

Costs Decision

Date of Hearing 24 and 26 March 2021

Site visit made on 1 April 2021

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

an Inspector appointed by the Secretary of State

Decision date: 1 October 2021

Costs Application in relation to

Appeal A: APP/R3650/C/19/3236157

Appeal B: APP/R3650/W/19/3236151

Land at Haybarn, Dye House Road, Thursley, Godalming GU8 6QN

- 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 Mr Wedge for a full and a partial award of costs against Waverley Council (the Council).
 - Appeal A was against an enforcement notice alleging the erection of a dwelling.
 - Appeal B was against the Council's refusal to grant planning permission for a dwelling.
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Decision

1. The application is refused.

The application

2. The application was for a full award of costs incurred in respect of both appeals, and in the alternative a partial award in respect of the Council's unreasonable behaviour "in the exercise of its development management responsibilities".
3. A "skeleton" application was submitted when the appeal was lodged in August 2019 and finalised in writing before the hearing. However the final version is substantially the same as the skeleton which is in fact relatively detailed. The Council responded in very brief terms to the skeleton application, in writing. I have considered all submissions which were cross copied to the other main party. The Council expressed its comments as an "initial response" but elected not to respond further in writing or orally after the hearing proceedings.

Submissions on behalf of the Applicant

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4. There were seven points.
 - I. By regarding the proposal as a new dwelling, the Council wrong-footed itself in applying national and local planning policy and came to a vexatious decision. Such an unfortunate, unprofessional assessment could have been avoided if repeated requests for a meeting had been taken up before the issue was conceded in the agreed Statement of Common Ground (SoCG).
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- II. The case officer's report was flawed, wrong, incomplete and misleading in describing a completely different site and failing to consider the context of the log cabin's surroundings. It was also "blindingly obvious" that the application documents were not sent to consultees, leading to unhelpful consultation responses that were latched onto in the assessment of the application. It is suggested that the Council was not interested in understanding the case and had pre-determined its position.
 - III. The Council was fundamentally wrong in viewing the proposal as inappropriate development requiring justification by way of very special circumstances. The error prejudiced determination of the application and appeal until conceded as such in the SoCG.
 - IV. The assessment against Green Belt (GB) policy failed to recognise that the proposal was for appropriate facilities for outdoor sport that are not inappropriate development in the GB, until conceded in the SoCG.
 - V. There was no professional assessment of the equine need for the accommodation and unreasonable reliance on "common sense" in the "totally unsound" case officer report. It was standard practice for Councils to seek consultants' advice in such cases but this was belatedly obtained in the appeal and in fact supported the need for the groom's accommodation.
 - VI. Natural England (NE) and the Surrey Wildlife Trust (SWT) were not given information on special protection areas (SPA). The Council failed to give due care and attention in the assessment of the SPA and ancient woodland (AW) issue in determining the application. The second and third reasons for refusal were unsound and "verge on being vexatious" and only belatedly resolved after the appeal and conceded in the SoCG.
 - VII. The Council misunderstood and misapplied paragraph 79 of NPPF in considering the application. The point was not pursued in its Statement and should never have been an issue.
5. If these failings had been addressed earlier and a different decision made, an appeal would have been unnecessary. Officers had no interest in understanding the appellant's and his professional advisers' concerns. It was "grossly vexatious" to be advised to 'push off' the decision to the Planning Inspectorate. It was obvious that the Council did not wish to work with the appellant positively and proactively in line with NPPF, paragraph 38. The application contained all the information to enable the Council to make a rational decision.

Enforcement action

- 6. This part of the application is very repetitive, and I have summarised it as follows.
- 7. It was not expedient to issue the enforcement notice because it had been made very clear that a revised application would address the "ill-considered manner in which the application had been determined" and the reasons for refusal. Contrary to paragraph 59 NPPF, the Council acted disproportionately to the suspected breach of planning control, especially since the appellant "had made it abundantly clear that the consideration and determination of the application was flawed".

8. It was unreasonable to have to appeal against an enforcement notice that should have been quashed.
9. A draft SoCG was submitted in August 2019 but the Council did nothing until prompted by the appellant in August 2020 yet failed to conclude it until 7 January 2021. It was "obvious" in August 2019 that fundamental issues required resolving so from then on, the Council could have withdrawn the notice and invited a planning application to retain the building. Although it conceded the reasons for refusal were overcome it failed to withdraw the notice and caused the appeals to continue.

Submissions of the Council

10. Most of the points were addressed in the Council's appeal statement. It was necessary to maintaining public confidence in the planning system and given the history of the site and the number of failed applications made, the issue of the enforcement notice was reasonable.
11. From the history of the site, the owner was clearly aware of the planning system and that certain forms of development require planning permission. Despite this, the owner erected the dwelling and only attempted to regularise the situation on the Council's insistence after significant complaints were received from the public. In such a situation the public have a clear expectation that robust action is taken to ensure confidence in our planning system. Enforcement action is discretionary and given the number of attempts to regularise the development, the notice was proportionate and reasonable.

Reasons

12. Paragraph 30 of the Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may be awarded where a party has behaved unreasonably and that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
13. Planning Practice Guidance 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. Although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviours and actions at the time of the application can be taken into account.
14. The appeal on ground (b) failed. It was a hopeless argument that the matters alleged to be a breach of planning control did not amount to a dwelling as I explained in depth in the Appeal Decision.
15. I did not find the consultation responses to be unhelpful. On the contrary they were relevant and in some respects persuasive on certain of the matters in issue. I also found the case officer's report to be relevant and helpful. There was a misdescription of the site but it was a minor error, and such errors as there were, were unlikely to have affected the decision on the application.
16. The Council was not (initially) fundamentally wrong in viewing the proposal as inappropriate development, as I found in my Appeal Decision. I also found that if I were wrong about whether the proposal was for appropriate facilities for

- outdoor sport, there was harm from a loss of openness that prevented the relevant applicable exception in the NPPF from applying to the proposal.
17. I should say at this point that the applicant assumes the SoCG controlled the outcome, whereas I made it clear at the hearing that I had doubts about the agreed way in which the proposal should be considered under NPPF policy, and therefore these matters were discussed at length during the hearing. Furthermore it is concerning that the applicant's agent should make such assumptions when there were interested persons, including neighbouring occupiers and the parish council who participated in the hearing and gave evidence of a contrary view put forward on behalf of the applicant. As a professional planning agent he should be aware that I have a duty to listen to all representations and take them into account in my decision and that it is the task of the appellant to deal with all relevant objections and not dismiss them because they come from interested persons and not the Council with whom an agreement had finally been secured, no doubt after pressing it very hard to turn its attention to the appeals.
18. It is not incumbent on a local planning authority to produce expert evidence to substantiate its position on cases where there is said to be an essential need for workers' accommodation on site. Perhaps more so in the case of equestrian and other specialist activities with which they are unfamiliar, the Council might have turned to consultants. However the Council clearly has experience of dealing with several equestrian related, and workers' accommodation proposals. The consultants' advice that the Council did belatedly obtain, supported the need for the accommodation but I did not find it persuasive as to the specific appeal dwelling.
19. I found the Council's initial position, set out in the delegated report, a competent and persuasive assessment which no doubt involved the application of a certain amount of common sense as well as planning experience. The application of common sense does not make an assessment totally unsound just because it is not backed up by consultants. I agreed that a residential dwelling (and other buildings) already exists on the site that would provide for the essential needs of the enterprise and I was not persuaded that there was an essential need for the proposed accommodation.
20. I agree that the Council was dilatory in the way they handled or made known the outcome of the consultation process and indeed once it became apparent that interested persons had provided detailed relevant information, I insisted that the Council provide the full consultation responses. This threw up some uncertainty over the way NE and SWT were consulted. Ultimately however I was able to obtain information sufficient to enable me to make a decision. Apart from ancient woodland, the responses from NE and SWT were not among the principal controversial issues in dispute and it is not the case that but for any irregularities in consulting them, the appeal would have been unnecessary. As to the ancient woodland issue I found this to be a relevant factor in determining the appeal and the Council's initial views, and those of the SWT as were reported, were not unreasonably held.
21. In the event none of the reasons for refusal was pursued by the Council. Indeed they adopted an unusual stance in coming to the hearing without bothering to make it's position clear in advance which was, as it told me when I pressed the officer for a clear explanation, "the development appears in

- accordance with all policies discussed in the statement [SoCG]" and that "the appeal is acceptable subject to conditions to control the development".
22. I can readily appreciate the applicant's vexation at being told, after the notice was issued and when he and the agent finally got to discuss the appeals with the officers, that the best thing to do was to 'push off' the decision (meaning that the decision should be allowed to be pushed off) to the Planning Inspectorate. This has not been disputed by the Council, the statements of the applicant are compelling, and I have no reason to disbelieve that was what the applicant was told. However, despite the language used, it might not have been inappropriate, because of the sustained objections of interested persons, to continue with the hearing. It was a matter for the Council to resolve at least until the hearing started.
23. I would like to think that the reason it was left to the Inspectorate to determine the appeal, rather than seek proactively to resolve any outstanding issues that needed to be dealt with by conditions, was that the Council recognised the position taken by interested persons who clearly objected to the development. These had some credence, bearing in mind also the initial objections taken by the Council as evidenced in its officer's report and which led to the reasons for refusal.
24. All that said, the third reason for refusal concerning the SPA's and SAC's was not substantiated by any evidence to contradict the appellant's reports, submitted at the time of the application which considered these issues in some detail and concluded there would not be any likely significant effect on the integrity of the SPAs or SACs. I agreed and found the proposal would comply with Policy NE1 of the Local Plan 2018 (Part 1). The Council's actions were unreasonable in failing to offer any evidence to the contrary and in failing to make its position clear until very late in the appeals process when it did an about turn and agreed everything with the appellant in the SoCG.
25. As to the second refusal reason, I found in the Appeal Decision that the development has created a new dwelling immediately adjacent to an area of designated ancient woodland likely to lead to future pressures that may incur a deterioration in the valuable landscape resource which would be detrimental to the visual amenity and character of the area. The Council's initial position as articulated in that refusal reason was broadly justified.
26. Turning to the enforcement notice, I found in the Appeal Decision that the notice was neither procedurally defective nor a nullity.
27. Paragraph 59 NPPF is a high-level tract which rightly asks local planning authorities to act proportionately in responding to suspected breaches of planning control. It also states correctly that enforcement action is discretionary. But whether it was expedient for the Council to issue the notice was entirely a matter for it. It is well established that absent a compelling reason to treat the notice as a nullity or as so defective that it cannot be made good without injustice to any party, an appeal against it is constrained to proceed along the grounds set out in statute and no other.
28. Just because the agent clarified his view that a revised application would address the "ill-considered manner in which the application had been determined" and that he had made abundantly clear the determination of application was flawed, does not make it so.

29. I accept that the Council's communication with the appellant in some respects was poor and I have no doubt that the persistence of the appellant's agent finally resulted in the Council giving up its original objections to the development, for whatever reason. Had the Council dealt expeditiously with matters prior to the hearing, however, it is difficult to say with any certainty what the outcome might have been in terms of continuing the appeal.
30. It was not obvious that the notice had to be withdrawn. Third parties had made substantive objections in the appeal process that still needed to be grappled with by the Council if it was to adhere to its SoCG with the appellant. One hopes that it was not going to sweep them aside. However its reasons for continuing, if not out of deference to the interested persons (a reed rather too readily clutched at by the Council's officer when I suggested it) remained unclear. The Council clearly got itself in a bind and decided the best way forward was to let me sort it out. I cannot say it would have been likely that they would have withdrawn the notice. If the author of the delegated report had any influence at the relevant times when attention should have been paid to the appellant's legitimate need to have matters clarified, I have doubts as to whether the volte face would have occurred.
31. The partial award applied for in respect of the Council's alleged unreasonable behaviour "in the exercise of its development management responsibilities" does not state sufficiently precisely which aspects of those duties are to be distinguished from the matters complained about in the application for the full award. Nevertheless it would be churlish to take the point that it has not been stipulated in the partial award and I find that the appellant has incurred loss through unreasonable behaviour of the Council, in that it should not have been necessary to prepare a case in respect of the third refusal reason related to the SPAs and SACs for the hearing.
32. A partial award of costs is therefore justified. The rest of the application is not.

Costs Order

33. 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 Waverley Council shall pay to Mr Wedge, the costs of the appeal proceedings limited to those incurred in appealing, preparing and presenting its case on the second reason for refusal of the Council's decision of 24 May 2019.
34. The applicant is now invited to submit to Waverley 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