was no prejudice, and the Council should not have had to incur expense in responding to it;
 - and the late service of flood risk evidence and the change in the appellant's case necessitated an adjournment to a third day.

The response by Mr Richard Joseph Scott and Mr Jonathan Mark Scott

6. The response was made in writing and augmented with oral submissions. However, the substance of the response is as follows.
7. The ecology evidence was submitted on 28 March 2018 and so the Council had plenty of time to consider it. It transpired that the first flooding expert instructed by Mr Richard Scott regularly worked for the Council and therefore had a conflict of interest and it was reasonable to engage an alternative expert. Concerns raised in the 2015 appeal decision regarding the lack of expert evidence concerning flooding and ecology have been addressed.
8. Cogent evidence was submitted in relation to the other grounds of appeal and they were not bound to fail.
9. In relation to ground (e), the service provisions in the 1990 Act must be complied with and proof of proper service of the notice on Mr Jonathan Mark Scott was not provided until a very late stage.

Reasons

10. The 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.
11. In the normal course of events, proofs of evidence should be submitted 4 weeks in advance of the start of the inquiry and in this case that would have been by 19 March 2018. However, the Planning Inspectorate (PINS) agreed to extend this deadline to 3 April. In the event, the appellant's ecology evidence was submitted to PINS on 28 March and forwarded to the Council on 5 April. The appellant forwarded his flood risk evidence to PINS and the Council simultaneously on 28 March.

12. The Council produced 3 written proofs in relation to ecology, but did not seek to call any live witness to speak to this issue. Even if that evidence can properly be described as late, the Council do not clearly indicate how this caused it to incur unnecessary expense.
13. The appellant's flooding evidence was very late, so that it was not possible for the Council to produce an expert witness until after the adjournment. It is also true that, when the appellant's flood risk expert gave oral evidence, he altered or at least elaborated on the arguments set out in his written evidence concerning the sequential test. However, at that point, the Council had not submitted expert flood evidence and when its witness produced his evidence for the resumed inquiry, he was able to address the matters raised orally by the appellant's witness back in April.
14. Had the appellant submitted his flood risk evidence in good time, it would still have been necessary for the Council to incur the expense of engaging an expert. Furthermore, I am not convinced that, if the flood risk evidence had been produced on time, the need for an adjournment and a third inquiry day would have been avoided. I adjourned the second day of the inquiry at about 14:45, in order to start the accompanied site inspection at 16:00. Even without the Council's 2 ½ hours of flood risk evidence, discussion of conditions, closing submissions and costs applications took up about 4 hours on the third day. Especially given that I would have needed to allow the parties time to finalise closing submissions, the inquiry would have gone on to a third day, even if the Council had not needed an adjournment to call expert flood risk evidence. I am not persuaded that the late delivery of the flood risk evidence resulted in wasted expense.
15. I found that the appeal development does conflict with the development plan and the Framework because of the risk of flooding. However, the appellant put forward an arguable case, over and above that which had been presented in the 2015 appeal. The appellant's case was supported by expert evidence and based on the premise that the development amounted to the expansion of an existing business. That case did not persuade me, but it was not so hopeless that it was unreasonable of the appellant to advance it.
16. With regard to ground (b), I found this to be misconceived in relation to the issue of fishing. However, to use Mr Garvey's expression in closing for the Council "it matters not", as the substance of the argument was relevant to ground (c) in any event and needed to be addressed. Indeed, I concluded on ground (c) that fishing was merely an incidental activity. I found on grounds (b) and (c) that the storage of caravans had taken place and that it was a primary element of a mixed use. However, again the appellants advanced an arguable case, given the scale and relatively short-term nature of the storage. It was not unreasonable of the appellants to pursue ground (b) or (c).
17. Ground (e) was withdrawn before the inquiry started. Whilst the appellants maintain they had the right to put the Council to proof regarding proper service on Jonathan Scott, this was only ever a barren academic exercise. There was never any indication that Jonathan Scott was unaware of the notice; he appealed against it. Even if the Council had failed to serve Jonathan Scott properly, section 176(5) of the 1990 Act would have enabled me to disregard a failure to serve, in the absence of any consequent prejudice. Ground (e) was always bound to fail. It was unreasonable of the appellants to pursue this

ground and the Council incurred unnecessary expense in responding to it, including by producing a proof of evidence from Mr Watson.

18. Turning to ground (f), the appellants' contention that the purpose of the notice was to remedy injury to amenity was unsound. I also rejected the argument that, because there had previously been a lawful caravan site use, the requirements of the notice were more than necessary to remedy the breach. However, this aspect merited close examination. Furthermore, my finding that most of the operational development was immune from enforcement action meant that, as a consequence, some of the requirements were excessive. It was not unreasonable of the appellants to advance ground (f).
19. In the event I substantially reduced the requirements of the notice, such that 3 months would clearly allow sufficient time for compliance. However, whilst the appellants asserted that 3 months would be insufficient time to enable compliance with the requirements of the notice as originally drafted, they produced no substantial evidence to support that assertion. On the evidence put before me, that ground did not have a reasonable prospect of success and it was unreasonable to advance it. However, the Council's response amounted to a single short paragraph in Mrs Taylor's proof, rejecting the appellants' assertion. The expense incurred by the Council as a result of the unreasonable pursuit of ground (g) was de minimis and insufficient to warrant an award of costs.

Conclusion on application 1

20. For the reasons given, I conclude that Mr Richard Joseph Scott and Mr Jonathan Mark Scott behaved unreasonably only in their pursuit of ground (e). The Council incurred unnecessary expense in responding to that ground and therefore a partial award of costs is justified.

Application 2

The submissions for Mr Richard Joseph Scott and Mr Jonathan Mark Scott

21. The application was made in writing and amplified orally but, in short, a full award of costs is sought on the basis that the Council behaved unreasonably in failing to engage with evidence indicating that the alleged operational development was immune from enforcement action. Had it engaged with that evidence, an inquiry could have been avoided, or at least the issues could have been narrowed.

The response by East Riding of Yorkshire Council

22. The Council responded orally on the following basis. The applicants sought to submit evidence in relation to ground (d) on a "without prejudice save as to costs" basis. It is not appropriate for the Council to make decisions on the basis of confidential documents, as the public are entitled to see the evidence in the process. In any event, whether or not any of the operational development was completed more than 4 years before the notice was issued, the Council maintain that the appeal on ground (d) should fail as the operational development facilitated the change of use.

Reasons

23. Whether or not the various items of operational development were substantially completed at least 4 years prior to the enforcement notice being issued, the Council contended that they facilitated and were part and parcel of the unauthorised material change of use. Given the principle affirmed in *Kestrel Hydro v SSCLG* [2016] EWCA Civ 784, this is not a case where, had the Council conceded on the 4 year point, it would have consequently conceded defeat on ground (d), rendering an inquiry unnecessary.
24. The precise timing of the works and the circumstances in which they were undertaken were relevant to the question of whether the works facilitated and were part and parcel of the unauthorised material change of use. Although I found against the Council in relation to most of the works, this followed an essential close analysis of the timing of those works and the question of whether permitted development rights for a small caravan site use had ever been implemented.
25. Whether or not it should have engaged with the appellants' without prejudice submissions on ground (d), the Council did not behave unreasonably in continuing to contest that ground and its behaviour did not cause the appellants to incur unnecessary expense. No award of costs is therefore justified.

Costs Order on application 1

26. 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 Mr Richard Joseph Scott and Mr Jonathan Mark Scott shall pay to East Riding of Yorkshire Council, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in responding to the appeals on ground (e); such costs to be assessed in the Senior Courts Costs Office if not agreed.
27. The applicant is now invited to submit to Mr Richard Joseph Scott and Mr Jonathan Mark Scott, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

J A Murray

INSPECTOR