

Costs Decision

Site Inspection on 2 March 2020

by Graham Self MA MSc FRTPI

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

Decision date: 12th March 2020

Costs Application relating to Appeal Reference APP/B1740/X/19/3239960
Site at: The Copse, Hart Hill, Hythe SO45 3ND

- The application was made under the Town and Country Planning Act 1990, Sections 174, 322 and Schedule 6, and the Local Government Act 1972 Section 250(5).
 - The application was made on behalf of Mr Gavin Schrader for a full award of costs against New Forest District Council.
 - The appeal was made against a decision by the council to refuse an application for a certificate of lawfulness for: "Erection of a domestic garage".
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Decision

1. The application for an award of costs is allowed to the extent that a partial award is made in the terms set out below.

Summary of Arguments for Appellant and Planning Authority

2. The appellant (through his agent) refers to a long exchange of correspondence with the planning authority. The basis of the claim for costs is that the appellant attempted to agree the evidence available and how the evidence should be evaluated, and that with better co-operation from the planning authority, a revised application might have established where any dispute could only have been resolved through the appeal process. The council had wrongly based their case about the extent of curtilage on the situation which existed at the time of an old planning permission, not on the situation at the time the certificate application was made. In short, the council had not taken the correct approach to considering all the available evidence.
3. In response, the council refer to the submission of an earlier application for a certificate of lawfulness in April 2019, which was refused and was followed by the June 2019 application subject to the appeal. The emails exchanged with the appellant's agent show that the council requested an application to establish the existing use of the area beyond the stream, and whether the proposed garage fell within permitted development rights. The council had advised the agent that before the lawfulness of the proposed garage could be assessed the lawful use of the land in question must be determined, and as the site of the proposed garage fell outside the defined curtilage the outcome of the earlier certificate application would be repeated. This advice was not taken; the agent requested that the application be registered as submitted, so the refusal decision was issued. The correct procedure had been followed. The council's actions did not result in unnecessary expense to the appellant in pursuing an appeal.

Assessment and Reasons

4. Irrespective of the outcome of the appeal, costs may only 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.
5. As I have explained in my decision on the appeal, the council's approach to the certificate application was flawed. In addition to the apparent muddling of terms such as "garden" and "curtilage", one of the council's main arguments was that the curtilage of the house was defined in the 1964 and 2010 planning applications and that in order to consider any change, an application was necessary to determine the lawful use of the land south of the stream. In other words, the council wanted a two-stage process - first to establish what the lawful use of this land was, then to decide whether the proposed garage would be lawful.
6. I can understand why the council took that stance, but it was wrong. The lawfulness of the proposed building had to be determined in the light of the circumstances at the date of the certificate application. A key factor was whether, at that date, the proposed building would have been within the curtilage of the house. But there was no reason why the council could not have accepted the application straight away and made that decision on the available evidence, including evidence from site inspection and documentary evidence such as the affidavit. The two-stage process should not have been sought by the council.
7. The weight put on the site boundary shown in the 1964 and 2010 applications was also misguided - those were factors to be considered, but not to the overriding extent apparently regarded by the council as appropriate. The council's position is clear from the stated reason for refusal, which referred to "the original designated curtilage of the dwelling", and from the emails submitted in evidence. For example, an email sent by the council's case officer in August 2019 stated that the proposed garage would not be permitted development because "it falls outside the original permitted garden curtilage". For the reasons just explained, the extent of the "original" curtilage is not the prime consideration and was not a sound reason for refusal.
8. The way the council in effect refused to register and process the certificate application despite repeated emails from the appellant's agent was also unreasonable. It should not have been necessary for the consultant employed by the appellant to have sent numerous chasing emails.
9. The consultant tried to arrange a meeting with a more senior officer and for various reasons, apparently including his unavailability during absences, this did not happen. That was unfortunate, since it might have been possible for a better understanding to have been reached between the parties, or perhaps some agreement about additional evidence if the council considered it necessary. However, from what I have read it seems that any such meeting would probably not have changed the council's position.
10. This is an unusual case because I have found that the refusal of the certificate application was justified; but I also find that unreasonable behaviour resulting in wasted expense has been demonstrated. I conclude that a partial award of costs should be made, so the application succeeds to that extent.
11. Costs in this type of case can only be awarded in relation to the appeal process - that is to say, starting from the submission of the appeal (where an award is partial, this includes the partial expense of making the appeal statements and the costs application) and ending on the decision date. The costs incurred by the appellant before the appeal was lodged are outside that scope, and even if the

council had not acted unreasonably by misinterpreting the law an appeal would have been likely. But at least the issues between both sides might have been narrowed and correctly identified.

12. In the circumstances just described it is difficult to devise a precise formula for allocating costs. I have considered whether the amount of costs could be related either to time spent (which would probably mainly be consultant's time) or an overall proportion. On balance, I have opted for the latter option, and I have decided that the council should reimburse 50% of the expenditure incurred by the appellant in pursuing the appeal.

Costs Order

13. 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 New Forest District Council shall pay to Mr Gavin Schrader 50% of the costs of the appeal proceedings described in the heading of this decision.
14. The applicant is now invited to submit to New Forest District 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.

G F Self

Inspector