

# Costs Decision

**by Anthony J Wharton BArch RIBA RIAS MRTPI**

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

**Decision date: 3 December 2021**

---

**Costs application in relation to  
Appeal Reference: APP/YO435/X/21/3279878**

- 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 N Russell against Milton Keynes Council.
  - The appeal was in relation to an application for a Lawful Development Certificate (LDC).
- 

## Decision

1. The application for an award of costs is refused.
2. Planning Practice Guidance (PPG) states that, irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process. The costs application has been made in a timely manner.

## The application for costs

3. It is considered that the Council have acted unreasonably in the way that they handled the application, causing a significant and unnecessary delay in obtaining a LDC and that the appellant has incurred unnecessary and wasted expense in pursuing this appeal.
4. It is argued that the LPA wrongly assessed the LDC application in that its starting point was that the appeal building is within the same planning unit of Caldecote Mill. It is stated that it should have considered whether or not, as a matter of fact and degree, a material change of use of the appeal building had occurred to create a separate planning unit.
5. The LPA approach is evident from the delegated report which provides an assessment as to the self-contained units level of dependency upon Caldecote Mill. The LPA failed to consider that the appeal building is a separate planning unit to that of Caldecote Mill and its curtilage. What has taken place is the material change of use of a former agricultural building to a dwelling house and the appeal statement demonstrates that the evidence confirms that the appeal building has been used as a dwelling house for a continuous period of 4 years prior to the submission of the application. It is therefore contended that the LPA prevented development which should clearly be permitted.
6. It is also considered that the LPA have acted unreasonably in procedural matters contrary to the NPPF. It is contended that the LPA have concealed relevant information with regard to the enforcement case opened in 2018. Furthermore, the

LPA have now indicated that the enforcement case was closed in 2018. This information was concealed within the application process.

7. It is contended that an enforcement case would only be closed once matters have been resolved, unless it is accepted that the development is lawful. Therefore, the LPA could have informed the Appellant that the enforcement case had been closed at the application stage and there would have been no reason to pursue the application and subsequent appeal to regularise the development.

8. It is contended that the LPA have also provided information which is manifestly inaccurate or untrue. The LPA's statement contends that the photographs submitted with the appeal were not provided at the application stage. This is not the case. The photographs were submitted at that time and the Development Services Officer confirmed that the photographs had been passed on to the case officer.

9. It is also noted that the first email received from the case officer following validation detailed that they would not accept any additional information, which was reiterated when the case officer emailed at a later date asserting that the evidence was not satisfactory thus, they would most likely be recommending refusal, and requested that the Agent does not send in any additional information as it would not be accepted. This does not reflect a positive and proactive approach based on seeking solutions to problems arising in relation to dealing with planning applications, as required by Section 35(2) of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

10. Additionally, the LPA's statement contends that the occupants of the subject building are reliant on Caldecote Mill for water. The Appeal Statement confirmed that the subject building has an oil tank which provides heating and hot water. The LPA's comments in this regard are therefore inaccurate.

11. Furthermore, the LPA's statement contends that the occupants Council Tax account was set up following information from a Planning Enforcement Officer and a telephone call to Mr N Russell to confirm the occupants of the appeal building. The submitted Council Tax records date from 2014. The Enforcement Officer contacted Mr Russell in 2018 regarding the use of the appeal building as a separate dwelling house (letter attached to appendix 4). It is therefore considered that the LPA's comments in this regard are untrue and unsubstantiated.

12. It is concluded that the Council have acted unreasonably in their assessment of the application and within procedural matters at the appeal, which has delayed development which could clearly be permitted having regard to material considerations. It is also considered that the LPA did not fulfil the statutory requirement to determine applications in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with planning applications.

13. The unnecessary and wasted expense is that of the professional fees incurred by the Appellant in pursuing this appeal and also in countering inaccurate/untrue assertions from the LPA under procedural matters within the appeal process in line with the National Planning Practice Guidance with specific reference to Paragraph 032 of "Appeals".

## **The Council's response to the costs application**

14. The costs application statement contends that the matter which ought to be considered under the original application is whether a material change of use from a former agricultural building to a dwellinghouse has occurred, as opposed to whether the building concerned is ancillary or independent from the main house known as Caldecote Mill.

15. In response to this allegation, the LPA refers to the supporting statement dated January 2021, which has no mention about the former use of the building to which the original application relates. The suggestion that it is a former agricultural building is a piece of information that was not available at the time the relevant applications (19/01209/CLUE and 21/01143/CLUE) were assessed.

16. The statutory declaration provided by the appellant suggests that the building in question was purchased as an outbuilding together with the main dwellinghouse known as Caldecote Mill in 1999. It is stressed that the application was for a LDC for *'certificate of lawfulness for an existing use of the outbuilding as a 2 bed dwellinghouse (C3).'*

17. The ordinary meaning of 'outbuilding' from Oxford Advance learner's Dictionary is *'a building such as a shed or stable that is built near to, but separate from, a main building'*. It was reasonable for the LPA to consider the spatial functional relationship between *'The Annexe'* and Caldecote Mill before forming a view on whether the building has been used as a dwellinghouse, independent from Caldecote Mill for longer than the relevant period as prescribed in the TCPA 1990.

18. It is stressed that the appellant's assertion that the subject building is a former agricultural building and hence a planning unit separate from the Caldecote Mill is neither supported by any substantive evidence, nor is it consistent with the information contained in the statutory declaration and the proposal description. Contrary to the appellant's allegation, the LPA submits that the way it assessed the original application, is entirely consistent with the relevant case law and appeal decisions on this matter.

19. Reference is made to the case of *Uttlesford DC v SSE & White [1992] JPL 171* in the High Court, where it was held that *'even if the accommodation provided facilities for independent day-to-day living, it would not necessarily become a separate planning unit from the main dwelling; it would be a matter of fact and degree'*.

20. It is considered that the accommodation gave the occupant the facilities of a self-contained unit, although it was intended to function as an annexe only, with the occupant sharing her living activity in company with the family in the main dwelling. There was no reason in law why such accommodation should consequently become a separate planning unit from the main dwelling.

21. On the specific circumstance of the case, the key issue is whether a separate planning unit has been created. If an outbuilding with its living accommodation was part of the same planning unit as the dwellinghouse and provided that the planning unit remains in single family occupation and continues to function as a single household, no material change of use is involved.

22. The LPA has concluded for the reasons already set out in the delegated report and in light of the *Uttlesford* judgement that the information provided is not adequate to demonstrate that the subject building has become a separate planning unit from Caldecote Mill and has been occupied as a dwellinghouse (C3) as defined in the Town and Country Planning (Use Classes) Order 1987 (as amended). Consequently, the balance of probability standard as stated in the PPG on Lawful development certificates has not been met.

23. On procedural grounds, the LPA strongly rejects the allegation that it has deliberately concealed relevant evidence at the application stage or at this subsequent appeal. Reference is made to PPG that *'the applicant is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land'*.

24. In this instance, it is stressed that there had been no request from the appellant concerning the enforcement case over the course of the original application. In addition, the fact the enforcement case has been referred to in the delegated report suggests that there is no intention whatsoever to conceal the planning history of the site. The appellant's allegation that the LPA has deliberately concealed relevant evidence at application stage or at subsequent appeal is therefore unfounded and considered to be defamatory.

25. The costs application statement argues that by virtue of no further action taken (in relation to the enforcement case opened in 2018), it could be assumed that either the matters have been resolved or that the works under investigation were lawful. This assertion is factually incorrect and is based on a flawed understanding of the enforcement procedure set out in the TCPA 1990.

26. PPG on enforcement and post-permission matters states that *'local planning authorities have discretion to take enforcement action, when they regard it as expedient to do so having regard to the development plan and any other material considerations...In deciding, in each case, what is the most appropriate way forward, local planning authorities should usually avoid taking formal enforcement action where: in their assessment, the local planning authority consider that an application is the appropriate way forward to regularise the situation, for example, where planning conditions may need to be imposed.'*

27. On this occasion, the enforcement officer considered that an application for a LDC might be an appropriate way forward to regularise the situation and therefore advised the appellant accordingly. For these reasons, despite no formal enforcement action taken concerning the alleged unauthorised works, the LPA maintains that it has handled the enforcement case and the LDC applications in a manner that is fully compliant with the relevant procedures outlined PPG and the TCPA 1990.

28. The LPA considers itself to have acted in strict accordance with Section 191 of the Town and Country Planning Act 1990, the Planning Practice Guidance on LDC certificates, and the NPPF in refusing to grant a lawful development certificate for the works concerned. There is no evidence to suggest that the LPA has concealed or has attempted to conceal relevant evidence at planning application stage or at a subsequent appeal deliberately.

29. With regard to 'Unnecessary or wasted expenses' the LPA fully appreciates the cost implication resulting from the submission of this planning appeal. However, the expenses incurred are not a consequence of unreasonable behavior of the LPA. Rather, it is due to the difference in view about the information provided, which both parties are entitled to have with due regard to the PPG and the NPPF and other material considerations. Thus, the LPA considers that the expenses arising from the current appeal are neither unnecessary nor wasted as alleged by the appellant.

30. The LPA requests that the costs application be refused.

### **The reply to the Council's response**

31. The information that the appeal building is a former agricultural building was not provided at the time of the applications because the appellant did not consider that it was in question as to whether or not it was being used as a dwelling house. The letter from the enforcement officer in 2018 suggested that the LPA was aware the appeal building was being used as a separate dwelling house and suggested that an LDC application be submitted to regularise the use of the appeal building.

32. The need to prove that it is a separate planning unit (and not therefore subject to the tests of interdependency) was solely borne out of the LPA's approach to assessing the application, as if it was historically some form of ancillary residential accommodation to Caldecote Mill, and subsequently coming to the conclusion that it is not a separate dwelling house, contrary to the LPA's enforcement case and suggested course of action.

33. The reference to 'outbuilding' within the Statutory Declaration does not impact the assessment as to whether or not the appeal building is a separate planning unit from Caldecote Mill. A single residential property with an agricultural outbuilding would still constitute two separate planning units (the residential planning unit and the agricultural planning unit). The spatial functional relationship between the appeal building and Caldecote Mill is not a relevant consideration.

34. The evidence provided demonstrating that the appeal building is a separate planning unit from Caldecote Mill is considered substantive; a previous delegated report produced by the LPA was provided confirming that the appeal building formed a range of Victorian agricultural buildings and an extract of the local Historic Environment Record listing which confirmed that the original Caldecote Mill was destroyed by a fire and rebuilt in early C20, demonstrating that the appeal building pre-dates Caldecote Mill.

35. There is no reason to doubt the LPA's historic records and the fact that the LPA have clearly accepted previously that the appeal building is a former Victorian agricultural building. The LPA has not provided any evidence to suggest otherwise; having merely made assumptions. Notwithstanding the evidence provided to support the Appellant's case, it is contended that visually, it is clear that the appeal building pre-dates Caldecote Mill, as set out in the appeal statement.

36. The information that the appeal building is a former agricultural building does not contradict the information within the Statutory Declaration as the LPA suggests. To clarify, the LPA considers the reference within the Statutory Declaration to 'outbuilding' a contradiction to the fact that the appeal building is a former agricultural building. This consideration is flawed.

37. The LPA reference to the case of '*Uttlesford*' remains flawed in the consideration that the appeal building has historically been part and parcel of the residential planning unit at the site (as per the case of *Uttlesford DC v SSE & White* [1992]). Nor has it historically '*become*' a separate planning unit; the appeal building pre-dates Caldecote Mill and has always been a separate planning unit from it. It seems the LPA is still assessing the situation incorrectly.

---

38. In response to the LPA's comments under 'Procedural grounds', despite the LPA's rejections, it is maintained that the LPA concealed relevant evidence within the appeal procedure given that the LPA's Statement suggested that the enforcement case does not make clear which part of the site it relates to and whether it is for the subject building or another. As set out within the costs application, the enforcement case clearly relates to the appeal building and the LPA would be aware of<sup>1</sup> *Mann LJ in North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137, *Singh J in R Midcounties Cooperative Limited v Forest of Dean District Council* [2017] EWHC 2050 and *Howell QC in Cumberlege v Secretary of State for Communities & Local Government* [2017] EWHC 2057.

39. The LPA's comments incorrectly suggest that the Appellant's position is that the LPA did not handle the enforcement case in a manner that is fully compliant with the relevant procedures outlined in the PPG and TCPA 1990. This is a misunderstanding on behalf of the LPA.

40. In fact, the Appellant's case is that in 2018 the enforcement officer acted wholly in line with the PPG in that they regarded it as expedient to take enforcement action for the unlawful use of the building. In line with the guidance, the enforcement officer then decided that the most appropriate way forward was to '*regularise the use of the structure as a dwelling house moving forward.*'

41. Therefore, subject to submitting an LDC application demonstrating that on the balance of probabilities, it had been in use as a dwelling house for a continuous period of 4 years prior to the application (which the submitted evidence clearly does), then the LDC should have been issued to regularise the development. The fact of the matter is that the enforcement case was closed before an LDC was issued, indicating that the enforcement officer regarded it as not expedient to continue the enforcement case, suggesting that it was accepted that the development was lawful.

42. It is noteworthy that the LPA has not made any submissions in response to the fact that the photographs of the building were supplied at the application stage, despite the LPA's assertions within the Statement of Case that the photographs were new evidence provided only at the appeal stage, as set out within the costs application.

## **My Assessment**

### *The handling of the application*

43. As indicated by the LPA the supporting statement dated January 2021, made no mention of the former agricultural use of the building to which the original application relates. This information was submitted at the time of either of the LDC the applications (19/01209/CLUE and 21/01143/CLUE). As also indicated the statutory declaration refers to the appeal building being purchased as an outbuilding, together with the main dwellinghouse known as Caldecote Mill in 1999. The LDC application

then goes on to indicate that it was for a '*certificate of lawfulness for an existing use of the outbuilding as a 2 bed dwellinghouse (C3)*.'

44. On the basis of the application as made, I do not therefore, consider that it was unreasonable of the Council to consider the functional relationship of the two buildings, irrespective of its lawful use. I have already referred to this point in the appeal decision. Whatever the lawful use of the appeal building in April 2021, the application had sought a certificate to confirm that '*The Annexe*' had become a separate and lawful dwellinghouse in Use Class C3. The onus was upon the appellant to submit precise and unambiguous evidence to demonstrate that this is the case and the LPA had to base its decision on that evidence.

45. In dealing with a LDC application it is not incumbent upon a LPA to seek evidence of its own to counter that submitted by an applicant. The LPA could only rely on the submitted application details on which to base their decision. From the submissions, I have concluded in my appeal decision that, as a matter of fact and degree, the mill and the appeal building were in the same planning unit in 1999 and that '*The Annexe*' was initially used as family accommodation, whether that was being lawfully used or not.

46. The question for the LPA to consider was whether or not sufficient precise and unambiguous evidence had been presented to demonstrate that '*The Annexe*' had been in use as a separate dwellinghouse for the required continuous 4-year period. As also referred to in my appeal decision, whether this was to be considered on the basis of a material change of use from the former agricultural building, or through a change in character of any incidental residential usage of the appeal building, the onus was upon the appellant to provide the necessary precise and unambiguous evidence at the time of the LDC application.

47. The LPA had concluded the information provided was not adequate to demonstrate that the subject building has become a separate planning unit from Caldecote Mill and has been occupied as a dwellinghouse (C3) as defined in the Town and Country Planning (Use Classes) Order 1987 (as amended). I have reached the same conclusion. In relation to their handling of the application I do not consider that the LPA acted unreasonably. They may not have acted as thoroughly as they might, but I do not consider that the manner in which they reacted to the application led to any direct loss or expense for the appellant in the appeal process

#### *The question of procedural unreasonableness*

48. On the question of concealment relating to the enforcement case the facts are that, although the LPA had written to the appellant querying the use of '*The Annexe*', no formal enforcement action was taken, and a notice was not issued. The details had been set out in the delegated report and in my view the LPA had neither concealed nor withheld any relevant information relating to the planning status of the land. In any case it was the planning status of the appeal building which was clearly being disputed and the onus was upon the appellant to demonstrate what was considered to be the lawful use of the appeal building at the time of the application.

49. Although the enforcement query did not specify the exact part of the appellant's land, in my view there can be no doubt that the letter from the LPA referred to '*The Annexe*' and if a notice had been issued it would have been aimed

at this building. From the appellant's submissions it is also clear that it was fully understood that the Council's concerns related to 'The Annexe' and not to any other building (in whatever use) on the appellant's land at Caldecote Mill.

50. As indicated by the LPA there had been no specific request from the appellant concerning the enforcement case over the course of the original application. I also agree with the LPA that the appellant's argument that no further enforcement action meant that it could be assumed that either the relevant matters have been resolved or that the works under investigation are lawful, is flawed.

51. PPG on enforcement, amongst other things, clearly state that: *local planning authorities should usually avoid taking formal enforcement action where: in their assessment, the local planning authority consider that an application is the appropriate way forward to regularise the situation*'. On this occasion, it was not unreasonable, in my view, for the LPA to have considered that an application for a LDC might be an appropriate way forward. There is no evidence to suggest that the LPA concealed or attempted to deliberately conceal any relevant evidence at the LDC application stage or at this appeal stage.

52. With regard to the LPA refusing to accept further evidence relating to the application, I accept that this stance could be considered to be unreasonable. However, normally sufficient precise and unambiguous evidence should be submitted at the application stage and a LPA is not necessarily obliged to accept further information.

53. In this instance, although I agree that it was unreasonable of the Council not to be more proactive and/or positive in their approach to the LDC application, I do not accept that this led to unnecessary loss and expense in the appeal process. The appellant had made a LDC application; this was refused by the LPA on the basis of insufficient precise and unambiguous evidence and an appeal against that decision was made. The initial onus had been on the appellant to submit evidence and it was inevitable that an appeal would need to be made.

54. With regard to the Council's reference to the submitted photographs I agree with the appellant that this also constitutes unreasonable behavior. The LPA should have been clear that the photographs did not constitute new evidence from that submitted at the time of the application. However, again I do not consider that this error on the part of the LPA had led to unnecessary loss and expense in the appeal process. All that had been required was a simple statement to correct the situation.

### *Conclusion*

55. In conclusion I do not consider that the LPA acted unreasonably in the manner they dealt with the application. Whilst acknowledging some procedural unreasonable behavior as well as an unwillingness to be fully proactive with regard to the application, I do not consider that the Council's actions led to unnecessary loss and expense for the appellant in the appeal process. I do not consider, therefore that the costs application should succeed.

*Anthony J Wharton*

Inspector