
Costs Decision

Site visit made on 7 September 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 October 2021

Costs application in relation to Appeal Ref: APP/R0660/X/20/3264261 Land at Bracken Hill, Mottram Road, Alderley Edge, SK9 7JF

- 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 Mr & Mrs Gouge for a full award of costs against Cheshire East Council.
 - The appeal was against the refusal of a certificate of lawful use or development (LDC) for an orangery to rear of existing house plus outbuilding to provide garaging, pool complex and gym.
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Decision: the application is granted in the terms set out below

Reasons

1. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may only 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. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against a Local Planning Authority. These include preventing or delaying development which should clearly be permitted; failure to produce evidence to substantiate each reason for refusal on appeal; and acting contrary to, or not following, well-established case law.
2. The essence of the appellants claim for costs is that they have been put to unnecessary expense and delay through having to appeal when the LDC should have been granted by the Council. I am inclined to agree.
3. The only indication available of the Council's consideration of the application is contained in the Officer Report. The latter sets out a reasonable analysis of the case law in relation to the definition of 'curtilage' albeit, I note, there is no reference there to the judgment of the High Court in *Challenge Fencing Ltd. v SSHCLG* [2019] EWHC 553 (Admin) that was issued in March 2019. The Officer Report then correctly identified that the issue of whether the proposed building falls into the curtilage of the property is different from what constitutes the planning unit.
4. However, having set out the correct framework for consideration of the main issues, on my reading the Officer Report then conflates the considerations of

curtilage and use. Moreover, the Officer Report does not deal adequately with the available evidence.

5. The appellants criticise the Council's interpretation of the aerial photographs, and in particular the reliance placed on the photograph taken in 1971-73. If those aerial photographs had been the only evidence available to the Council in its consideration of the application, then in my view the Council would have been perfectly entitled to rely upon its own interpretation of those photographs and to reach a conclusion on that basis. But that was not the only evidence before the Council.
6. The applicants had provided two Statutory Declarations from people who had direct knowledge of the site over many years. Those Statutory Declarations were important evidence that attracted substantial weight in evidential terms, but did not even receive a mention in the Officer Report.
7. Then there was the series of photographs taken by the applicants of various family functions held at Bracken Hill between 2012 and 2018. The Officer Report concludes that the use was only occasional and that no evidence had been supplied to show that the photographs were taken on the land claimed in the application to be within the curtilage of the dwelling and not elsewhere within the property. The Officer Report goes on to suggest that the use of this area appears to have been sporadic at best and does not suggest a continuous change of use to residential.
8. That, in my view, is a remarkable statement to make and is wholly unsupported by evidence. The photographs taken in the summer months all show a closely mown lawn across a large part of the site. If the use was truly sporadic, the implication is that the lawned area was specifically mown for each occasion that the use took place. I can understand that some items visible in those photographs, such as the garden furniture and inflatable play equipment, were taken onto the land specifically for those events. But it seems wholly implausible that such a large area of lawn was only mown for occasional family functions.
9. Furthermore, those photographs clearly show features on the site: for example, the steps through the rockery, the line of trees on the boundary and the long-established permanent play area at the end of the garden. On the assumption that the case officer visited the site before writing that report, it should have been evident that those photographs were taken on the land in question. If the case officer had not visited the site before writing the Officer Report, that in itself would represent a major failing in the Council's determination of the application.
10. The Council's error, it seems to me, is that the applicants' evidence was not considered holistically. Had it done so, the Council may have, and in my view should have, reached the conclusion that the land did fall within the curtilage of the dwelling known as Bracken Hill on the date the application was made. Moreover, the Council had no evidence of its own to contradict that of the applicants or make their version of events less than probable.
11. For that reason, I cannot accept the Council's response that it reached a reasonable decision, based on the information provided. In my view, the Council did act unreasonably in not properly considering all the available evidence and by not substantiating the reason for refusal on appeal.

12. I am mindful that the Council did not share my initial concerns about whether the outbuilding was reasonably required for purposes incidental to the dwellinghouse as such. In my view, the applicants are therefore correct in their belief that the LDC should have been granted by the Council and that the entire appeal was unnecessary.
13. The Planning Practice Guidance advises that, irrespective of the outcome of the appeal, costs may only 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. In this case, the applicants have clearly incurred unnecessary or wasted expense in submitting the appeal and the supporting documentation. Accordingly, both criteria have been met and a full award of costs is justified.

Costs Order

14. In exercise of the powers under sections 195, 320 and Schedule 6 of the Town and Country Planning Act 1990, and section 250(5) of the Local Government Act 1972, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Cheshire East Council shall pay to Mr & Mrs Gouge, the full costs of the appeal proceedings described in the heading of this decision.
15. The applicants are now invited to submit to Cheshire East 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.

Paul Freer

INSPECTOR