



Costs Decisions

Hearing Held on 17 and 23 March 2021

Site visit made on 26 March 2021

by M Cryan BA(Hons) DipTP MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 December 2021

APPLICATION A

Costs application in relation to Appeal Ref: APP/C1435/W/20/3252657 Land at St Ives Farm, Off Butcherfield Lane, Hartfield TN7 4JX

- 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 Mr Brian Howard for a full award of costs against Wealden District Council.
 - 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 a temporary agricultural worker's dwelling.
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APPLICATION B

Costs application in relation to Appeal Ref: APP/C1435/W/20/3252657 Land at St Ives Farm, Off Butcherfield Lane, Hartfield TN7 4JX

- 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 Wealden District Council for a partial award of costs against Mr Brian Howard.
 - 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 a temporary agricultural worker's dwelling.
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Decisions

Application A

1. The application for costs is refused.

Application B

2. The application for an award of costs is allowed in the terms set out below.

Preliminary Matter

3. The Planning Practice Guidance (the 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.

APPLICATION A

The submissions for Mr Howard

4. Mr Howard's claim is based on the Council's failure to issue a decision on the planning application. The application was originally submitted in January 2017, and remained undetermined in May 2020 when the appeal was submitted. The scheme had not been determined by mid-2018, and following a series of exchanges between Mr Howard and the Council the scheme was amended in January 2019. Since that point the appellant has contacted the Council with additional information and, by early 2020, was requesting a decision on the revised scheme.
5. Mr Howard considers that the Council has not engaged with him sufficiently, and there have been long periods without any engagement. In the interim, Mr Howard has noted the other planning applications which the Council has determined, and considers that the no substantive reasons have been put forward to explain the delay in determining his application. In the absence of any decision he has been left with no alternative but to submit an appeal.

The response by Wealden District Council

6. The Council considers that the planning application conflicted with the development plan from the outset, and this was not altered by the amendments to the scheme in January 2019. The delays in decision making generally were related to the emerging Wealden Local Plan ("the WLP"), and efforts were made to keep Mr Howard up-to-date with relevant matters on that front.
7. The Council allocated the proposal to a new case officer with the expectation that they would be able to have a dialogue with Mr Howard, and during the period from January 2020 paid for and sought further professional agricultural advice from its rural estates consultant to ensure it fully understood and could test the agricultural case being presented by the applicant. The Council understood that the proposal was being updated in March and April 2020 in response to the most recent comments from its rural estates consultant – which remained that a temporary dwelling could not be supported – and that the appeal against non-determination was submitted shortly afterwards.
8. The Council does not seek to condone delays in its decision making, but considers that it has strived to retain an open dialogue with Mr Howard to try and reach a positive decision on the planning merits of the case.

Reasons

9. Paragraph 047 of the PPG states that delay in providing information or adhering to deadlines may give rise to a procedural award of costs against a local planning authority. Paragraph 048 PPG states that that "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 that "if an appeal in such cases is allowed, the local planning authority may be at risk of an award of costs, if the Inspector or Secretary of State concludes that there were no substantive reasons to justify delaying the determination and better communication with the applicant would have enabled the appeal to be avoided altogether". Paragraph 049 cites preventing or delaying development which should clearly be permitted, having regard to its accordance with the

development plan, national policy and any other material considerations as an example of unreasonable behaviour which may give rise to a substantive award of costs.

10. In this case, given the extremely long timescale between the submission of the original planning application and the eventual lodging of the appeal, it is entirely understandable that Mr Howard should feel frustrated with the process. It is apparent to me from both parties' evidence that the period during which the planning application was being determined, or not, was characterised by flurries of activity and correspondence in both directions interspersed, with long periods of quiet.
11. However, it is worth noting that the nature of the proposal changed considerably between submission and appeal. This applies both to the extent of the development, which was originally intended to be a permanent three-bedroom dwelling, and to the farm business plan and numbers of livestock on which the proposal depended. It is also relevant that the Council's substantive reasons for which they would have refused planning permission were justified. For the reasons which are set out in my main decision, I found that the proposal conflicted with the development plan and consequently dismissed the appeal. I therefore cannot find that the Council prevented or delayed development which should clearly be permitted.
12. Although they did not do so in a way which found favour with Mr Howard, the Council did attempt to address the changes to the scheme so that they could reach a fair and reasonable determination of the application. The Council also made clear early on that the proposed development was not supported, and subsequently offered opportunities to amend or withdraw the scheme. Acknowledging Mr Howard's comments that "there is no excuse for not making a decision on the application good or bad", it is quite possible that with hindsight the Council wishes it had done so. Notwithstanding this, while the problems with the emerging local plan no doubt left the Council struggling with resources, it seems to me that some of the delays in determining the planning application which it attributed to issues in respect of the WLP are, in at least a small way, something of a red herring. For example, while I note their comments about a tariff in respect of mitigating impacts on air quality, it is not clear from the evidence before me that this could have made a significant difference to the decision on Mr Howard's application, which turned on the matter of essential need for an agricultural worker's dwelling.
13. I consider that not all of the delays in determining the application have been adequately explained or justified and, in this very limited respect I therefore find the Council acted unreasonably in the terms set out in the PPG. However, in order to make an award of costs I need to be satisfied that this resulted in unnecessary or wasted expense.
14. As I have already explained, the reasons for which the Council would have refused the planning application were justified and substantiated. It is quite clear from the evidence before me, including numerous items of correspondence between the main parties, that Mr Howard's relationship with the Council is not, or has not always been, a harmonious one. It is also apparent that Mr Howard still seeks to extend his farming operations at St Ives Farm. Taking all of this together, it seems more likely to me than not that, had the planning application been determined and refused by the Council, Mr

Howard would have sought to challenge the decision at an appeal in any case. There is therefore no substantive evidence which persuades me that the Council's behaviour has led to unnecessary or wasted expense in the appeal process for Mr Howard.

Conclusion

15. In Application A, I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated.

APPLICATION B

The submissions by Wealden District Council

16. Mr Howard introduced a witness at the Hearing, his agricultural consultant Mr Skinner, who presented a new piece of written evidence – the Present System Budget ("PSB") – setting out revised figures which differed from the previously-submitted business plans. This had not been presented in advance of the hearing, and introducing it at that time put the Council at a disadvantage. After a short adjournment to consider the evidence, Mr Skinner indicated at the Hearing that it had taken approximately two days to prepare the PSB; the Council's agricultural consultant Mr Lloyd-Hughes was of the view that it would take him a similar time to review and test the new data provided.
17. Accordingly there was no option but to adjourn the hearing as the new information was inextricably linked to a key issue of the appeal regarding functional and financial justification for the proposed temporary dwelling. The hearing was adjourned until the following week, during which time the Council and Mr Lloyd-Hughes assessed the PSB, and provided a written summary response for all parties at the Hearing. This resulted in the hearing, originally scheduled as a one day event, extending to two days over consecutive weeks, creating additional workload for Council officers and leading to additional direct costs in the form of paying Mr Lloyd-Hughes for additional hours.
18. The Council considers that providing this evidence at such a late stage was unreasonable, and that Mr Howard should have instructed Mr Skinner earlier in the day, certainly no later than January 2021 at which point Mr Howard was responding to earlier comments by Mr Lloyd-Hughes.

The response by Mr Howard

19. The Council is attempting to distract from its own failings. In January 2021 Mr Howard wrote to the Council stating that Mr Lloyd-Hughes had made an error, and instead of addressing this the Council issued a rebuttal. Mr Skinner was therefore appointed to look independently at the figures and issue a report. The inconvenience of adjourning the hearing for a few days is insignificant alongside the time Mr Howard has been waiting for a decision.

Reasons

20. Paragraph 052 of the PPG states that introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen is an example of behaviour which may give rise to a procedural award of costs against an appellant.

21. I note Mr Howard's comment that Mr Skinner's evidence was a review of earlier business plan figures and Mr Lloyd-Hughes comments. However, it was apparent to me that the PSB submitted at the Hearing was, essentially, a new business plan. It included new and increased livestock numbers, as well as new assumptions about operating costs and income for the business, and followed on the back of earlier revisions submitted during the planning application process. These changed the nature of the proposal, and the assessments of business viability and essential need which needed to follow and were at the heart of the Hearing discussions.
22. The PSB was a relatively complex set of tables with little or nothing in the way of explanatory notes. As such, it required scrutiny both by the Council and on my own part. It was apparent to me that this could not have been done within the original timescale of the Hearing, and it would have been unfair to the Council to ask or expect them to respond to it without an adjournment of several days. Accordingly, I gave Mr Howard the opportunity to decide not to submit the PSB, and I warned that the Council may seek an award of costs in respect of the late submission of evidence.
23. No reasonable explanation was given as to why the PSB was submitted so late in the day, nor indeed why Mr Howard did not appoint Mr Skinner to act for him until the week before the hearing. There is therefore no doubt in my mind that the late submission of the PSB was unreasonable behaviour.
24. In terms of unnecessary expense, the late submission of that evidence resulted in an adjournment of the Hearing and the need for an additional day of sitting. It also resulted in additional preparatory work to assess and respond to the content of the PSB.

Conclusion

25. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs is justified.

Costs Order – Application B

26. 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 Mr Brian Howard shall pay to Wealden District Council, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in addressing the Present System Budget document submitted as late evidence at the Hearing and the additional sitting day; such costs to be assessed in the Senior Courts Costs Office if not agreed.
27. The applicant is now invited to submit to Mr Brian Howard, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

M Cryan

Inspector