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## Costs Decision

Inquiry Held on 27 August 2021

Site visit made on 1 September 2021

**by Katie Peerless Dip Arch RIBA**

**an Inspector appointed by the Secretary of State**

**Decision date: 25 October 2021**

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### **Costs application in relation to Appeal Refs:**

**APP/J2210/C/18/3209297(Appeal A), APP/J2210/C/18/3209299**

**(Appeal B) and APP/J2210/C/18/320300(Appeal C)**

**Land at Whitstable Beach, Whitstable Foreshore, Kent**

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Whitstable Oyster Company Limited (Appeal A), Whitstable Oyster Fishery Company (Appeal B) and Whitstable Oyster Trading Company Limited (Appeal C) for a full award of costs against Canterbury City Council.
  - The inquiry was in connection with an appeal against an enforcement notice alleging the unauthorised construction of oyster trestles.
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### **Decision**

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

### **The submissions for the Appellants**

2. The appellants have submitted their claim, and their comments on the Council's response, in writing and I will not, therefore, reproduce these in full here. However, they submit that the Inquiry could have been avoided had the Council allowed more time for a planning application to be submitted following the refusal of the application for a Certificate of Lawful Development (LDC) for the trestles. Because of the Council's delay in informing the appellants as to what had caused them to change the opinion expressed in the letter of 2010, in which the appellants were told that planning permission was not required, the appellants did not know what information would now be required to support such an application.
3. The appellants therefore sought to establish that the trestles were, in fact, lawful through the LDC application and, following the refusal, time was needed to undertake the surveys and compile the reports that were required to support a subsequent planning application. These reports have been prepared for the Inquiry and following receipt of the information, the Council has now withdrawn all the reasons for refusal set out in the enforcement notice.

### **The response by Canterbury City Council**

4. Again, the Council has also submitted its response in writing but their case is that the appellant companies were told in August 2017 that the Council considered that planning permission was required for the trestles and they were asked to submit an application for them. Instead, the appellants applied for a LDC, which was not appealed when it was refused.

5. The Council had repeatedly asked when a planning application could be expected and had had no positive response between 25 August 2017 and 6 July 2018 when the enforcement notice was issued. In the absence of any timetable for the submission of an application, the Council considered it expedient to issue the Notice to ensure that any harm arising from the trestles could be controlled.

## **Reasons**

6. The Government's Planning Practice Guidance (PPG) advises that costs may 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.
7. The appellants are aggrieved because they consider the issue of the enforcement notice was 'unreasonably premature' given that they believed there was no time pressure to enforce against the trestles and 'no irreparable environmental impacts' being caused by them. They state that they consider that it was sensible to first establish a baseline for any future environmental habitat or environmental assessment through an application for an LDC.
8. However, it is clear from the content of the email dated 11 April 2018 that the Council did not agree with this approach and considered that a planning application should not have awaited the outcome of the decision on the LDC application. Nevertheless, the Council had suggested, in a letter dated 9 January 2018, that enforcement action would be suspended if a planning application was received.
9. The need for any environmental assessment should, in my opinion, more properly have been pursued from the outset through discussions with the Council and Natural England (NE), one of the Government's statutory consultees on environmental matters, rather than through a LDC application. The appellants were aware of the location of the farm in a number of important protected designations and, by at least July 2017, of the need to involve the Marine Management Organisation (MMO) in licensing parts of the development. Although it has now been demonstrated that the environmental impacts are acceptable, this was not established until the ecological surveys were carried out and the resultant information analysed. There was no such information available at the time the notice was issued.
10. In any event, the LDC application was not submitted until March 2018 which was a considerable time after the Council had asked for a planning application. That application also concentrated on justifying the trestles on the grounds that it was too late to take enforcement action against them, that they were permitted development or that they did not fall within the Council's jurisdiction. Had the LDC application been submitted in a more timely manner, the decision on it, which took about 2 months, would have been available sooner, allowing more time to prepare the submission of a planning application.
11. In the event, the Council had no evidence that the appellants were taking any positive action to resolve the matter in the period between April 2017, when a Planning Contravention Notice was first served and March 2018 when the LDC application was submitted.

12. The appellants consider that the Council 'jumped the gun' by issuing the notice when it did, but it was their decision to prolong the process and take the risk of applying for the LDC before submitting a planning application. The Council had previously expressed its views on why it considered the development was not authorised through the permitted development regime but the appellants chose to submit the LDC application despite this.
13. Although the appellants complain that they were not informed of the reasons why the Council had changed the views expressed in the 2010 letter, they did not take the opportunity of seeking pre-application advice, as they were invited to do. It was also open to the parties to agree a timescale for undertaking the relevant surveys whilst a planning application was running.
14. I accept that the determinative issue in this application is whether it was unreasonable of the Council to issue the notice when it did, rather than whether the appellants should have submitted the planning application earlier. However, I do not find it was unreasonable to have issued an enforcement notice almost a year after warning the appellants that the development was considered to be unauthorised.
15. The appellant companies were aware of the environmental importance of the site but made no apparent attempt to begin the assessment process until after the LDC had been refused. Expansion of the farm was continuing and although it is the case that a dialogue with the Council was maintained, there was no firm agreement to submit a planning application by any specified date. The Council was entitled to be concerned about the possible harmful environmental impacts of the trestles in the absence of any positive response from the appellants.
16. The fact that the appeal trestles have subsequently been shown to be having no significant effects did not emerge until partway through the Inquiry and after the appellants had commissioned detailed environmental studies. I therefore consider that the issue of the notice was a reasonable and proportionate method of addressing the concerns of the Council at the time.
17. I consequently find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated and the application for an award of costs is refused.

*Katie Peerless*

**Inspector**