

Costs Decision

Hearing held on 19 November 2019

Site visit made on 19 November 2019

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

an Inspector appointed by the Secretary of State

Decision date: 27 April 2020

Costs application in relation to Appeal A Ref: APP/D0515/C/19/3226096 and Appeal B Ref: APP/D0515/W/19/3226090

Six Acres, Land West of Bar Drove, Wisbech

- The application is 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 is made by Mrs Lynda Smith (the Applicant) for full and partial awards of costs against Fenland District Council (the Council) in respect of both appeals.
 - The appeals were against an enforcement notice and against refusal of planning permission in respect of the residential occupation of three static caravans and associated development.
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Decision

1. The application as far as it relates to a full award of costs against the Council is refused. Insofar as it relates to a partial award of costs against the Council the application is granted in the terms set out below.

Introduction

2. The application was made for full and, in the alternative, partial awards of costs in both Appeals A and B. It was made orally before me and responded to orally by the Council. The particular arguments of the Applicant revolved around the Council's behaviour at the hearing and reasons for refusal of the appealed application in Appeal B. However the refusal reasons are replicated in the reasons for issue of the enforcement notice in Appeal A.
3. Refusal reason No 1) related to a dispute over the gypsy/traveller status of members of the appellant's family. Refusal reason No 2) was that the development was visually incongruous and prominent within the open and flat landscape, resulting in an unacceptably adverse impact on the character and appearance of the area.
4. I allowed an adjournment at the request of the Council to prepare a response to the application.

Submissions of the Applicant

5. Both reasons for refusal were unjustified and the Council had maintained its position with no convincing evidence in support. In addition its approach to the Human Rights Act 1998 (HRA) was misconceived.
 6. The flaw in the first reason for refusal was that it assumed the applicant must have gypsy status for planning permission to be granted. The Council asked
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- the applicant to withdraw the application and resubmit it in the name of JS, the applicant's son who (which was not in dispute) was a Romany Gypsy. This showed that if permission had been granted on an application from JS then if there was no merits-based reason for refusal, the appeal was unnecessary.
7. As regards refusal reason No 2) the Council was aware that the appeal site was previously developed land (PDL) but gave it no consideration beyond agreeing it as a matter of fact. Additional time was wasted on the situation relating to the hardstanding on site, as clearly the Council knew it was there. Paragraph 26(a) of Planning Policy for Traveller Sites (PPTS) was thus ignored (which gives weight to PDL), and 26(d) (weight given to not enclosing a site with so much hard landscaping, high walls or fence) was misinterpreted.
 8. If the Council failed to give proper consideration to the HRA, or to the fact that the appeal site was PDL, then at least a partial award of costs was appropriate. Further, additional time was spent unnecessarily on examining the local provision of and need for sites for gypsy and traveller accommodation. The Council introduced new evidence at the hearing to support a change of position but later accepted the new evidence had not altered the position. It was akin to being "marched up to the top of the hill and down again" and resulted in wasted time.
 9. Regard had to be given to Planning Practice Guidance (PPG) which gave examples of unreasonable behaviour by local planning authorities. Thus the evidence on character and appearance, especially, consisted of vague generalised assertions. Permission was refused where issues could have been met by imposing conditions, such as how to deal with the naming of the appellant/family. In addition the Council acted contrary to or did not follow well established case law.
 10. Therefore the Council acted unreasonably in the hearing, and in refusing the planning application and issuing the enforcement notice, which caused the Applicants unnecessary wasted expense in the appeal process.

Submissions of the Council

11. In determining the reasons for refusal of the appealed application (and in issuing the enforcement notice), the Council exercised purely professional judgement based on the information provided by the Applicant, and made all its decisions on sound policy grounds. Case law and policy were a matter of interpretation. If the reasons for refusing permission or taking enforcement notice were not convincing, such that the appeals might be allowed, that would not necessarily imply that the Council was guilty of unreasonable behaviour.
12. The HRA was considered at the application stage. With regard to the points made on PDL, hardstanding and the local provision of and need for gypsy and traveller accommodation, the Applicant had not incurred any unreasonable additional expense.
13. Therefore the Council had behaved in a reasonable manner and should not be liable to any award of costs.

Reasons

14. 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.
15. Firstly, the evidence on the effect of the development on the character and appearance of the area was not a foregone conclusion. Although the Council brought limited specific evidence to bear on the issue, it made out a case based on the points made in reason for refusal No 2). It was necessary to examine this issue at the hearing, which included my inspection of the site and its surroundings. I find no fault with the Council on this score.
16. HRA matters were considered by the Council at the application stage, although not as fully as the Applicant's agent had done before and during the hearing. However, in my view it would likely have been necessary in any event for the hearing to consider exactly how the principles arising from relevant case law should be applied (rather than interpreted) to the circumstances of the Applicant and her family, where there was a dispute as to gypsy status.
17. So, as to refusal reason No 1) the Council made a coherent case on whether some of the applicant's family were eligible under the planning definition of travellers in PPTS. In my Decision, and despite the careful analysis of the Council's Diversity and Traveller Manager, I disagreed with the Council's assessment but as a matter of fact and degree, for example on whether one family member was living a travelling life for an economic purpose on a seasonal or periodic basis. I find no unreasonable behaviour by the Council in this matter.
18. With regard to PPTS paragraph 26(a) and (d), the Council should have given explicit weight to PDL. However the extent and use of the hardstanding were usefully discussed at the hearing to enable me to assess for myself *what* weight to accord this factor, given the limited extent of previous development on site. No significant unnecessary time was taken up in so doing. Equally the session on conditions would have been necessary in any event. If the Council's approach was misconceived in relation to certain matters, this did not significantly extend the time taken to deal with conditions overall.
19. That leaves the issue of evidence adduced by the Council during the hearing. It was undisputed that the Gypsy and Traveller Accommodation Need Assessment showed that need was accepted for another 5 pitches during the current five year period. At the hearing however the Council sought to present a case that in the last twelve months additional pitches had been approved such that the position on unmet need was reversed. I allowed this further information to be submitted and requested that both parties considered and discussed this material between themselves during the lunch break.
20. In the Decision it was unnecessary to go into details of the material provided by the Council in support of their change in position, as I was informed at the start of the afternoon's session that it was no longer to be relied on. The Applicant's agent had spent his lunch break examining the evidence and discussing it with the Council who then told me that it accepted after all that

there was an unmet need for additional pitches in the district, in line with its position before the hearing began.

21. If there were additional evidence of such importance that it would change the Council's position on an undisputed but key issue such as need, this should have been canvassed with the Applicant in good time beforehand. Not to do so was unreasonable behaviour. I was persuaded to accept the evidence because it had now appeared to be a principal matter in dispute. There were several candidate sites and documents submitted in relation to each. The criteria for deliverability and availability of sites (set out in my Decision) had to be worked through in relation to each of the sites put forward by the Council, before it was realised that its case was without foundation.
22. Consequently, I disagree that the Applicant was not put to any unreasonable additional expense. Her professionally qualified agent had to peruse the documentation and discuss and seek to clarify a position with the Council on these matters, where possible during the morning session of the hearing, and certainly in the 43 minutes that were taken for the lunch break. Although the hearing itself was not extended, clearly additional unnecessary expense would be incurred in having to deal with and counter this evidence.
23. I conclude that whilst there are no grounds for a full award of costs, there was unreasonable behaviour by the Council that caused the Applicant to incur some wasted expenditure. This justifies a partial award of costs, limited to those costs incurred in assessing and countering the additional evidence on need presented by the Council.

Costs Order

24. In exercise of my 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 powers enabling me in that behalf, I HEREBY ORDER that Fenland District Council shall pay to Mrs Lynda Smith the costs of the proceedings, limited to those costs incurred in assessing and countering the Council's additional evidence on need presented at the hearing, such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned an enforcement appeal and an appeal against the refusal of planning permission heard at a Hearing, more particularly described in the heading of this decision.
25. The Applicant 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