



Costs Decision

Hearing Held on 23 March 2021

Site visit made on 24 March 2021

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 April 2021

Costs application in relation to Appeal Ref: APP/N2739/X/19/3235398 Land at Dunelm Farm, King Rudding Lane, Riccall, Selby YO19 6QL

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Mrs J Gaskell-Horner for a full award of costs against Selby District Council.
 - The hearing was in connection with an appeal against the failure of the Council to issue a notice of its decision within the prescribed period on an application for a certificate of lawful use or development (LDC) for creation of a dwelling, siting of twin unit log cabin and static caravan, and use of land as associated residential curtilage.
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Decision

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

The submissions for Mrs Gaskell-Horner

2. There were procedural failings in the way the Council responded to the application and appeal:
 - It had no new evidence to contradict that of the applicant and instead relied on the evidence it had used to refuse a previous LDC application relating solely to her dwelling¹. No proper explanation or reasoning for not reaching a decision within 8 weeks, or in the 7 months between the dates of the application and the appeal, has been given.
 - It failed to co-operate with the applicant and did not respond adequately to correspondence, including requests for updates made prior to and following the submission of the appeal.
 - It failed to review the case promptly after the appeal was made and did not clarify its intentions until after the appeal start letter was issued.
 - It did not provide detailed information in advance of its statement of case and refused to agree a Statement of Common Ground (SoCG) that would have enabled both parties to identify and focus upon key issues.
3. As a result of the Council's untimeliness and lack of co-operation the applicant was unable to submit a detailed case until the final comments stage of the appeal.

¹ 2018/0052/CPE refused 13 June 2018

4. There were also substantive failings in the way the Council responded to the application and appeal:
 - It wrongly and unfairly assessed the applicant's evidence, requiring a higher standard of proof than the balance of probability.
 - It failed to produce evidence of its own, or from others, to contradict or otherwise make the applicant's version of events less than probable and unreasonably rejected the applicant's evidence. It unfairly accused the applicant and others of deception by suggesting the statutory declaration and corroborating evidence are false.
 - It instead placed weight on a misunderstanding of a Design and Access Statement submitted in support of a planning application in 2007.
 - It wrongly considered immunity from enforcement action by working backwards from the date of the application, contrary to case law².
 - It adopted a position inconsistent with other cases in the District concerning whether replacement caravans constitute a continuation or change of use.
5. As a result of these failings, the applicant incurred additional expenses in relation to the appointment of planning consultants to provide advice, prepare and submit documents, seek to engage with the Council, review its appeal statement, represent her at the hearing and submit the costs application.

The response by Selby District Council

6. The application included additional evidence, over and above that submitted as part of the previous LDC application, and there are differences in the content of the 2 applications.
7. The initial delay was due to the original case officer experiencing a high workload. However, she had told the applicant that, in her view, insufficient evidence had been submitted to justify the grant of the LDC on the balance of probability. Accordingly, she intended to recommend that the Council refuse to issue an LDC. However, continuing workload problems meant she was unable to consult the Council's legal team about this before the appeal was made.
8. The case was transferred to another officer after the appeal was made and after the original case officer had left. The Council waited for the appeal start letter to be issued before proceeding further. The new case officer only became aware of her predecessor's intention to consult the Council's legal team following correspondence in January 2020.
9. The new case officer reviewed the file in conjunction with the Council's legal team and advised the applicant of her conclusions on 18 June 2020. Accordingly, the applicant knew more about the Council's case by the time her statement needed to be submitted than she had when the appeal was made.
10. The appeal start letter did not set out any requirement for a SoCG. The Council advised the applicant that it intended to focus on preparing its statement of case but would be happy to discuss the potential drafting of a SoCG if I were to request one.

² Panton and Farmer v SSETR and Vale of White Horse DC [1998] EWHC Admin 1138

11. The Council assessed the applicant's case using the appropriate test of the balance of probability. It did not use a higher test or require independent corroboration of the applicant's evidence. It considers that the applicant has not provided sufficiently precise and unambiguous information to justify the grant of an LDC and that it had evidence of its own to contradict or otherwise make the applicant's version of events less than probable.
12. While erroneous references to 4 and 10-year periods ending with the date of the application are acknowledged, they did not alter the Council's position on the application. Its appeal statement considered the correct test of any continuous 4 or 10-year period prior to the date of the application.
13. The other LDC decisions identified by the applicant did not involve operational development or a material change of use of land and they are therefore not comparable to the appeal proposal.
14. As the Council would have refused to issue an LDC, an appeal would have been inevitable. The Council has not behaved unreasonably or caused the appellant to incur unnecessary or wasted expense in the appeal process. It followed the correct procedures throughout and has fully substantiated its reasons.

Reasons

15. The Planning Practice Guidance (the PPG) advises that costs may be awarded where a party has behaved unreasonably; and where that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
16. If a local planning authority knows it will fail to determine an application within the prescribed period, it should give the applicant a proper explanation. The authority may be at risk of an award of costs if there were no substantive reasons to justify delaying the determination and better communication with the applicant would have enabled the appeal to be avoided altogether. A similar explanation should be given in any appeal against non-determination.
17. Given the extent of the Council's reliance on evidence it had previously analysed as part of another LDC application, it is difficult to understand why it did not express a view earlier in the application process. When it did so, by email dated 11 July 2019, it was some 5½ months after the application had been made. The broad references to workload problems fall short of a satisfactory explanation for this delay in processing the application. However, as the Council subsequently indicated that it would have refused to issue an LDC, an appeal could not have been avoided altogether. It has therefore not been demonstrated that unnecessary or wasted expense arose from this delay.
18. There was an unfortunate failure to respond to the applicant's initial enquiries about progress, in particular the email of 14 June 2019, and a significant period of silence between July 2019 and January 2020. The Procedural Guide for LDC appeals³ (the Guide) states that it is "best practice for the local planning authority to have constructive discussions with 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."

³ Procedural Guide: Certificate of lawful use or development appeals – England, February 2021

19. The Council's email of 11 June 2019 indicates that a step could have been taken in that direction. It suggested that the applicant's claim might have been accepted for one of the dwellings, but not both, based on Council Tax records. However, that possibility was not explored.
20. When communication was resumed with the new case officer in January 2020 it was already some months after the appeal had been submitted but the start letter had yet to be issued. While it is regrettable that the applicant still had to chase progress, it is not surprising that the Council did not afford the case a high priority in these circumstances. While the evidence indicates that the Council experienced resourcing problems, since addressed through recruitment and restructuring, it does not demonstrate that effective casework management was then in place.
21. The PPG and the Guide expect all parties to meet statutory appeal timetables to ensure that no-one is disadvantaged, and the appeal is processed efficiently. There is limited evidence that the Council reviewed its case promptly following the appeal being made and before the start letter was issued. There were delays before and after the original case officer left, and a lack of clarity regarding discussion with the Council's legal team. The latter issue is of particular concern because the original case officer's intention was recorded in writing. It therefore could, and should, have been followed up on reallocation. All these matters are indicators of unreasonable behaviour.
22. However, the Council gave the applicant a summary of its view 3 days after the start letter was issued and complied with the deadlines set by that letter, so there was no delay in the appeal process. Furthermore, the Council's email of 18 June 2020 made it clear that the Council intended to follow the time scales allowed by the start letter and the applicant's response the following day did not suggest that would be unreasonable. While it would have been preferable for the Council to state its case earlier, it was not obliged to do so, and it was therefore not unreasonable to work to the deadlines that had been set.
23. Because the application and appeal relate to development that had not been the subject of the earlier LDC application, the officer report on that application was of limited assistance to the applicant. However, that was unavoidable considering the difference between the 2 applications. While the applicant did not know the Council's full position when she made the appeal, that is equally unavoidable where a decision has not been made. The applicant was able to address the Council's full case in her final comments and it has not been shown that she was disadvantaged in the appeal process overall. Neither has it been shown that she incurred expenditure that would not otherwise have arisen at an earlier stage.
24. There was no essential requirement for a SoCG in this case and I did not request one. In view of this, the applicant confirmed in the hearing that the Council had not acted unreasonably in this respect.
25. While the applicant may feel that the Council sought a higher standard of proof, the Council's case in the appeal was presented in terms of the balance of probability. As the Council did not determine the application, there is no record of what standard of proof it might have relied upon at that time. Unreasonable behaviour has therefore not been demonstrated in this regard.

26. It may not be necessary for a local planning authority to produce or consider contradictory evidence in refusing to issue an LDC or deciding that it would have refused to do so. This is because the PPG also requires that the applicant's evidence must be sufficiently precise and unambiguous to justify the grant of an LDC on the balance of probability. The applicant's final written comments on costs recognise that the Council considers her evidence to not be sufficiently precise and unambiguous.
27. Nevertheless, the Council identified additional evidence in paragraph 4.6 of its statement of case and presented some of that evidence in the appeal. Of this, an aerial image dated 15 September 2012 and a Design and Access Statement from 2007 contradict aspects of the applicant's case. The highlighted content of the latter document and the location plan of the accompanying application are unequivocal, and the Council did not misunderstand them. The location plan does, however, appear incorrect when compared with the evidence of the Land Registry documents that the applicant had provided. Consequently, it would have been unreasonable for the Council to rest its case on that evidence alone. However, that did not happen.
28. The applicant has not identified any statement by the Council making an accusation of deception or suggesting that the statutory declaration and supporting evidence are false. Indeed, her final written comments on costs, noted above, seem to step back from those assertions. In the absence of such evidence, I have no reason to question the Council's behaviour in this regard.
29. The Council concedes that it wrongly considered immunity from enforcement action by working backwards from the date of the application. However, it has also shown that correcting this error did not alter its position. Accordingly, the error did not cause the applicant to incur unnecessary or wasted expense.
30. The Council has identified material differences between this case and others within the District that concerned whether replacement caravans constitute a continuation or change of use and for which LDCs were granted. Consequently, it has not been demonstrated that it acted inconsistently.

Conclusion

31. For the reasons set out above I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated.

Mark Harbottle

INSPECTOR