The Planning Inspectorate

Costs Decision

Hearing Held on 9 June 2021

Site visit made on 10 June 2021

by Sarah Manchester BSc MSc PhD MIEnvSc

an Inspector appointed by the Secretary of State

Decision date: 19th July 2021

Costs application in relation to Appeal Ref: APP/M9496/W/20/3260846 Lane End Farm, Abney, Hathersage, Hope Valley, Derbyshire S32 1AH

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Ms V Howson for a full award of costs against Peak District National Park Authority.
- The hearing was in connection with an appeal against the failure of the Council to issue a notice of their decision within the prescribed period on an application for planning permission for conversion of barn and holiday unit to dwelling, including removal of modern lean-to barn (revision to planning permission NP/DDD/1117/1162).

Decision

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

Procedural Matter

2. The applicant submitted an application for costs in writing the day before the opening of the Hearing. The Council responded in writing on the morning of the Hearing. At the Hearing, the applicant's agent confirmed orally that he had received the Council's cost rebuttal statement before the Hearing opened and that he did not wish to make any further comments in response. However, following the close of the Hearing, the applicant was invited to provide a written response to the costs rebuttal and I have taken into account the further representation.

The submissions for Ms V Howson

3. The applicant considers that the Council has behaved unreasonably in a number of ways, drawing comparisons with the Planning Practice Guidance (the PPG) examples of unreasonable behaviour which may result in an award of costs. These are set out below.

4. The application subject of the appeal was validated on 13 February 2020 with a deadline for determination of 9 April 2020. The application was not determined within the prescribed time limit and no extension of time was either sought or agreed. The applicant emailed the Director of Planning on 10 September 2020 requesting an update on progress with the application. However, no update was provided and the applicant exercised her right of appeal to meet the deadline for appealing against non-determination. In this case, the Council's evidence to the appeal sets out why permission would not have been granted, but the applicant considers that it has not given a proper explanation of its failure to determine the application.

5. The applicant considers that the Council behaved unreasonably by only supplying relevant information at appeal when it was previously requested, but not provided, at application stage. This is a reference to the applicant's email to the Council dated 10 September 2020, which stated that if there was still a problem, then some warning would be appreciated. The Council responded to the effect that it would contact the applicant to discuss the matter, but it did not set out its concerns in writing until after the appeal was made.

6. A previous appeal against the Council's refusal to grant permission for the same scheme was withdrawn. The proposal was re-submitted to the Council with additional supporting information. The applicant considers it was unreasonable of the Council to suggest that the previous appeal be withdrawn, only to fail to determine the application subject of the appeal.

7. Failure to produce evidence to substantiate each reason for refusal on appeal also constitutes unreasonable behaviour. In this regard, the applicant considers that the Council did not examine in detail the additional information relating to the viability of the scheme; it did not seek professional advice in respect of viability or protected species; it did not provide any empirical evidence and it instead relied on earlier advice received in relation to the refused application, which the applicant considers to be flawed.

8. If the Council had communicated its concerns in a timely manner, including in relation to the planning obligation and the need for a bat survey, then the appeal might have been avoided, or the issues to be considered could have been narrowed, thus reducing the expense associated with the appeal.

The response by Peak District National Park Authority

9. The Council has explained that the delay in determining the application was due to the exceptional and unprecedented circumstances of the covid-19 pandemic, and the consequent disruption to normal working practices.

10. While it did not communicate its concerns to the applicant before the appeal was made, the Council notes that the applicant did not attempt to contact the relevant case officer directly who would have been able to discuss the case. Moreover, the applicant would not have lost her right of appeal if she had not appealed against the non-determination of the application, because she could have appealed against a subsequent refusal. Furthermore, the appeal could not have been avoided because the Council would have refused it.

11. The Council states that it did examine the additional evidence submitted by the applicant, but it nevertheless considered its own earlier financial viability assessment produced by Milner Commercial to be more compelling. In reaching its conclusions, it exercised its planning judgement.

12. With regard to impacts on protected species, the bat survey was carried out in 2013 and by its own admission it was out-of-date. No updated information was provided. The Council did not request an updated survey because it was minded to refuse the application on other substantive grounds and it would therefore have been unreasonable to put the applicant to further expense.

13. In relation to the Unilateral Undertaking (the UU), this does not follow the Council's advice in terms of what it would need to achieve. The signed and dated UU would meet the tests set out in Regulation 122 of the Community and Infrastructure Levy Regulations 2010. However, it fails to include obligations

relating to the use of the holiday accommodation within the planning unit and it would undermine an existing Enforcement Notice relating to the use of part of the appeal site.

14. The Council did provide pre-application advice, albeit verbally, but this was provided in good faith, based on limited information, and without prejudice to any subsequent decision by the Council.

Reasons

15. The PPG states that if it is clear that the local planning authority will fail to determine an application within the time limits, it should give the applicant a proper explanation. In any appeal against non-determination, the local planning authority should explain their reasons for not reaching a decision within the relevant time limit, and why permission would not have been granted had the application been determined within the relevant period.

16. The applicant considers that the covid-19 pandemic is not a valid reason or proper explanation for the Council's failure to determine the application because for much of the time between the submission of the application and the appeal, there were no lockdown restrictions in place. However, the prescribed time limit for determination expired in April 2020, which was within the first national lockdown.

17. While restrictions were eased later in 2020, I consider that the first lockdown, and the significant change and disruption to working practices at that time, does adequately explain the Council's failure to determine the application within the prescribed time limit. While this was not communicated directly to the applicant at the time, general information relating to the impact of the pandemic on decision-making was publicly available on the Council's website. The evidence indicates that the applicant was aware of the impacts of the pandemic. Nevertheless, I accept that, in the appeal, the Council did not explain its reasons for not reaching a timely decision.

18. It appears that neither party attempted to engage with the other during the prescribed time period, nor indeed for a further 5 months following the expiry of the deadline for determination, at which time the applicant contacted the Director of Conservation and Planning for a progress report. Roughly 4 weeks later, having heard nothing further from the Council, the applicant appealed against the non-determination.

19. I accept that a direct approach to the relevant case officer might have elicited a more timely response. Nevertheless, once the long delay had been brought to the attention of the Council, it still failed to set out its concerns in a timely manner. Moreover, it did not seek to agree an extension of time which would at least have provided the applicant with some certainty that progress would be made.

20. If the applicant had not appealed against the non-determination of the application, there would have been a further right of appeal following the refusal of the application. However, in the 6 months that the application was with the Council, the applicant was given little indication of when a decision was likely to be taken or what that decision was likely to be.

21. The Council did not set out its concerns in response to the applicant's email, and there is no decision notice. Consequently, when the appeal was made, the

applicant was not aware of the specific concerns of the Council or the particular matters that would need to be addressed in the appeal. While this would be understandably frustrating to the applicant, it is not unusual in an appeal against non-determination in my experience. The Council did subsequently set out its concerns by email dated 29 October 2020 and it expanded upon these in its appeal statement of case, including the reasons why it would have refused the application.

22. The Council's statement is relatively brief in its treatment of the detailed evidence relating to the feasibility and viability of converting the barn. However, these issues were explored during the Hearing and I am satisfied that the Council could substantiate its reason for refusal in relation to the feasibility and viability of converting the barn.

23. I understand the applicant's frustration that the Council seemingly gave greater weight to the report by Peter Milner that was commissioned in relation to the refused application subject of the withdrawn appeal. That report pre-dated the viability assessment submitted with the application subject of the appeal. It is not an independent financial viability assessment and it does not take into account all of the costs associated with converting the barn. However, while its costings are not reliable, it introduces uncertainty including in relation to the works necessary to convert the barn and hence the costs of the conversion. It was not unreasonable of the Council to exercise its professional judgement based on a review of the available evidence.

24. The Council's ecologist was not consulted in relation to potential impacts on protected species. However, the Council was already aware that the appeal site provided bat roosting opportunities. Moreover, as the bat report was carried out in 2013 and caveated that it would need updating if more than a year had elapsed, there could be little doubt that it was out of date. The Council's ecologist visited the site in 2018 to establish whether or not an updated survey was required in connection with earlier proposals. Given the elapse of time and the different schemes, the Council could not be certain that mitigation measures secured by conditions imposed on earlier planning permissions would be adequate to avoid impacts and offences. While the concerns were not communicated to the applicant, nevertheless there were sufficient grounds to substantiate the putative reason for refusal relating to impacts on bats.

25. The parties did not engage with one another in relation to the UU before the appeal was made. However, it was clear from the discussions at the Hearing that the Council had set out, during the course of the appeal, the detailed matters that it wished to see addressed in the UU. I understand the applicant was living outside of the UK during the appeal, such that there was little opportunity to revise the UU. The Council's particular concerns were discussed at the Hearing, including whether they could be addressed by planning condition since they were not included in the UU. Irrespective, it was not unreasonable of the Council to raise concerns as to whether or not the UU provided sufficient clarity in relation to the previous permissions, authorised and unauthorised uses within the same planning unit, and the treatment of the adjacent barns.

26. On balance, given the timing, I consider that the covid-19 pandemic first national lockdown is a reasonable justification for the Council's failure to determine the application within the prescribed time period. However, it does

not explain why the Council could not communicate directly with the applicant either during that time or the subsequent months before the appeal was made. I find the lengthy delay and lack of communication, including the Council's failure to respond to the applicant's email request for an update on progress, to constitute unreasonable behaviour on the part of the Council.

27. It will obviously be a disappointment to the applicant to know that the Council would have refused the application if it had determined it. The applicant disagrees with the Council in relation to the interpretation of policy, the reliability of the evidence and the benefits of the scheme. However, I am satisfied that the Council substantiated the reasons why it would have refused the application with reference to the development plan. It was a finely balanced decision and it did require the exercise of planning judgment, irrespective of the matters the applicant considers are factual. As can be seen from my appeal decision, I also found harm and conflict with the development plan and I dismissed the appeal accordingly. While the Council did behave unreasonably in the processing of the application, the appeal could not have been avoided and the Council's failure to determine the application did not prevent or delay development that should clearly have been permitted.

Conclusion

28. Therefore, unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated and a partial award of costs is not justified.

Sarah Manchester

INSPECTOR